



CAI'S COLLEGE OF COMMUNITY ASSOCIATION LAWYERS PRESENTS

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Case Law Update Part I & II

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32nd ANNUAL COMMUNITY ASSOCIATION LAW SEMINAR

CASE LAW UPDATE

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Amendment of Covenants and Bylaws

Hawkins v. Morrison, 2010 Tex. App. LEXIS 8472 (Tex. App. 2010). The court held that a document recorded by the president of a homeowners association purporting to extend the term of the restrictive covenants was invalid and of no effect. The court interpreted the restrictive covenants as not permitting an extension of the covenants after the expiration of the covenants.

Buttross V., Inc. v. Victoria Square Condominium Homeowners' Association, Inc., 2010 Tex. App. LEXIS 6803 (Tex. App. 2010). A condominium unit owner sued the condominium association for breach of contract by adopting amendments to the recorded declaration which were not approved by the members of the association as required by the declaration and applicable law. The court found that the breach of contract claim required the unit owner to prove that the unit owner was damaged as a result of the association's adoption of the amendment. The court ruled against the unit owner on the breach of contract claim, because the unit owner failed to establish that the owner had suffered any damages.

Dreamland Villa Community Club, Inc. v. Raimey, 226 P. 3d 411 (Ariz. App. 2010). Dreamland Villa Community Club, Inc., was incorporated as a nonprofit corporation by volunteer members to provide recreational facilities to those residents of a master planned residential community that chose to join the club. Each of the different sections in the planned community was governed by a separate set of restrictive covenants. Each of the restrictive covenants provided that they could be changed in whole or in part by a vote of the owners of the majority of the lots. Amendments were recorded for each of the sections within the community requiring lot owners to become members of the club and to pay annual assessments and special assessments levied by the club for the operation and maintenance of the recreational facilities owned by the club. Except for one section, the original restrictive covenants did not require payment of assessments or even mention the club or the recreational facilities. Each of the amendments to the covenants had been approved by a majority of the lot owners in each section. The court held that the amendment to the covenants were invalid and unenforceable. The authority to amend did not allow a majority of the lot owners to force the other lot owners to be members of the club and pay assessments to the club.

Scully v. Tillery, 926 N.E. 2d 154 (Mass. 2010). A condominium project was developed in two phases. After construction of the first phase, a lawsuit was filed by the condominium association against the developer regarding the plans for the development of phase two. The lawsuit was settled pursuant to a settlement agreement which

included, among other things, an agreement to execute and record certain amendments to the condominium's governing documents. Those amendments reallocated the percentage interest of the units in phase one. The court found that the amendments to the condominium's governing documents violated the provisions of the applicable statutes concerning the allocation of percentage interest to units in a condominium. However, the court found that the amendments were nevertheless enforceable because the provisions of the statutes were waived by the developer and that the phase two owners could not challenge those provisions, because they had purchased their units with notice of the nonconformity of the amendments with applicable law.

The Meadows Condominium Unit Owners Association v. Blakey, 2010 Ohio App. LEXIS 2000 (Ohio App. 2010). The board of directors of a condominium association sent all unit owners a notice informing them that at the annual meeting of the members a vote would be taken on two proposed amendments to the restrictive covenants and bylaws of the association. The notice specified that the voting would be conducted over a 14 day period beginning at the meeting. Voting was to continue during the 14 day period until a sufficient number of votes were collected to either pass or defeat the proposed amendments. At the annual meeting, there were not sufficient votes to amend the restrictive covenants and the bylaws. Votes were then collected following the meeting until a sufficient number of votes were obtained to pass the amendments. The court found that it was not permissible to combine votes taken at the meeting with votes taken after the meeting. However, the court concluded that there were remaining issues of fact as to whether the amendments were passed at the annual meeting, by an action without a meeting or by an improper combination of votes. Accordingly, summary judgment in favor of the homeowners association was improper.

Architectural Control

Foster v. Orchard Development, LLC, 2010 W.Va. LEXIS 145 (W.Va. 2010). A member of a homeowners association filed suit to stop the construction of a new townhouse project within a planned community on the grounds that the townhouse development violated the minimum square footage for residential units set forth in the design guidelines for the community. After the case was filed, the design guidelines were amended to alter the minimum square footage provisions in a manner that would permit the townhouse development to proceed. The restrictive covenants did not contain any minimum square footages for residences within the community. The court held that the homeowner was not entitled to an injunction to stop the construction of the townhouse development, because there was no minimum square footage requirement in the recorded covenants and that the minimum square footage requirement in the design guidelines was properly amended to allow for the construction of the smaller townhouses.

