CAI'S COLLEGE OF COMMUNITY ASSOCIATION LAWYERS PRESENTS

Law Seminar

Opening General Session: Case Law Update Part I & II

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30th ANNUAL COMMUNITY ASSOCIATION LAW SEMINAR

CASE LAW UPDATE

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Amendment of Covenants and Bylaws

Schroeder v. Rancho Escondido Community Improvement Association, 248 S.W.3d 415 (Tex. App., 2008). Homeowners filed suit seeking a declaratory judgment that the homeowners association could not impose certain building restrictions. The homeowners also requested an injunction to prevent the association from amending the deed restrictions to impose new conditions. The court held that the case was not ripe for adjudication, because the association had not yet amended the restrictions. The court also refused to issue an injunction on the basis that a court cannot grant injunctive relief based upon a hypothetical and contingent situation that might or might not arise at a later date.

Gall v. The Mariemont Windsor Square Condominium Association, 888 N.E.2d 1144 (Ohio App. 2008). The court held that a statute which allowed the board of directors of a condominium association to amend the condominium declaration to correct clerical or typographical errors or obvious factual errors in the declaration without a vote of the unit owners did not permit the board of directors to amend the condominium declaration to alter the par value of some of the units in the condominium and their percentage interest in the common areas, because there was no showing of a clerical error in the original par value. The court held that such an amendment to the declaration would require a unanimous vote of the unit owners.

Mission Shores Association v. Pheil, 83 Cal. Rptr. 3d 108 (Cal. App. 2008). The defendants purchased a home in a subdivision based upon representations of the developer's agent that they would be allowed to rent or lease the home without restriction. At the time of the purchase, the restrictions provided that any owner could rent to a single family if the rental agreement was in writing and subject to the restrictive covenants. Following the defendant's purchase of the home, the board of directors of the association decided to amend the covenants to prohibit rentals of less than 30 days. Under the terms of the restrictive covenants, the amendment required the approval of at least 67% of the voting power of both classes of membership in order to be adopted. A vote of the members was taken with respect to the amendment, and only 57% of the voting power approved the amendment so the amendment was not adopted. The association petitioned the court for an order reducing the percentage of affirmative votes required for passage of the amendment and approving the amendment based upon the number of affirmative votes actually cast which constituted at least a majority of each voting class. The petition was based on a California statute

that provides that a homeowners association may petition the court for a reduction of the percentage of affirmative votes required to amend restrictive covenants that require approval by owners having more than 50% of the votes in the association. The court may, but may not, grant the petition if it finds that notice was properly given, the balloting was properly conducted, reasonable efforts were made to permit eligible members to vote, owners having more than 50% of the votes voted in favor of the amendment and the amendment is reasonable. The court found that the imposition of a 30 day minimum lease term was reasonable and that all of the conditions required in order for the court to reduce the percentage necessary to adopt the amendment were present. The court, therefore, upheld the trial court's decision to reduce the percentage necessary to approve the amendment.

Fourth La Costa Condominium Owners Association v. Seith, 71 Cal. Rptr. 3d 299 (Cal. App. 2008). The condominium documents required an affirmative vote of 75% of the owners for an amendment. After a simple majority of the owners voted for an amendment, the association filed a petition to have the court reduce the necessary percentage. The vote on the amendment was conducted by mail ballot and was not secret. The court found the mail ballot procedure complied with applicable law and that all of the other conditions necessary in order for the court to be able to reduce the percentage necessary to approve the amendment had been satisfied.

Architectural Control

Dwan v. Indian Springs Ranch Homeowners Association, Inc., 186 P.3d 1199 (Wy. 2008). A homeowner presented building plans to the homeowners association for a proposed addition to her residence. The plan showed the same roof pitch as her residence and guesthouse/garage. The association denied the application on the basis that the roof pitch of the proposed addition violated a specific provision of the restrictive covenants for the subdivision. The court found that the only objection raised by the association to the application for the addition to the residence was that the roof pitch did not conform to the requirements set out in the covenants. However, the proposed roof pitch was identical to the roof pitch of the rest of the residence which had been approved by the association. The court held that the association could not deny the application for the addition to the residence.

Glisson v. Irha of Loganville, Inc. 656 S.E.2d 924 (Ga. App. 2008). A homeowners association brought suit against a homeowner alleging that the homeowner violated the subdivision's restrictive covenants by erecting a shed on her property. The court held that the structure constructed by the homeowner was a "shed" within the meaning of the restrictive covenants. The court held that the covenants required that any structure on the property must be consistent with the construction of the main residence, and that the shed constructed by the homeowner clearly did not satisfy that requirement.

