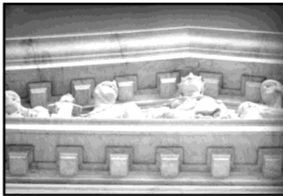

CAI'S COLLEGE OF COMMUNITY ASSOCIATION LAWYERS PRESENTS

Law Seminar

Case Law Update—Part I & II

January 22-23, 2010
8:15 – 9:30 AM

Presenter(s):
George E. Nowack, Jr., Esq.
Wilbert Washington, II, Esq.

31st ANNUAL COMMUNITY ASSOCIATION LAW SEMINAR

CASE LAW UPDATE

Donald E. Dyekman, Esq.
Mariscal, Weeks, McIntyre & Friedlander, P.A.

Amendment of Covenants and Bylaws

Apple Valley Gardens Association, Inc. v. MacHutta, 763 N.W. 2d 126 (Wisc., 2009). An owner of units in a condominium challenged the validity of a bylaw amendment prohibiting the rental of the condominium units on the basis that applicable law required any restrictions on the use of the units to be placed in the condominium declaration. The court held that nothing in the Wisconsin Condominium Ownership Act required that all restrictions on use must be identified in the declaration, and that no applicable statute suggested that a prohibition on the rental of condominium units must be placed in the declaration to be effective. The court held that declarations are not required to be exhaustive as to permissible uses of condominium units. Therefore, the court concluded that as long as use restrictions in the bylaws do not conflict with the declaration or state or federal law, they are valid and enforceable.

Riverview Heights Homeowners' Association & Riverview Heights Homeowners, Inc., v. Rislov, 205 P.3d 1035 (Wyo., 2009). A homeowner contested the validity of an amendment to the subdivisions restrictive covenants prohibiting manufactured homes and requiring approval of an architectural control committee before development. The amendment provisions of the restrictive covenants provided that the restrictions could be amended by instruments executed and acknowledged in the form prescribed for the execution of deeds by 75% of the owners of the total acreage of the land subject to the covenants. The amendment prohibiting manufactured homes and requiring approval of the architectural control committee was filed and recorded by the association. The amendment recited that at least 75% of the subdivision's landowners have approved of the amendment. Thirty-four pages containing signatures of lot owners were attached to the amendment. The association contended the amendment complied with the requirements of the restrictions because the signatures of the association's officers who signed the amendment were notarized. The court found that the language of the covenants was plain and unambiguous and required the execution and acknowledgment of the amendment by the owners. The court found that the execution and acknowledgment by the association's officers did not satisfy the requirement. Several of the signature pages attached to the amendment were not notarized. The court found that those signature pages were ineffective as approvals of the amendment. Subtracting the ineffective approvals, the amendment was not approved by 75% of the owners and, therefore, the court held that the amendment was invalid.

Regency Homes Association v. Schrier, 759 N.W. 2d 484 (Neb., 2009). A homeowners association sued a homeowner after the homeowner replaced his roof in violation of the covenant prohibiting asphalt shingles. The covenant has been added to the restrictive

covenants for the subdivision by an amendment. The covenant stated that the association had the right in the manner set out in its bylaws to extend, modify or terminate all or part of the covenants. The bylaws provided that the covenants could be amended by three-quarters vote of the entire number of memberships of regular members present, in person or by proxy at an annual or special meeting or response to the vote thereon by mail. The homeowner contended that the amendment adding the restriction against asphalt shingles was invalid and unenforceable. The court found that the amendment provision in the bylaws was not ambiguous and that the bylaws allowed an amendment to the covenants by three-quarters of those voting, regardless of how many total homeowners chose to participate in the vote. The court also rejected the homeowner's argument that the amendment created a new and different covenant that could only be passed unanimously. The court found that the covenants' broad language contemplated control over general appearance, and general appearance included roofing materials.

Miller v. Miller's Landing, L.L.C., 2009 Ala. Civ. App. LEXIS 401 (Ala. App., 2009). Restrictive covenants were amended to reduce the minimum area of houses that could be built in the subdivision. The amendment was approved by the owners of 16 of the 18 lots in the subdivision. The 2 other lot owners filed suit testing the validity of the amendment on the basis that the amendment was unreasonable and inconsistent with the general scheme or plan of development of the subdivision. The court noted that the amendment was properly adopted because the covenants allowed an amendment to be adopted by 75% of the property owners and the amendment in question was adopted by owners holding 16 of the 18 lots in the subdivision. However, the court stated that the amendment was still subject to a "reasonableness" standard. After reviewing the various factors to be examined in order to determine whether an amendment of a restrictive covenants is reasonable, the court held that the amendment in question was reasonable and not inconsistent with the general scheme or plan of development of the subdivision.