Stage Run Owners Association, Inc. v. Bains, 2010 Tex. App. LEXIS 9370 (Tex. App. 2010). A homeowners association filed suit seeking the removal of concrete pads installed in the side yards and backyards of a lot. The court found that the recorded covenants required the architectural control committee's approval for exterior modifications to the property. The court further found that the concrete ground cover was installed by framing areas with wooden forms, drilling holes into the foundation,

installing metal mesh and pouring concrete, and therefore, the concrete pads constituted modifications to the exterior of the property and were prohibited without approval of the architectural committee.

Bodine v. Harris Village Property Owners Association, Inc. 699 S.E. 2d 129 (N.C. App. 2010). Homeowners received permission from the homeowners association to construct a 10x14 foot pool house and tiki hut to adjoin their home. However, the homeowners constructed a 14x42 foot pool house and tiki hut. The court rejected the homeowner's argument that the board of directors could not appoint themselves as the architectural committee under the recorded covenants. The court found that the homeowners had not received approval to build the structures which they actually constructed and, therefore, the structures were built in violation of the restrictive covenants.

McCraw v. AUX, 696 S.E. 2d 739 (N. C. App. 2010). A homeowner applied to the architectural committee for their subdivision for approval to replace their cedar roof with a metal roof. The request was denied, but the homeowner nonetheless installed the metal roof on their house. Another homeowner in the subdivision filed suit claiming that the installation of a metal roof was in violation of the restrictive covenants for the subdivision. The plaintiff's sought an injunction ordering the defendant to remove the metal roof. The court noted that the requested remedy was dependent upon determinations to be made by the architectural committee which was not a party to the lawsuit. The court found that any changes to be made to the newly installed metal roof to bring it into compliance with the restrictive covenants would have to be approved by the architectural committee. The court held that the architectural committee was a necessary party which would have to be brought into the action before any decision was made on the merits of the case.

Clear Lake Riviera Community Association v. Cramer, 182 Cal. App. 4th 459, 105 Cal. Rptr. 3d 815 (Cal. App. 2010). The court held that a homeowners association could enforce a guideline on the height of buildings in the subdivision even though there was no direct evidence that the committee given the power to enact height restrictions had ever officially adopted the height restriction. The court held that the adoption of the guideline could be established by circumstantial evidence such as the fact that the guideline had been published by the association and had been applied and enforced for a long period of time.

Grove Hill Homeowners' Association, Inc. v. Rice, 43 So. 3d 609 (Ala. Civ. App. 2010). Homeowners made modifications to their driveway without obtaining the approval of the architectural committee for the subdivision as required by the recorded covenants. The court held that there was no patent ambiguity in the covenants and that the driveway constructed by the homeowners violated the restrictive covenants.

Assessments

Eagle Ridge Estates Homeowners Association, Inc. v. Anderson 777 M.W. 2d 369 (S.D. 2010). The court held that under a private access easement agreement, owners of property are only liable to a homeowners association for general road assessments and

not for general assessments of the association under the association's recorded covenants which included more than just road assessments.

Hazelwood Association, Inc. v. Helfrich, 2010 Ohio App. LEXIS 2378 (Ohio. App. 2010). A homeowners association submitted an invoice to a homeowner for delinquent assessments, late fees and interest. The homeowner contacted the association's management company by telephone and asked that the late fees and interest be waived. The homeowner then issued a check to the association on which the homeowner noted that the check was payment in full for dues. The association's management company cashed the check. The court held that the cashing of the check did not constitute an accord and satisfaction of the debt. The court found that there was a good faith dispute about the debt, but the court found that the notation on the check did not give the homeowners association reasonable notice that the check was intended to be full satisfaction of the debt that not only included dues but also late fees and interest.

Chleborowicz v. Inlet Point Harbor Boat Owners Association, Inc., 2010 N.C. App. LEXIS 1588 (N.C. App. 2010). The homeowners association for a residential waterfront community levied a special assessment against the members of the association for the repair of a bulkhead. Several members of the association claimed that the bulkhead was a limited common area so that the costs associated with the repair of the bulkhead should be borne only by the lots to which the limited common area was assigned. The court found that the bulkhead was a water related common area and not a limited common area, and therefore, the cost of repair of the bulkhead was properly assessed to all the members of the association.