Drenter v. Duitz, 883 N.E.2d 1194 (Ind. App. 2008). The court found that the subdivision's restrictive covenants did not require the property owner to obtain the signatures of all of the property owners in the subdivision before erecting an outbuilding. However, the restrictive covenants did require a property owner to obtain the written approval of the subdivision's developer or its assignee before erecting an outbuilding. The court found that the property owners did not obtain the written approval of the subdivision's developer. Accordingly, the court held that the shed constructed by the property owners was constructed in violation of the restrictive covenants.

Gleneagle Civic Association v. Hardin, 2008 Colo. App. LEXIS 1427 (Colo. App. 2008). Homeowners constructed a boundary fence without approval of the homeowners association. The homeowners association filed suit to have the fence removed and had fines imposed for the violation of the covenants. The court found that the association's disapproval of the plans for the construction of the fence were delivered to the homeowners within the 30 day period required by the covenants. The court found that emails sent by the association to the homeowners disapproving the plans constituted writings that provided notice by mail or otherwise as required by the covenants. The court held that covenants that do not contain objective standards to guide an architectural committee's decisions are enforceable so long as the approving authority acts reasonably and in good faith. Finally, the court found that a determination as to whether a homeowners association has acted reasonably or arbitrarily is a question of fact.

Santa Fe Ridge Homeowners' Association v. Bartschi, 2008 Ariz. App. LEXIS 116 (Ariz. App. 2008). The court held that a lawsuit filed by a homeowners association to compel a homeowner's compliance with deed restrictions regarding proper maintenance of the homeowner's property did not affect title to real property, and, therefore, the association was not authorized to record a Notice of Lis Pendens against the homeowner's property.

Pacific Hills Homeowners association v. Prun 73 Cal. Rptr. 3d 653 (Cal. App. 2008). Homeowners constructed a gate and fence which violated the height and setback requirements in the recorded restrictions for the subdivision and in the architectural guidelines adopted by the homeowners association. The court found that the action had been filed within the applicable five year statute of limitations. The court further found that although the association delayed in enforcing the restriction, the delay could not support a finding of laches, because the homeowners began building the gate before seeking approval, and therefore could, not show prejudice. The court also found that the homeowners could not show that the association acquiesced in the violation. There was evidence that the association followed its ordinary procedures in attempting to enforce setback requirements and did not engage in selective enforcement.

Assessments

Cordova The Town Homeowners Association, Inc. v. Gill Development Company, Inc., 2008 Tenn. App. LEXIS 522 (Tenn. App. 2008). The court found that the provisions of the restrictive covenants with respect to when assessments commenced against the lots subject to the covenants were unambiguous and did not require the developer to pay assessments on lots that the developer owned until the first day of the month following the transfer from the developer or completion of improvements on the lot, whichever first occurs.

Supkis v. Madison Place Homeowners' Association, Inc., 2008 Tex. App. LEXIS 4563 (Tex. App. 2008). A homeowners association sought to recover delinquent assessments and other fees from a homeowner. The homeowner claimed that the association's right to levy assessments and foreclose on the homeowner's property violated the rule against perpetuities. The court concluded that the requirement that homeowners pay maintenance fee assessments was a covenant running with the land and that the assessment burden vested upon transfer of the property and thus did not violate the rule against perpetuities because it did not involve the remote vesting of a real property interest.

Willow Bend Homeowners Association, Inc. v. Robinson, 665 S.E.2d 570 (N.C. App. 2008). The court held that an assessment provision of the restrictive covenants for a subdivision allowed the homeowners association to levy assessments to promote the welfare of residents in the subdivision contemplated assessments levied to cover legal costs incurred by the homeowners association in defending itself and its members in any lawsuit or administrative proceeding.

Riverpointe Homeowners Association, Inc. v. Mallory, 656 S.E.2d 659 (N.C. App. 2008). The court held that the applicable provisions of the North Carolina statutes granted homeowners associations the right to levy fines for violations of the association's rules, unless the articles of incorporation or declaration of the homeowners association expressly provides to the contrary.

Mullowney v. Masopust, 943 A.2d 1029 (R.I. 2008). The condominium declaration required that all unit owners pay an equal share of the common expenses of the association. The condominium was a marina condominium which consisted of 65 condominium units and 65 slips. The units were 65 individual lockers that were used for storage of boat equipment. Appurtenant to each marina unit was the right to use a specific boat slip at the marina. The board of directors of the association changed the method of assessment and began to allocate common expenses based on the length of each owner's boat slip reasoning that owners with larger slips received proportionately greater benefits from each dollar required to maintain and operate the marina. The court held that the board of directors did not have the power to change the method of

allocating the expenses and that the action by the board of directors violated the Rhode Island Condominium Act.