Nikolai v. Deer Run Owners' Association, 2009 Ohio App. LEXIS 5525 (Ohio App. 2009). The court held that an amendment to a condominium declaration to reclassify roofs from common areas to limited common areas required unanimous approval from the condominium unit owners.

Boyd v. Spring Creek Condominium Association, 2009 Ohio App. LEXIS 1870 (Ohio App., 2009). A condominium declaration was amended to reduce the number of units that could be rented from 25% to 5%. A unit owner filed a declaratory judgment action seeking to have the amendment declared invalid, because the amendment required the consent of 100% of the unit owners. The association filed an answer and a motion to stay the proceedings pending arbitration which the association contended was required under the condominium declaration. The court upheld the provision of the condominium declaration requiring arbitration of disputes between a unit owner and the association and referred the matter to arbitration.

Architectural Control

Alsatian Heights Homeowners Association v. Rodriguez, 2009 Tex. App. LEXIS 702 (Tex. App., 2009). A homeowner filed a lawsuit seeking declaratory relief that he was in

compliance with the restrictive covenants for the subdivision which required approval for any construction within the subdivision based on a conditional approval issued by the association's architectural committee. The court found that the conditional site plan approval stated only that the location and size of the home were accepted and approved. The court held that the conditional approval did not constitute approval of all details of construction.

Edberg v. The Laurel Canyon Ranch Architectural Review Committee, 2009 Tex. App. LEXIS 2726 (Tex. App., 2009). The subdivision's architectural review committee notified homeowners that they were constructing a home in violation of the recorded covenants for the subdivision, because they have not received approval of the architectural review committee for the construction. The homeowners argued that the architectural review committee was not legally constituted as an unincorporated non-profit association under Texas law. Although the court found that the architectural review committee was property constituted, the court found that the restrictive covenants only covered Unit 1 of the development and did not impose any covenants or restrictions on the plaintiff's property which was located in Unit 2.

Ballew v. Ndudi, 2009 Tex. App. LEXIS 3029 (Tex. App., 2009). The defendant built a home across the street from the plaintiff and constructed a fence and gate to which the plaintiff objected. The restrictive covenants for the subdivision contained a provision that no fence, wall or hedge shall exceed 8 feet in height unless otherwise specifically required by the city in which the subdivision was located and approved in writing by the architectural control committee. While the fence did not exceed the height restrictions, the ornamental see-through gate the defendant installed did exceed the height restrictions as did the adjoining post to which the gate was attached. Prior to construction, defendant submitted his plans to the architectural control committee which approved them. Nonetheless, the plaintiff objected and sued to enforce the restrictive covenants. The plaintiff asserted that the covenants provided that a fence could exceed 8 feet in height only if approved by the architectural control committee and required by the city. The court rejected that argument and held that there were at least two situations in which the height restrictions could be ignored. One was when the city mandates it and the other was when the architectural control committee authorized it. The court found that approval of the plans by the architectural control committee constituted a variance from the restrictions which the architectural control committee was authorized to grant.

Highland Springs South Homeowners Association, Inc. v. Reinstatler, 907, N.E. 2d 1067 (Ind. App., 2009). A homeowner requested approval from the subdivision's architectural committee to build an addition to her house. The committee denied the request. The association filed suit to obtain an injunction to prevent her from commencing construction. The trial court dismissed the association's complaint as being premature. On appeal, the court rejected the homeowner's argument that the fact that she obtained a variance from the municipality meant that she could proceed with the construction notwithstanding the restrictive covenants. The court found the zoning ordinances and laws cannot relieve real estate from valid private restrictive covenants. The court also rejected the defendant's argument that the association's claim was premature because she had not started construction of the improvements. The court found that because the

homeowner had procured a variance, had received approval to obtain the necessary building permitted and had indicated that she would begin construction as soon as the weather permitted was sufficient to establish a present existence of an actual threat that she would take action in violation of the covenants. Therefore, the court found that the association's action was not premature.

Curci Village Condominium Association, Inc. v. Santa Maria, 14 So. 3d 1175 (Fla. App. 2009). The defendant condominium unit owner made certain landscaping modifications to the backyard of her condominium unit. Before control of the condominium association was transferred to the homeowners, defendant inquired whether she could put decorative improvements in her backyard. The manager of the developer, who was also president and director of the association at the time, told her that he did not see a problem with the proposed improvements. However, the homeowner never requested or obtained written permission from the association to make the modifications. Shortly after control of the association was turned over to the homeowners, the association demanded that the modifications be removed. The unit owner filed suit against the association seeking declaratory relief that she was not required to remove the landscaping modifications. The court noted that the declaration required the homeowner to obtain written permission of the board of directors prior to making improvements or alterations to her property or the common elements. The homeowner claimed that the association was estopped from claiming lack of compliance with the condominium documents because of the verbal permission she received from the president and director of the association to make the modifications. The court held that the unit owner could not reasonably rely upon the verbal representation as constituting the written approval from the board of directors that was required by the declaration. However, the court found that there were issues of fact with respect to the unit owner's claim that the board's refusing to consent to the modifications was arbitrary and capricious and remanded the case for further proceeds on that claim.