Debaliviere Place Association v. Veal, 2010 Mo. App. LEXIS 886 (Mo. App. 2010). A homeowners association was incorporated pursuant to a recorded declaration of covenants and restrictions which declared the purpose of the association to maintain and administer the common areas, to enforce the covenants and restrictions and to collect and disburse assessments. Approximately 15 years after the formation of the association, the association was dissolved. Approximately 11 years after the original association was dissolved, a new association was formed using the same name as the original association. The new association sued one of the homeowners for failing to pay assessments in accordance with the provisions of the declaration. Subsequently, the original association purported to assign the current association all rights and powers under the declaration. The court held that the original association ceased to exist when it was administratively dissolved, subject to the right to apply for a rescission of the forfeiture of its corporate charter within a 10 year period following the forfeiture. After that 10 year period expired, there was no statute under which the original association could lawfully exist. The purported assignment by the original association of its rights and responsibilities under the declaration was made after the 10 year period had expired. Thus, at the time of the purported assignment, the original corporation did not exist and had no ability to act in any corporate capacity. Accordingly, the original association was unable to assign its former interest in the declaration to the current association.

Ridenour v. Carl Sandburg Village No. 7 Condominium Association, 931 N.E. 2d 692 (Ill. App. 2010). Owners in a condominium project filed suit against the condominium

association claiming that the windows in the condominium were limited common elements and, therefore, the condominium association was required to assess the cost of the replacement of the windows only against the owners benefited by limited common elements. The court found that the windows were limited common elements under the applicable statutes and the condominium declaration. The court further found that all costs for the maintenance, repair and replacement of the limited common elements were to be assessed only to the unit owners benefited by the limited common elements. The association historically had assessed the cost of the repair and maintenance of limited common elements to all the unit owners equally. The court held that such practice was an incorrect application of applicable law and the condominium declaration. Accordingly, the court held that the association could only use the percentage of its existing reserve funds equal to the percentage of ownership for membership in the association allocated to the units benefited by the limited common elements.

Wyndham Lakes Homeowners Association, Inc. v. Gray, 692 S.E. 2d 704 (Ga. App. 2010). A homeowners association filed suit against homeowners seeking payment of past due association dues. The defendant homeowners argued that they were not obligated to pay assessments under the recorded covenants, because a prior owner of their lots had conveyed the property to a bank in lieu of foreclosure. Since the bank's security deed was recorded prior to the recording of the restrictive covenants, the deed to the bank extinguished the covenants, including the obligation to pay assessments. The court held that because the transfer to the bank was by a warranty deed and not by virtue of a foreclosure of the prior existing security deed, the covenants were not extinguished and, therefore, the homeowners were obligated to pay assessments to the association.

Coral Lakes Community Association, Inc. v. Busey Bank N.A., 30 So. 3d 579 (Fla. App. 2010). A bank held a mortgage on property within a homeowners association. The community's governing documents at the time the bank acquired the mortgage provided that the assessment lien of the homeowners association was subordinate to a first mortgage and that any person who acquired title at a foreclosure sale was not liable for any assessment that became due prior to their acquisition of title. Subsequently, the Florida legislature enacted a statute which made a person acquiring title at a foreclosure sale liable for a certain portion of the assessments that became due prior to the date of the sale. The court held that the plain and ambiguous language of the restrictive covenants subordinated any claim for unpaid homeowner association assessments to first mortgagees. The court found that the bank had every right to rely upon provisions of the covenants when deciding to financing a homeowner's home in the community. The court held that to apply the statute to require the bank pay assessments that it was clearly not required to pay under the provisions of the covenants would impair the bank's prior mortgage lien.

Holly Park Condominium Homeowners' Association, Inc. v. Lowery, 310 S.W. 3d 144 (Tex. App. 2010). The court held that a condominium association for a condominium created prior to the effective date of the Texas Uniform Condominium Act could not foreclose its assessment lien nonjudicially as permitted by the Uniform Condominium Act, because the condominium declaration only allowed judicial foreclosure of assessment liens. The Condominium Act provided that the Uniform Condominium Act

could be applied only to the extent that it did not invalidate existing provisions of declarations created before the effective date of the Uniform Condominium Act. The court found that application of the Uniform Condominium Act to allow nonjudicial foreclosure of the assessment lien would invalidate an existing provision of the condominium declaration.