Ocean Two Condominium Association, Inc. v. Kliger, 983 So. 2d 739 (Fla. App. 2008). When the owners of condominium units become aware of the fact that the fee accounts for their two condominiums were in arrears, they attempted to make payments to bring the accounts up to date. Because the matter had been turned over to the association's attorneys, the association took the position that it could not accept the payments. The court found that no prejudice or jeopardy could occur from the association accepting a partial payment because a Florida statute specifically provides that the payments be applied on account, without prejudice to the association's and unit owner's respective positions, even if the unit owners place a restrictive endorsement, designation or instruction on or accompanying the payment. The court found that had the association accepted and applied the tendered payments, the dispute would have been reduced to an inconsequential amount, and the association's attorneys could not in good faith had filed to foreclose the miniscule claim remaining. Thus, the court held that the association, its property manager and its attorneys could not reject and refuse to apply a payment, even a partial payment, while the matter is in dispute.

Association Powers and Operations

Baumann v. Long Cove Club Owners Association, Inc., 668 S.E.2d 420 (S.C. App. 2008). The court held that actions of a board of directors of a homeowners association should be reviewed under the business judgment rule. The court held that since certain expenditures approved by the board of directors were approved by a vote of the members, the board of directors did not act outside the authority granted to the homeowners association by the restrictive covenants.

Dogwood Valley Citizens Association, Inc. v. Shifflett, 654 S.E.2d 894 (Va. 2008). An association passed and recorded articles of incorporation and bylaws purporting to give it the duty to maintain roads and common areas in the development. The court held that the association was not a Property Owners' Association under the Virginia Property Owners' Association Act and, therefore, did not have the power to levy assessments. The court held that in order for an association to qualify as a Property Owners' association under the Virginia Property Owners' Association Act, a declaration must be recorded imposing on the association both the power to assess fees for road and common facilities maintenance and the duty to perform such maintenance. The court held that that the articles of incorporation and bylaws recorded by the purported association did not constitute such a declaration.

Lake v. Woodcreek Homeowners Association, 174 P.3d 1224 (Wash. App. 2007). With the permission of the condominium association's board of directors, a unit owner built a second story bonus room above his garage. The bonus room both converted a common area (air space) into an apartment area and created a new common area (walls) thus

changing the character of the property and altering all the condominiums owners' individual percentage interest in the common areas. The court held that under the condominium declaration, such a change required unanimous consent of all the owners. Because unanimous consent of the condominium owners was not obtained, the authorization of the bonus room by the board of directors of the condominium association was improper.

Williams v. Southern Trace Property Owners Association, Inc., 981 So.2d 196 (La. App. 2008). The court found that under the recorded covenants, the homeowners association had the power, but not the duty, to enforce the covenants. Whether a particular violation should be enforced was left to the discretion of the board of directors of the association.

McMahon v. Pleasant Valley West Association aka Pleasant Valley West Club, 952 A.2d 731 (Pa. Commw. 2008). A homeowner filed suit against an adjoining lot owner and the homeowners association for injuries suffered as a result of being attacked by the adjoining lot owner's dogs. The plaintiff claimed that the homeowners association was negligent by failing to establish and enforce rules and regulations requiring lot owners to maintain, control and confine dogs on their property. The plaintiff also alleged that the homeowners association had violated its duty to exercise reasonable care to prevent harm flowing from the lot owner's failure to control and confine his dogs based on the homeowners association's knowledge of the violent propensities of the pit bull breed prior to the attack on the plaintiff. Referencing provisions of the Restatement of Torts and the Restatement Third of Property (Servitudes), the court held that the homeowners association did not have a duty or assume a duty to compel the owner of the dogs to maintain control and confine their dogs upon their property or to prevent the harm to the plaintiff flowing from the adjoining lot owner's failure to control and confine their dogs on their property.

Webster v. Ocean Reef Community Association, Inc., 2008 Fla. App. LEXIS 14649 (Fla. App. 2008). The court held that the transfer of a home to an irrevocable qualified personal residence trust did not constitute a sale or purchase which required the approval of the homeowners association.

Reno v. Bethel Village Condominium Association, Inc., 2008 Ohio App. LEXIS 3772 (Ohio App. 2008). The plaintiff condominium owner filed suit against her condominium association challenging the decision of the association to eliminate parking on the street in front of her unit. The condominium association filed a motion to compel arbitration of the dispute pursuant to arbitration provisions contained in the condominium declaration. The arbitration provision allowed the condominium association to select the arbitrator and imposed the arbitration cost on the unit owner regardless of the outcome of the arbitration. The arbitration provision also only required unit owners to arbitrate disputes, but left the condominium association free to pursue other remedies. The court held that an arbitration provision that compels one party to arbitrate, while

leaving the other party free to pursue additional remedies, does not support a claim of substantive unconscionability. The court also held that a provision allowing one party alone to appoint the arbitrator does not demonstrate substantive unconscionability, absent evidence of a direct connection or substantial nexus between the arbitrator and either the party or related non-party. The court noted that the arbitration provision required the arbitrator to be independent and that under Ohio law a party to an arbitration had a remedy if the unit owner believed that the arbitrator was biased. Thus, the court concluded that the arbitration agreement was not substantively unconscionable.