Lake Charleston Maintenance Association, Inc. v. Farrell, 16 So. 3d 182 (Fla. App., 2009). A homeowner submitted an application to the development review board of the homeowners association requesting permission to repaint her house. She received a letter stating that her application was pending and requested additional information. She then attended a meeting of the development review board where she was advised that her application had been denied. A couple of weeks later, the homeowner painted her house in the color she originally submitted in her application. The association filed suit. The court found that the defendant had violated the declaration by painting her house without first obtaining approval of the design review board. The court found that she was informed of the denial of her application when she attended the meeting of the design review board which was held within the 30 day period within which the design review board was to approve or disapprove an application.

Assessments

Beazer Homes Indiana, LLP v. Carriage Court Homeowners Association, Inc., 905 N.E. 2d 20 (Ind. App., 2009). A developer filed conditional final plats for a subdivision. The conditional final plats were interim documents as the location, number and configuration

of buildings depicted on the plats changed after construction was complete. The developer eventually filed final plats of all the lots. The developer calculated and paid assessments from the time of the filing of the final plats rather than the filing of the conditional plats. The homeowners association filed a complaint against the developer seeking to collect assessments beginning with the filing of the conditional final plats. The court held that under the subdivision's restrictive covenants the assessment obligation was triggered by the filing of a final plat rather than a conditional final plat.

U.S. Bank National Association as Trustee for the Benefit of Harborview 2005-10 Trust Fund v. Tadmore, 2009 Fla. App. LEXIS 18408 (Fla. App., 2009). The bank sought to foreclose a first mortgage on a condominium unit owned by a deceased unit owner. The condominium association was joined as a defendant in the action. Approximately one year after the action was filed, the association filed a motion to compel the bank to either proceed with its foreclosure action or commence paying the monthly maintenance fee for the unit to the association. The association conceded that the bank was not contractually obligated to pay the monthly maintenance fees to the association before it obtained title to the unit. The court found that there was no legal basis for the issuance of the order requested by the association.

Museum Tower Condominium Association, Inc., v. The Children's Museum of Atlanta, Inc., 676 S.E. 2d 448 (Ga. App., 2009). The Museum Tower Condominium is a mixed-use development consisting of 2 commercial and 167 residential units. The defendant owned a ground floor commercial unit. Under the condominium declaration, the association had the power to levy monthly assessments on members to meet the condominium's common expenses, including expenses related to the maintenance of the common elements. Not all common elements were accessible to every unit owner. The condominium declaration defined a number of limited common elements which were reserved for the exclusive use of the residential units. The association levied an assessment against the defendant based on its percentage of ownership for all expenses of the association. The defendant contended that it had no access to, and therefore no financial responsibility for, the limited common elements assigned to the residential units. The court found that the condominium declaration clearly provided that the expenses related to the limited common elements allocated to residential units could only be assessed against the residential unit owners.

Oronoque Shores Community Association No. 1, Inc. v. Smulley, 968 A. 2d 996 (Conn. App., 2009). A condominium association brought suit against a unit owner to foreclose a lien for two unpaid special assessments. The unit owner claimed that both special assessments had been incorrectly apportioned among the unit owners and, therefore, were invalid. The court found that both special assessments had been properly approved. The apportionment of the assessments had initially been done improperly but was later corrected by the association. The court held that the apportioning of the assessment to each unit was a ministerial task which does not affect the validity of the assessment itself. The court also found that a mere technical deficiency in the notice of the meeting at which the special assessment was approved did not invalidate the assessment.

Association Powers and Operations

Acacia on the Green Condominium Association, Inc. v. Gottlieb, 2009 Ohio App. LEXIS 4143 (Ohio App., 2009). A condominium association sued a unit owner seeking to permanently enjoin him from further renovating his unit without obtaining a permit. The rules of the condominium association required a unit owner to obtain a permit from the association prior to commencing renovations in their unit. The defendant claimed that he was not bound by the declaration, bylaws or rules and regulations because he did not have notice of them when he purchased his unit. Consequently, he did not procure the appropriate permit on numerous occasions he renovated his unit. The court found that the defendant had both constructive and actual notice of the rule and that the rule was not arbitrary. The court held that the defendant was in violation of the rule and the association was entitled to an injunction.