Park Ridge Condominium Association, Inc. v. Callais, 660 S.E.2d 736 (Ga. App. 2008). A condominium resident brought an action against the condominium association seeking to inspect and copy certain records of the association. The plaintiff made the request in order to have an understanding of the proposed budget of the association. The association refused to allow inspection of the records. The association contended that the plaintiff, who was a former member of the board of directors of the association, had requested the records as a means of harassing the association. The trial court found in favor of the plaintiff and ordered that the association to allow the inspection of the records.

Ekstrom v. Marquesa at Monarch Beach Homeowners Association, 2008 Cal. App. LEXIS 2371 (Cal. App. 2008). Individual homeowners in a common interest development that was comprised of single family homes sued their homeowners association with regard to palm trees that had grown to heights exceeding the roof tops and were blocking their views. Each of the plaintiff homeowners had paid a premium for a home with ocean and/or golf course views. The recorded restrictions provided that all trees on a lot be trimmed so as not to exceed the roof of the house on the lot, unless the tree did not obstruct views from other lots. The homeowners association took the position that, because trimming a palm tree would effectively require its removal, the requirement of the covenants did not apply to palm trees. The court held that the rule of judicial deference was not applicable to the challenged decision of the association's board of directors. The court found that even if the board of directors was acting in good faith and in the best interest in the community as a whole, its policy of excepting all palm trees was not in accord with the requirements of the restrictions that all trees be trimmed so as not to obscure views. The rule of judicial deference also did not apply to new rules that specifically excluded all palm trees planted before 2006, because the rules were in direct conflict with the recorded restrictions. The court held that the board of directors did not have the discretion to exclude view blocking trees or define what is meant by view in a fashion that rendered a provision of the restrictions meaningless. The rule of judicial deference does not extend to board decisions that are outside the scope of its authority under the governing documents.

Stamford Landing Condominium Association, Inc. v. Lerman, 951 A. 2d 642 (Conn. App. 2008). A condominium association filed an action to foreclose a lien for nonpayment of

assessments and for fines levied against the unit owner, because the owner's tenant was keeping a dog in the unit in violation of the condominium declaration. The court found that the association had the power to adopt a rule prohibiting tenants from housing dogs in the condominium. The court further found that the defendant had been given adequate notice of the violation and an opportunity for a hearing prior to the imposition of the fines.

Ritter & Ritter, Inc. Pension and Profit Plan v. The Churchill Condominium Association, 82 Cal. Rptr. 3d 389 (Cal. App. 2008). Condominium owners sued the condominium association and its directors for failure to stop slab penetrations in the common areas adjacent to the owner's units. The jury found that the association's failure to stop the slab penetrations was a breach of the covenants, conditions and restrictions. The court noted that the California Supreme Court had adopted a judicial deference rule toward the decisionmaking of directors of community associations. However, the jury did not find any liability on the part of the individual directors. The court noted that the judicial deference rule was restricted to ordinary decisions involving repair and maintenance actions. The court did not find any inconsistency between the findings of the jury that the directors are not personably liable and the verdict rendered against the association. The court found that the liability of the association is separate and distinct from the personal liability of the directors and that it was legally possible to have one without the other. The court stated that the judicial deference rule was designed to protect board members from personal liability for their decisions made in good faith, but ultimately incorrect. The court held that the same rule of judicial deference does not automatically provide coverage to the association itself.

Glenwright v. St. James Place Condominium Association, 2008 Colo. App. LEXIS 1433 (Colo. App. 2008). A condominium owner filed suit against the condominium association requesting production of certain records which the owner contended were necessary to determine whether the association was overcharging owners for services. The applicable Colorado statute required that subject to certain exceptions, all financial and other records of an association be made reasonably available for examination and copying by any unit owner. The court found that a record in the possession of the association's agent is an "other record" for purposes of the statute, if the records reflect the activity of the agent in performing any of the association's powers or responsibilities under applicable law, the association's governing documents or its agreement with the agent.

Harvey v. The Landing Homeowners Association, 76 Cal. Rptr. 3d 41 (Cal. App. 2008). A condominium owner sued the condominium association claiming that the board of directors of the association had acted outside the scope of its authority under the recorded covenants, conditions and restrictions when it determined that certain homeowners could exclusively use up to 120 square feet of inaccessible common area attic space for rough storage. The court held that the board of directors acted within its authority under the covenants, which gave the board of directors authority to allow an

owner to use exclusively common area, provided such use was nominal in area and adjacent to the owner's exclusive use area or living unit and provided that such use did not unreasonably interfere with any other owners use or enjoyment of the project. Citing the rule of judicial deference, the court deferred to the board's authority and presumed expertise. The court held that the board's action was not invalid merely because directors who owned the units voted in favor of allowing the limited exclusive use of the attic space common area, because a disinterested majority of the board approved the transaction and there was full disclosure.