In Their Representative Capacity as Trustees for the Indian Springs Owners Association v. Greeves, 277 S.W. 3d 793 (Mo. App., 2009). The plaintiff homeowner association brought an action against the defendant homeowners alleging that the homeowners violated the subdivision's covenants by erecting a shed on their property without approval of the association. The homeowners argued that the association's failure to hold annual trustee elections violated the trust indenture and therefore, the trustees were not validly in office and did not have authority to bring suit on behalf of the association. The trial court dismissed the case, and the association appealed. On appeal, the court held that the trial court had confused the issue of capacity to sue with standing to sue. An objection to standing cannot be waived and can be raised at any time, but a lack of capacity to sue must be raised as a defense. The court found that the homeowners did not file a motion or pleading raising the defense of lack of capacity to sue, and therefore, they waived their claim that the association did not have capacity or authority to sue. The court found that the association did have standing to sue.

Valley View Village South Improvement Assoc., Inc. v. Brock, 2009 Mo. App. LEXIS 263 (Mo. App., 2009). A developer created a subdivision and recorded a declaration of covenants which provided for establishment of a property owners' association to be known as Valley View Village South Improvement Association, Inc. The association was incorporated as a Missouri nonprofit corporation. Subsequently, the association's charter was forfeited. The homeowners tried to reactivate the original homeowners association, but its charter could no longer be reinstated. Therefore, the homeowners incorporated a new homeowners association under a name almost identical to the original association. The new homeowners association then brought suit against the owner of the unsold lots seeking a declaration that the association was the rightful administrator and owner of the water system for the subdivision. The court held that the current homeowners association was not a valid successor homeowners association for the subdivision and did not hold all the rights, privileges and responsibility granted in the original declaration of covenants. The court held that the court could not create an assignment of such rights where none was made by the original homeowners association.

Pearlbinder v. Board of Managers of the 411 East 53rd Street Condominium, 886 N.Y.S. 2d 378 (N.Y. App., 2009). The plaintiffs converted a building to condominium

ownership. Thereafter, the plaintiffs placed a sign on the outside of the building advertising the availability of unsold units. The board of directors of the condominium association directed the plaintiffs to remove the sign. The plaintiffs complied but then filed a lawsuit seeking a declaration that they had a right to place signs on the building. The court found that the bylaws and declaration granted the plaintiffs the right to post signs advertising the availability of unsold units provided the signs do not unreasonably interfere with the permissible use of any unit.

The River Plaza Homeowner's Association v. Healey, 904, N.E. 2d 1102 (Ill. App., 2009). A board of directors of a homeowners association brought suit to stop the proposed construction of an adjacent multi-family condominium building which the association claimed would interfere with easements belonging to the homeowners. The trial court dismissed the suit on the grounds that the board of directors lacked standing to bring the suit on behalf of the homeowners, because the board did not obtain a two-thirds vote of the homeowners to bring the lawsuit. On appeal, the court found that the bylaws required that two-thirds of the homeowners must consent for the board of directors to bring a lawsuit. The court found that such consent was not obtained, and therefore, the court affirmed the dismissal of the lawsuit without prejudice to the association's ability to file the suit if they obtained the required two-thirds consent.

Platt v. Aspenwood Condominium Association, Inc., 214 P.3d 1060 (Colo. App., 2009). A condominium association proposed a renovation project that included creating and selling two new condominium units. The unit owners unanimously voted to build and sell the two new units. The owners agreed that the two new units would be offered for sale through a private auction to unit owners within the condominium first. The plaintiffs bid successfully on a unit and entered into a purchase and sale contract with the association for the unit. The association asked the unit owners to approve the purchase contract believing that 67% of the owners had to vote to approve the contract. However less than 67% of the owners voted to approve the contract. The plaintiffs filed a complaint asserting various claims including a claim for specific performance of the contract. The plaintiffs contended that once the unit owners approved the sale of the two new condominium units, the association had the requisite authority to enter into the contract with the defendants without further attempts to obtain 67% approval. The court disagreed and held that 67% of the unit owners had to approve the contract, and their failure to do so rendered the contract unenforceable. However, the court allowed the plaintiffs to prosecute claims for breach of the implied covenant and good faith and fair dealing, fraud and negligent misrepresentation based on the allegation that the association represented that it was authorized to enter into the contract.

Raphael v. Silverman, 2009 Fla. App. LEXIS 17689 (Fla. App., 2009). The plaintiffs owned a condominium unit in a project comprised of three buildings. Originally, privacy dividers with a basket-weave design separated the balconies of the units. The board of directors of the association installed new transparent dividers. When the board refused the plaintiffs' request to modify their dividers to restore their privacy, the plaintiffs filed a complaint against the association and the individual members of the board, alleging a breach of fiduciary responsibility and seeking damages arising out their inability to sell their unit and its diminution in value. The court found that the individual directors were

immune under Florida law from liability in their individual capacity absent fraud, criminal activity, or self-dealing/unjust enrichment. The court found that no personal benefit was derived by the directors simply because the directors owned units within the condominium project and were thereby also able to enjoy the alterations or improvements to the common areas.