Construction Defects

Anse, Inc. v. The Eighth Judicial District Court of the State of Nevada in and for the County of Clark, 192 P.3d 738 (Nev. 2008). The court held that subsequent owners of a "new residence" could seek residential construction defect remedies so long as the action was instituted within the applicable statute of repose. A "new residence" under the applicable statutes was one that had remained unoccupied as a dwelling from the completion of its construction to the point of its first sale.

Westlake View Condominium Association v. Sixth Avenue View Partners, LLC, 193 P.3d 161 (Wash. App. 2008). The court rejected a builder's attempt to define the implied warranty of habitability to only include claims for violation of applicable building codes. The court noted that the implied warranty is intended to insure that serious structural deficiencies will be fixed before major damage results and that condominiums do not have to degrade to a state where they are uninhabitable for the implied warranty to apply. The court held that the homeowners association had presented sufficient evidence of construction defects that were neither trivial nor merely aesthetic to make the granting of summary judgment in favor of the builder erroneous.

Phan v. Addison Spectrum, L.P., 244 S.W.3d 892 (Tex. App. 2008). A condominium association filed suit against the builder of the condominium alleging construction defects both in the common areas and in the individual units. Subsequently, a unit owner also filed suit against the builder for construction defects relating to the condition of her unit. The condominium association settled its claims against the builder and signed a release which released the builder from any further claims by not only the condominium association but by any of the unit owners. The builder then obtained a dismissal of the unit owner's claims based upon the release signed by the condominium association. The court held that under the Texas Condominium Act, the condominium association had the power to institute, settle and comprise litigation in its own name on behalf of itself or two or more unit owners on matters affecting a condominium. The lawsuit was filed by the condominium association as the attorney-in-fact for each owner to address design and construction defects in both the common areas and the individual units. The court found that the release clearly intended to release claims of both the condominium association and the individual unit owners as to defects in the common areas and the individual units. The unit owner argued that the

condominium association did not have standing to settle her individual claims. The court held that by purchasing a unit in the condominium, the unit owner consented to allow the condominium association to bring and settle lawsuits in its own name and on her behalf and, therefore, the release was a complete bar to her claims.

Thompson v. Toll Dublin, LLC, 81 Cal. Rptr. 3d 736 (Cal. App. 2008). The buyers of condominium units sued the builder and its agents for concealing the existence of mold in the condominium units. The contractual documents drafted by the builder included documents that contained arbitration provisions. The builder filed a motion to compel arbitration of the dispute. The court held that the dispute resolution provisions of the documents applied only to statutory construction defect claims. The court further held that to the extent that the dispute resolution provisions might be read to apply to other disputes, such a reading would render them unconscionable, because the provisions were part of a contract of adhesion and had elements of oppression and surprise due to unequal bargaining power. The court held that the inclusion of other claims in the arbitration provisions would not have been within the reasonable expectations of the buyers.

The Phoenix on Peachtree Condominium Association, Inc. v. Phoenix on Peachtree, LLC, 2008 Ga. App. LEXIS 1211 (Ga. App. 2008). A condominium association sued alleging defects in the construction of the common areas of the condominium. The defendants asserted that the association lacked standing to bring the claims. The condominium declaration provided that the association could not institute any legal action on behalf on any or all the owners which is based on any alleged defect in any unit or the common elements and that all such actions had to be instituted by the person or persons owning the units or served by the common elements. After the lawsuit was filed, the condominium declaration was amended to remove the prohibition against the association filing lawsuits for construction defects. The court held that standing must be determined at the time the complaint is filed, and therefore, the amendment could not provide standing to the association. However, the court held that the association should have been given a reasonable time to substitute the real parties in interest.

Anse, Inc., dba Nevada State Plastering v. The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, 192 P.3d 738 (Nev. 2008). The court held that the definition of "new residence" under the Nevada statute pertaining to construction defect claims is a residence which is the product of original construction that has been unoccupied as a dwelling from the completion of its construction until the point of its original sale. Therefore, the subsequent owner of a home that is a product of original construction, unoccupied as a dwelling from the completion of its construction until the point of its first sale, is not precluded from seeking residential constructional defect remedies so long as the subsequent purchaser does so within the limitation period provided by the applicable statute of repose.

Treo @ Kettner Homeowners Association v. The Superior Court of San Diego County, 2008 Cal. App. LEXIS 1420 (Cal. App. 2008). A homeowners association sued the project's developer and others for alleged construction defects. The covenants, conditions and restrictions contained a requirement that all disputes between owners and the developer and disputes between the association and the developer be decided by a general judicial reference. The court held that the covenants, conditions and restrictions did not suffice as a contract under the applicable statutes, when the issue involved was the waiver of the right to trial by jury and therefore, the association could not be compelled to submit the matter to general judicial reference.