Cohn v. The Grand Condominium Association, Inc., 2009 Fla. App. LEXIS 16833 (Fla. App., 2009). The Grand Condominium was created in 1986. It is a mixed-use condominium consisting of residential units, retail units and commercial units which were operated as a hotel. In 1986 when the condominium was created, there was no specific statute regulating mixed-use condominiums. The articles of incorporation and bylaws of the condominium association created a board of directors which was controlled by the commercial unit owner and the retail unit owners. In 1995, the Florida legislature enacted a statute specifically addressing voting rights in mixed-use condominiums and provided that where the number of residential units in the condominium equals or exceeds 50% of the units, owners of the residential units shall be entitled to vote for a majority of the seats on the board of directors. The statute was silent on the issue of retro activity. In 2007, the legislature amended the statute to make it apply retroactively. After the 2007 amendment, a residential unit owner requested that the voting arrangements be changed to give a majority of the board membership to the residential unit owners in accordance with the statute. The condominium association filed a declaratory judgment action contending that the statute constituted an impairment of the obligation of contract. The court stated that the voting arrangements in a condominium are of great importance, and the change imposed by the statute operated as a substantial impairment of the existing contractual relationship. The court found that the 2007 amendment to the statute which made the statute retroactive was unconstitutional as an impairment of the obligation of contract.

Village of Doral Place Association, Inc., v. For Sale by Owner Realty, Inc., 2009 Fla. App. LEXIS 15540 (Fla. App., 2009). A condominium association failed to pay real estate taxes. As a result, the tract on which the swimming pool of the condominium was located was sold at a public sale. The buyers barred access to the swimming pool. The condominium association filed an action to set aside the tax deed and restore access to the condominium swimming pool. The court found that the swimming pool was part of the common elements of the condominium and, therefore, under applicable Florida law, could not be sold separately. The court set aside the tax deed.

Comcast of Florida, L.P. v. L'Ambiance Beach Condominium Association, Inc., 17 So. 3d 839 (Fla. App., 2009). Prior to the formation of the condominium association the developer of the condominium entered into an agreement with a cable television company to provide cable television services to the residents of the condominium. After transfer of control of the association, the unit owners voted to terminate the agreement. The cable television company filed an action contesting the right of the association to terminate the agreement. The applicable Florida statute provided that after transfer of control of a condominium association, unit owners could terminate any agreement made by the developer for operation, maintenance or management of the condominium association. The court found that because the agreement was for the "operation,

maintenance or management" of the cable television services, the agreement could be terminated by the association.

Lake Forest Master Community Association, Inc. v. Orlando Lake Forest Joint Venture, 10 So. 3d 1187 (Fla. App., 2009). An association filed a lawsuit against the developer of the subdivision for construction defects. Applicable Florida law required that before commencing litigation against any party in the name of the association involving amounts in controversy in excess of $100,000.00, the association must obtain the affirmative approval of a majority of the voting interests at a meeting of the members at which a quorum has been obtained. The plaintiff association held its annual meeting for the purpose of electing directors. A quorum was present and an election of directors was conducted, but the election of members of the architectural review committee could not be held because a larger quorum was required and the required quorum was not present. Thus, the president of the association announced that the annual meeting would reconvene at a later date. The reconvened annual meeting took place and the election of the architectural review committee members was conducted. At the end of the meeting, the president announced that the meeting would be reconvened at a later date for the purpose of allowing residents to vote for or against the association pursuing construction defect litigation against the developer. At the reconvened annual meeting, the members approved the association pursuing litigation. The developer claimed that further written notice of the reconvened meeting was required by Florida law and was not given. The court held that no additional notice had to be mailed to members regarding the reconvened meeting.

Covenant Enforcement

Musgrove v. Westridge Street Partners I, LLC, 2009 Tex. App. LEXIS 2660 (Tex. App., 2009). Landowners sought an injunction to prevent a planned development on the basis that the development would violate existing restrictive covenants on the property. The defendant contended that the covenants has been abandoned or waived because of prior violations of the covenants. The court found that an abandonment or waiver exists where the violations were so extensive and material as to reasonably lead to the conclusion that the restrictions had been abandoned or waived. The restrictive covenants contained a non-waiver clause which the plaintiff argued precluded any abandonment or waiver of the restrictions. The court rejected that argument stating that a non-waiver clause would be ineffective if a complete abandonment of the restrictions had occurred. The court found that there were ongoing material violations of the restrictions that fundamentally changed the character of the development, and therefore, the restrictions had been abandoned.