The Lofts at Fillmore Condominium Association v. Reliance Commercial Construction, Inc., 190 P.3d 733 (Ariz. 2008). The court held that although the builder was not the seller of the condominiums, the builder could nevertheless be sued by the condominium association for breach of the implied warranty of workmanship and habitability. The court found that the purpose of the implied warranty of good workmanship and habitability given in connection with new home construction was to protect innocent purchasers and to hold builders accountable for their work, and that the implied warranty arose from the construction of a new home whether or not the builder was also the seller of the home.

Covenant Enforcement

Mack v. Armstrong, 2008 Wash. App. LEXIS 2708 (Wash. App. 2008). Homeowners began construction of a significant addition to the back of their home. The architectural committee disapproved the proposed addition, because it would negatively impact the view of surrounding scenery from at least one of the other lots in the subdivision even though the proposed addition was below the 30 foot height restriction contained in the recorded restrictions for the subdivision. The court held that if covenants include both specific restrictions of some aspect of design or construction and a general consent-to-construction provision, the specific covenant prevails, and a homeowners association may not impose restrictions under a general consent-to-construction covenant which are more burdensome than provided for by the specific objective restrictive covenant. Therefore, since the proposed addition complied with the specific height restriction in the covenants, the association could not require the addition to be lowered.

Courtyards of Crystal Lake Homeowners Association v. Bradesca, 2008 Ohio App. LEXIS 5159 (Ohio App. 2008). The court held that the recorded covenants for a master association and the recorded covenants for a sub-association were not in conflict with respect to the ownership of dogs and that the covenants for the master association were "eased" by the covenants for the sub-association. The court found that the defendant homeowner was not in violation of the master declaration or the sub-association covenants by having a dog on her property. The court also found that there was insufficient evidence presented to demonstrate that the dog was a nuisance. The court noted that the handbook for the sub-association required that all complaints be in

writing and signed by a resident and that the sub-association had not produced any written complaints.

Lake Buckhorn Property Owners Association, Inc. v. Townsend, 2008 Ohio App. LEXIS 3780 (Ohio App. 2008). Homeowners filed an application with their homeowners association for a permit to increase the size of their master bedroom. Seven months later, the homeowners association sent the owners a letter denying the permit because a three bedroom septic system had not been installed for the two bedroom house. The covenants required the homeowners association to approve or disapprove proposed plans within 30 days. The court held that by failing to disapprove the plans within the 30 day time period, the homeowners association had approved the application. However, the court also found that even if the homeowner association had disapproved the plans within the 30 day time period, the disapproval would not have been valid, because the regulation of the homeowners association requiring a three bedroom septic system conflicted with the deed restrictions which only required a septic system approved by the local health department. The court held that the rules and regulations could not unilaterally amend the deed restrictions.

Foonberg v. Thornhill Homeowners Association, Inc., 975 So. 2d 601 (Fla. App. 2008). A builder submitted plans to the homeowners association for approval which did not include a perimeter fence. After obtaining approval of the plans, the builder, at the homeowner's request, installed a white aluminum fence around the perimeter of the property. The fence was not submitted to the homeowners association for approval as required by the homeowner association's rules. Prior to the conveyance of the property to the homeowner, the builder was informed that the white aluminum fence was not allowed, but the builder did not remove the fence. After the homeowner completed the purchase of the property, the homeowners association notified them that the fence had not been approved and was not in compliance with the rules. The homeowner claimed that the association was selectively enforcing the rules. The court held that there was competent evidence to support the finding of the trial court that the association had been consistent in applying its long standing policy regarding the type of fences which were approved and, therefore, there was no selective enforcement.

Covenant Interpretation

Meier v. Huntington Ridge Townhouse Homeowners Association, Inc., 2008 Tenn. App. LEXIS 635 (Tenn. App. 2008). Owners of townhouses sued for a declaratory judgment that their homeowners association was responsible for the cost of repair of defective floor trusses. The court held that the trusses were "common elements" as defined in the restrictive covenants. The court further found that the trusses did not constitute "limited common elements" because they were part of the foundation and bearing wall systems of the entire building and therefore did not serve exclusively a single unit, but instead served the entire building. The court held that the homeowners association was responsible for the cost of repair of the trusses.

Rakowski v. Committee to Protect Clear Creek Village Homeowners' Rights and Preserve Our Park, 252 S.W.3d 673 (Tex. App. 2008). A homeowners committee filed suit to prevent the homeowners association from selling a park to a purchaser who intended to use it for commercial purposes. The homeowners association and the potential purchaser argued that the park was not included within the platted boundaries of the subdivision and, therefore, was not subject to the restrictions set forth in the recorded covenants. The covenants included a provision entitled "Recreational Area" that referenced a "Recreation Area" labeled on the recorded plat for the subdivision. There was no dispute that the "Recreational Area" referred to in the restrictions was the "Recreation Area" shown on the plat. The restrictions reserved the area for the use and enjoyment of those owning and occupying residential lots in the subdivision. The homeowners association and the purchaser argued that because the language in the covenants referred to placing and imposing restrictions and covenants upon and against the lots, the restrictions did not apply to the park. The court disagreed and held that even though the park was outside the platted boundaries of the subdivision, the general plan of development created by the restrictions impose restrictions on the park.

Walker v. 90 Fairlie Condominium Association, Inc., 659 S.E.2d 412 (Ga. App. 2008). The owners of a penthouse condominium unit claimed that the building's 10th floor rooftop terrace was a limited common element reserved for their exclusive use. The association contended that most of the terrace was a common element reserved for the use of all unit owners. While it still owned at least one unit, the developer of the condominium recorded an amendment to the condominium declaration in which it changed the designation of the rooftop terrace from a previously unassigned common element to a limited common element for the exclusive use of the owner of the penthouse unit. The court concluded that the condominium declaration did not assign the entire 10th floor rooftop terrace as a limited common element. Instead, the rooftop terrace was a common element for the use of all unit owners. The court further held that the purported amendment of the condominium declaration by the declarant to allocate the rooftop terrace as a limited common element was ineffective, because although the declarant may have had the effective unilateral authority to amend the declaration when it controlled the association, that control had ended by the time the declarant sought to amend the declaration to assign the rooftop terrace as a limited common element.

Birdwood Subdivision Homeowners' Association, Inc. v. Bulotti Construction, Inc. 175 P. 3d 179 (Ida. 2008). The court held that a declaration of covenants, conditions and restrictions which was not signed by the owner of one of the lots to be subject to the declaration could not impose any restrictions upon that lot. The court further found that the subsequent purchasers had not ratified the declaration by accepting title to the lot, because the deeds did not include any specific reference to the declaration. Since the lot was not subject to the initial covenants, the lot was not subject to a subsequent amendment to the covenants adopted by the other lot owners. The court further held

that the owner of the lot was not estopped from denying the applicability of the covenants by having requested approval of the other lot owners to amend the covenants to permit the subdividing of the lot.

Triple Crown Subdivision Homeowners Association, Inc. v. Oberst, 2008 Ky. LEXIS 287 (Ky. 2008). The developer recorded a declaration of covenants that applied to all of the developer's property. The covenants included an "expansion" clause which allowed the developer to subject after-acquired property to the same restrictions. The "expansion" clause required the developer to amend the original restrictions to include the legal description of the after-acquired property. The developer obtained additional property and sold it pursuant to deeds which included a specific reference to the recorded covenants. However, the developer did not also amend the restrictions to include the legal description of the after-acquired property. The subsequent owners of the after acquired property contended that the developer's failure to amend the restrictive covenants to add the after-acquired property rendered the restrictions inapplicable to their property. The court held that the developer obviously intended for the after acquired property to be subject to the restrictions, because the developer included a specific reference to the covenants in the deeds. Therefore, the restrictions were applicable to the property even though the covenants had not been amended.

Eastgate Village Water and Sewer Association v. Davis, 183 P.3d 873 (Mont. 2008). The court held that under the restrictive covenants for the subdivision, the Board of Directors of the Association had the power to forbid privately operating irrigation wells located within the subdivision that are not connected to the Association's water system and that the rule adopted by the Board of Directors prohibiting such wells was reasonable in light of the Association's duty to promote the health, safety and welfare of subdivisions residents by preserving the subdivisions water supply.

Fair Housing

Villas West II of Willowridge Homeowners Association, Inc., v. McGlothin, 885 N.E.2d 1274 (Ind. 2008). The court held the homeowners association's enforcement of a no lease covenant did not violate the Fair Housing Act. The plaintiff claimed that the no lease covenant violated the Fair Housing Act because it had an impermissible disparate impact on African Americans. The court found that the facts did not support a claim under the disparate impact theory. The association asserted a legitimate, non discriminatory reason for the no lease covenant, stating that the exclusion of renters helped maintain property values, because renters did not maintain homes as well as owners. The court noted that to establish a right to disparate impact theory recovery under the Act, a plaintiff must establish a prima facie case by demonstrating that a policy or practice actually or predictably has a significant adverse or disproportionate impact on a protected class. To rebut such a showing, the defendant must demonstrate that its policy or practice has a manifest relationship to a legitimate nondiscriminatory interest. The plaintiff may then overcome the defendant's showing by demonstrating

that a less discriminatory alternate would serve the defendant's legitimate interest equally well. The plaintiff claimed that even though the association had a legitimate nondiscriminatory reason for its no lease covenant, there was an equally effective, less discriminatory alternative which was that the covenants required owners to maintain their property. The court found that although the specific property maintenance covenants were a less discriminatory alternative to promote maintenance, the covenants were not an equally effective means of maintaining property values.