Schwartz v. Banbury Woods Homeowners Association, Inc., 675 S.E. 2d 382 (N.C. App., 2009). A homeowners association assessed fines against a lot owner for violating the parking restrictions in the recorded covenants. The covenants stated that owners of lots shall not be permitted to park boats, trailers, campers and all similar property on the streets in the development. The homeowner claimed that his motor home did not fall within the definition of "campers and all similar property" as stated in the covenants. The court held that although the term "motor home" was not expressly listed in the

covenants, based on the natural meaning of the term "camper" at the time the covenants were drafted and recorded, the court concluded that it would defeat the plain and obvious purposes of the restriction to exclude plaintiff's motor home.

Aberdeen Property Owners Association, Inc. v. Bristol Lakes Homeowners Association, Inc., 8 So. 3d 469 (Fla. App., 2009). A sub-association within a master association filed a complaint challenging several amendments to a declaration of covenants and restrictions that required all new owners taking title to certain property become members of a country club. The master association moved to disqualify the judge assigned to the case after learning that the judge had himself been involved in a similar dispute within the community where he resided. In that dispute, the judge had taken the same position as the sub-association was taking in the action against the master association. The appellate court agreed that the fact that the judge's personal situation aligned him with the sub-association's position on the primary issue to be determined in the litigation supported his disqualification. The court held that there was no need for the master association to show proof of any actual prejudice. It needed to show only well-founded fear of bias.

Fox v. Madsen, 12 So. 3d 1261 (Fla. App., 2009). Plaintiffs and defendants were homeowners of adjacent properties in a subdivision which were subject to a declaration of restrictions. The plaintiff filed suit seeking injunctive relief to require the defendant to remove driveway paving constructed to the property line between plaintiff's property and the defendant's property. The plaintiffs claimed that the driveway violated the declaration of restrictions. The defendant claimed that the action was barred by the statute of limitations, since the case was a claim for specific performance rather than a claim for an injunction. The court held that a mandatory injunction is the proper means for enforcing a restrictive covenant and that since the plaintiff filed a complaint for an injunction, the 5 year statute of limitations applied rather than the 1 year statute of limitations applicable to an action for specific performance.

Westgate v. Laumbach, 966 A. 2d 349 (Del., 2009). The plaintiffs filed suit against their next door neighbors to enforce compliance with certain restrictive covenants governing the residential subdivision in which they resided. The defendants erected a 20 foot wide, 38 foot long, and 13 foot high military quonset hut made of plywood and corrugated steel on a concrete foundation in the rear of the property. The purpose of the structure was to refurbish classic cars. They also parked a 20 foot long cargo trailer used for transporting cars to their property and paved asphalt over their grass side yard resulting in a driveway approximately 30 feet in width abutting the common property line with the plaintiffs. The purpose of the enlarged driveway was to enable cars to be driven around the two car garage to the quonset hut for repair. At various times, the defendants also used an industrial car lift, sandblasting equipment, a compressor for spray painting, a pressure washer and welding equipment to work on the cars. In addition to the noise caused by these activities, fumes from welding or spray painting would often drift over onto the plaintiffs' property. The court found that the quonset hut clearly violated the restrictive covenants and that the defendants' welding, sandblasting and spray painting constituted a nuisance in violation of the covenants. The court ordered the defendants to remove the non-conforming structures, vehicles and debris from their property and cease all activities

constituting a nuisance. The court rejected the defendants' claim that the covenants had been waived and abandoned because of the violation of the covenants by the plaintiffs and other property owners.

Lallo v. Szabo, 911 N.E. 2d 788 (Mass. App., 2009). A duplex the parties lived in was converted to a condominium. The defendants occupied the first floor, and the plaintiffs occupied the second floor and the attic. The plaintiffs notified defendants that they wanted to convert the attic to a master suite and to modify common areas of the condominium, primarily the roof. The defendants refused to agree to any of the proposed changes and refused to enter into arbitration pursuant to an arbitration clause in the trust document that created the condominium. The court held that since the plaintiffs proposal required the use of common area space for their sole benefit and would thus alter the defendants 50% interest in those common areas, the applicable law required the defendants' consent to the plaintiff's proposal. The court held that the defendants were not obligated to enter into arbitration because an arbitrator could not permit the plaintiffs to proceed with the modifications over the objection of the defendants.

Abril Meadows Homeowner's Association v. Castro, 211 P. 3d 64 (Colo. App., 2009). An association filed suit against certain owners claiming the owners were in breach of the recorded covenants. The defendants claimed that since the declaration was not signed by the declarant, the declaration was invalid. The court agreed and held that a declaration filed without a declarant's signature was invalid, because the Common Interest Ownership Act required that the declaration be executed in the same manner as a deed.

Covenant Interpretation

Fawn Lake Maintenance Commission v. Aldons Abers, 202 P. 3d 1019 (Wash. App., 2009). The defendants purchased two lots in a subdivision which they later combined into one lot. The owners argued that because they combined their two lots into one, they were obligated to pay homeowners assessments for only one lot. The association brought a declaratory action asking the court to determine whether the owners should pay dues for one lot or two lots. The court held that the covenants applied to lots as originally configured, and the obligation to pay dues attached to both of the lots individually under the covenants. The owners could not unilaterally modify their contract with the association through an arrangement with the county, which recognized the property as one lot for tax purposes.

Hiwan Homeowners Association v. Knotts, 215 P.3d 1271 (Colo. App., 2009). A homeowners association filed a petition to obtain court approval of proposed amendments and restatements of restrictive covenants. The recorded covenants for the subdivision did not contain any express mechanism for amending the covenants. Instead, there was only a provision for releasing or terminating any or all of the covenants with approval of 75% of the homeowners. The association filed a petition seeking court approval of proposed amendments to the covenants pursuant to the Colorado Common Interest Ownership Act which allows an association to seek court approval of a proposed covenant amendment if unit owners holding more than 50% of the votes necessary to adopt the proposed amendment vote in favor of the amendment. Certain homeowners

objected to the association's petition on the basis that the subdivision was not a common interest community, and therefore not subject to the Colorado Common Interest Ownership Act. The court held that the subdivision was a common interest community because an owner of a unit in the subdivision was obligated by a declaration to pay for maintenance or improvement of other real estate. The court held that the definition of a common interest community does not necessarily require the existence of common property.

Starlight Ridge South Homeowners Association v. Hunter-Bloor, 99 Cal. Rptr. 3d 20 (Cal. App., 2009). A homeowners association filed an action against a homeowner for injunctive and declaratory relief. Both a drainage channel and a landscape maintenance area crossed the homeowner's lot. The recorded covenants assigned general responsibility for landscaped maintenance areas to the association, while specifically providing that individual property owners would be responsible for drainage facilities if any, on their property. The association presented evidence that for the past 20 years, it had enforced the obligation of individual owners to maintain and repair drainage devices existing on their lots at the owner's expense. The court held that where two provisions appear to cover the same matter and are inconsistent, the more specific provision controls over the general provision. The court held that under the circumstances of the creation of the covenants, and the practice over a period of 20 years, the covenants assigned general responsibility for landscape maintenance areas to the association, but specifically provided that the individual property owners would be responsible for drainage facilities on their property.

B.B. & C. Partnership v. The Edelweiss Condominium Association, 218 P.3d 310 (Colo., 2009). The plaintiff filed a lawsuit against a condominium association seeking to quiet title to one of the parking spaces in the condominium. The plaintiff based its quiet title claim on the fact that one of its employees, who served as the managing agent of the association, parked his vehicle in the parking space for over 20 years and the plaintiff paid all taxes, maintenance fees and insurance fees on the parking space during that period. The dispute arose when the plaintiff sought to sell its claimed unrestricted fee simple ownership interest to a third party who was not a condominium owner. The court held that the parking space was a common element of the condominium that could not be sold or leased to a third party who was not a condominium owner.

1230-1250 Twenty-Third Street Condominium Unit Owners Association, Inc. v. Bolandz, 978 A. 2d 1188 (D.C. App., 2009). A condominium unit owner built an enclosure around his balcony due to what he claimed was a structural defect in the building that resulted in water pooling in the balcony. The condominium association demanded that he remove the enclosure claiming that it had been built in violation of various condominium rules that prohibit unit owners from making alterations to the building without prior approval of the association's board of directors. The unit owner eventually prevailed, and the association was prohibited from removing the enclosure or imposing any sanctions against the unit owner. The unit owner then requested attorney's fees pursuant to a provision of the bylaws of the condominium association which provided that in any proceeding arising out of any alleged default by a unit owner, the prevailing party shall be entitled to recover reasonable attorney's fees. The association

argued the unit owner's lawsuit did not come within the purview of the bylaw provision. The court disagreed and upheld an award of attorney's fees to the unit owner.

Southeastern Jurisdictional Administrative Council Incorporated v. Emerson, 683 S.E. 2d 366 (N.C., 2009). The plaintiff was a nonprofit, non-stock corporation that manages, owns, developments and sells land known as the Lake Junaluska Assembly Development. The plaintiff also maintained and operated the assembly by providing services such as street lighting, fire and police protection and maintenance of roads and common areas. The plaintiff operates the assembly under the auspices of the Southeastern Jurisdictional Conference of the United Methodist Church in the United States of America. The development's residential properties were always subject to restrictive covenants aimed at preserving the unique religious character and heritage of the development. The first owners purchased lots in the development nearly 100 years ago. Numerous covenants were incorporated in all deeds to residential properties in the development. The defendants owned lots in the development and refused to pay annual service charges assessed against their properties. The plaintiff filed suit to recover the unpaid assessments. The defendants contended that their deeds did not provide for the assessments of any fee or charge, did not contain a description of the permissible uses of the assessments and did not describe the property and facilities to be maintained with the money collected. The defendants also argued that the council was not a homeowners association and thus the defendants interests were not adequately represented through an election of directors or officers. The court found that to be enforceable, covenants imposing service charges must be subject to standards by which courts can measure the property owners' liability to pay the charges, must identify with particularity the properties to be maintained, and must provide guidance to courts reviewing the council's decision as to which properties and facilities will be kept up with the proceeds. The court held that the covenants imposing the disputed service charges, in tandem with supporting documentation, provided sufficient guidance to enable courts to enforce the covenants. The court, therefore, held the covenants enforceable against the defendants.