Miller v. Savana Maintenance Association, Inc., 979 So.2d 1235 (Fla. App. 2008). A homeowners association brought suit against a homeowner to prevent the homeowner from running an assisted living facility in her home in violation of the rules of the homeowners association. One of the defenses asserted by the homeowner was that the rule violated the Florida Fair Housing Act, because the residents were "handicapped" as defined in that Act. The trial court ordered the homeowner to provide the homeowners association with the names and addresses of the current and former residents of the assisted living facility so that the association could confirm that they suffered from medical conditions which caused them to be "handicapped" and fall within the Act. The homeowner sought a writ from the court of appeals to quash the order requiring the homeowner to disclose the name and addresses of the residents. The court of appeals upheld the order of the trial court requiring the disclosure of the names and addresses of the residents. The court noted that the information sought by the homeowners association was relevant to the defense raised by the homeowner, because the physical condition of the residents was central to the defense based on the Act. Thus, the court refused to quash the trial court's order.

Chesler v. Conroy, 2008 U.S. Dist. LEXIS 80074 (N.D. Ill. 2008). A lawsuit arose from various heating personal disputes between neighbors living within the same 3 unit building. One of the neighbors filed suit against the other and the Condominium Association for alleging violations of the Fair Housing Act. One of the plaintiffs had underwent surgery which he alleged rendered him almost completely in mobile and therefore handicapped under the Fair Housing Act. The court noted that the Fair Housing Act was not intended to convert every quarrel among neighbors into a federal case. The court found that the plaintiffs had not alleged the type of discrimination that congress targeting when it passed and amended the Fair Housing Act, therefore, the plaintiffs had failed to state a claim under the Fair Housing Act.

Bloch v. Frischholz, 533 F.3d 562 (7th Cir. 2008). Condominium residents sued the condominium association and its president under the Fair Housing Act because the mezuzah, a religious symbol, that they placed on their condo units door post was removed pursuant to a rule adopted by the condominium association. The condominium association adopted a religious exception to the rule before the suit was filed, but the plaintiffs nevertheless continued the lawsuit, seeking both a prospective injunction and damages for the distress that they allegedly suffered prior to the rule change. The court held that the Act required an accommodation of handicaps but it did

not require an accommodation of religious beliefs and practices. The court held that the condominium association's original rule which did not contain a religious exception was not discriminatory and was compatible with U.S. Constitution's guarantee of free exercise of religion.

Stassis v. Ocean Summit Association, Inc., 2008 U.S. Dist. LEXIS 31856 (S.D. Fla. 2008). Members of a condominium association filed suit against their association for violations of the Fair Housing Act. The association sought to have the lawsuit dismissed on the basis that the plaintiff's claims were subject to mandatory, non-binding arbitration under applicable Florida law. The court held that since the plaintiff's claims were for violations of the Act, not the Florida Condominium Act or any governing documents of the association, the claims were not subject to arbitration. The association also sought to have the lawsuit dismissed on the basis that the plaintiff's had not filed an administrative complaint with the Florida Commission on Human Relations or the U.S. Department of Housing and Urban Development. The court held that there is no requirement that a plaintiff exhaust its administrative remedies prior to filing suit under the Act.

Fair Debt Collection Practices Act

Owens v. Hellmuth & Johnson, PLLC, 550 F. Supp. 2d 1060 (D.C. Minn. 2008). Homeowners filed an action against the law firm for their homeowners association alleging a violation of the Fair Debt Collection Practices Act. The defendant law firm argued that it was not a debt collector under the Act, because it was seeking to enforce a security interest rather than collect a debt. The court noted that the letter sent to the plaintiffs made no reference to the fact that the delinquency created a lien under Minnesota law. The court also noted that the letter did not refer to the association's right to foreclose that lien or in any way threatened foreclosure in the absence of payment. The court found that the letter was concerned only with an attempt to collect delinquent homeowner association dues and, therefore, the defendant law firm was a debt collector for purposes of the Act. The court noted that the letter did contain the validation notice required by the Act. However, the letter also advised the plaintiffs that they must pay the alleged debt within 30 days of the date of the letter to avoid the acceleration of the annual assessment. The court held that the letter constituted a violation of the Act.

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This Case Law Update is not intended to be a complete list of all cases decided in 2008 involving community associations or the enforcement of restrictive covenants. Some of the cases discussed in this Case Law Update may be subject to revision prior to official publication or may be subject to further appellate review. An attorney should check the current status of a case before citing or otherwise relying upon the case.