Fair Housing

Bloch v. Frischolz, 2009 U.S. App. LEXIS 24917 (7th Cir., 2009). The court held that in some circumstances homeowners may have a cause of action under the Fair Housing Act for discrimination that occurred after they moved into a dwelling. The court concluded that the plaintiff's had offered enough evidence to allow a trier of fact to decide whether they suffered intentional discrimination at the hands of the condominium association and its president. Therefore, the court reversed a summary judgment granted against the plaintiffs. The case involved the attempted enforcement by the condominium association of a rule adopted by the association which prohibited objects of any sort outside unit entrance doors. The association attempted to prohibit certain unit owners who were Jewish from affixing a mezuzot to the outside of their unit door. The defendants contended that the Fair Housing Act only addressed discrimination that takes place in the sale of housing, and, therefore, the plaintiffs could not assert any Fair Housing Act claims for actions by the association after completion of the purchase of their unit.

Overlook Mutual Homes, Inc., v. Spencer, 2009 U.S. Dist. LEXIS 105100 (S.D. Ohio, 2009). The board of trustees of a mutual housing corporation adopted a no pet rule which prohibited members and residents from having pets, except for service animals necessary to accommodate a resident's disability. The board of trustees demanded the resident remove a dog from her unit. The owner requested a reasonable accommodation from the rule on the basis that the resident was current receiving psychological counseling and her psychologist had recommended that she have a companion/service dog to facilitate her treatment. The board of trustees rejected the request. The association filed suit requesting a declaratory judgment that the dog was not a service animal and did not qualify as a reasonable accommodation under the Fair Housing Act. The court held that the types of animals that can qualify as reasonable accommodations under the Fair Housing Act include emotional support animals, which need not be individually trained.

Hawn v. Shoreline Towers Phase I Condominium Association, Inc., 2009 U.S. Dist. LEXIS 24846 (N.D. Fla., 2009). The condominium association had a no pet policy. A unit owner requested that the association allow him to keep a dog in his unit. The request was not granted by the board of directors. Later, the unit owner sought permission from the board of directors to keep his dog in his unit as a reasonable accommodation under the Fair Housing Act. The unit owner claimed that he was disabled and that the dog was certified as a service animal. The board of directors allowed the unit owner to address the board of directors with respect to the request. The board of directors asked for additional documentation regarding the unit owner's medical condition. The unit owner failed to provide the requested information. The court found that the board of directors did not know the unit owner was handicapped when it made its decision to deny his request and therefore, the board of directors could not be held liable for failing to make a reasonable accommodation for the unit owner.

Stross v. The Gables Condominium Association, 2009 U.S. Dist. LEXIS 52918 (W.D. Wash., 2009). The plaintiff was a resident of a condominium project. The plaintiff had a disease which required her to have physical assistance on a daily basis. She employed six aids to assist her with daily functions. She also had four emergency responders available to provide emergency assistance during the night. For 16 years, the plaintiff had a sufficient number of keys to the exterior door of the condominium project and to condominium unit door so as to provide keys to each of her aids, her emergency responders and herself. The board of directors of the condominium association decided to change the locks on the front door of the building. The board of directors advised all the unit owners that they would only be given 4 keys each. The plaintiff requested additional keys, but the board of directors refused. The court issued a temporary restraining order against the association on the basis that the plaintiff had established a strong likelihood of success on the merits of her reasonable accommodation claim under the Fair Housing Act.

Fair Debt Collection Practices Act

Madura v. Lakebridge Condominium Association, Inc., 2009 U.S. Dist. LEXIS 21241 (M.D. Fla., 2009). An owner of a condominium unit sued the condominium association, the association's managing agent and the president of the association claiming violations of the Fair Debt Collection Practices Act. The court found that the association was a creditor within the definition of the Fair Debt Collection Practices Act and that creditors are not considered to be "debt collectors" subject to the Act. The court also found that the property management company for the association had a contractual obligation and a fiduciary duty to collect both current and past due assessments from the members of the association. Therefore, the court found that the management company was not a debt collector under the Act, because its activities were incidental to a bona fide fiduciary obligation. Finally, the court found that the president of the association was also not a debt collector under the Act.

____

This Case Law Update is not intended to be a complete list of all cases decided in 2009 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.