Carniello v. Second Horizons Condominium Association, Inc., 34 So. 3d 86 (Fla. App. 2010). The condominium association levied a special assessment against a unit for the costs incurred by the association in repairing an air conditioner. The court found that the condominium declaration provided for a special assessment of non-common areas only in the case of an “alteration” or “improvement”. The court held that a special assessment was not authorized for the cost of simply repairing an inoperative air conditioner.

Ritter v. The Las Colonitas Condominium Association, 319 S.W. 3d 884 (Tex. App. 2010). A condominium association filed an action for a declaration that a special assessment was valid. The defendant condominium owners filed counterclaims seeking a declaration that the special assessment was invalid. The court held that under the bylaws of the association, the board of directors had the power to pass a special assessment for replacement, repair, maintenance and restoration of the common areas without a vote of the members. The court concluded that the special assessment passed by the board of directors was for the repair of the common elements and, therefore, no approval of the members was required.

Bosch v. Open Pines Condominium Owners Association, Inc., 2010 Tex. App. LEXIS 8965 (Tex. App. 2010). A condominium owner filed suit against the condominium association claiming that a special assessment approved by board of directors was invalid because it was not approved by 95% of the owners of the condominium. The court concluded that no approval of the members was needed in order for the board of directors to pass a special assessment to replace the siding in the project.

Association Powers and Operations

Nelson v. Big Woods Springs Improvement Association, Inc., 322 S.W. 3d 678 (Tex. App. 2010). At an annual meeting of a homeowner association, persons claiming to have purchased lots two days prior to the annual meeting attempted to vote at the meeting. Since it was unclear whether the votes of the purported new member should be counted, the meeting was adjourned by a vote of the members present. After the meeting was adjourned, the purported new members held their own meeting and elected a board of directors. The association filed suit contesting the validity of the election. The court found that the president of the association had the right to call for a vote to adjourn the annual meeting. The court further found that the bylaws of the association required a lot owner to submit an application for association membership and pay their annual assessment fee before being entitled to vote. The court found that the meeting and the election of directors held by the purported new members following the adjournment of the annual meeting was invalid.

Lake v. Woodcreek Homeowners Association, 2010 Wash. LEXIS 829 (Wash. 2010). The owner of a one-story condominium unit sought and obtained approval from the condominium association to add a second story. A neighboring owner filed suit claiming that the addition of the second story would require the unanimous consent of the other owners in the condominium. The court found that the second story addition took a portion of the common area and combined it with an existing condominium unit. The court concluded that applicable law required a declaration to allow for the division of a common area and the combination of a common area with a private apartment. The court further held that applicable law and the condominium declaration did not require the unanimous consent of condominium owners to combine a portion of the common area with an owner's apartment.

Condominium Management Associates, Inc. v. Fairway Village Owner's Association, Inc., 2010 Tenn. App. LEXIS 105 (Tenn. App. 2010). The plaintiff management company filed suit against the defendant homeowners association for, among other things, breach of contract for failing to pay amounts due under a management agreement pursuant to which the plaintiff management company provided administrative condominium property management services and ground maintenance to the association. The association filed a counter complaint alleging, among other things, breach of fiduciary duty. The court held that the management company owed no fiduciary duty to the association. The court found that the management company and the association were not engaged in a per se fiduciary relationship, because the management company did not exercise dominion and control over the homeowners association.

Yusin v. Saddle Lakes Home Owners Association, Inc., 902 N.Y.S. 2d 139 (N.Y. App. 2010). The condominium's bylaws indicated that the homeowners were permitted to walk their pets over the condominium's common areas. The board of directors of the condominium association passed a rule requiring homeowners to curb their pets and prohibiting homeowners from walking their pets on the condominium's common areas. The court held that the rule was invalid, because it was not approved in the manner required for an amendment to the condominium's bylaws.

Duvall v. Fair Lane Acres, Inc., 2010 Fla. App. LEXIS 18296 (Fla. App. 2010). The court held that a homeowners association could not require homeowners who were not members of the association to submit to the applicability of the associations articles of incorporation and bylaws which implemented the conversion of the community to "housing for older persons" by placing age limits on the residents and requiring association approval before any sale of the homeowners property in order to continue receiving water and sewer services from the association.

Tedeschi v. Surf Side Tower Condominium Association, Inc., 35 So. 3d 915 (Fla. App. 2010). Owners of a condominium unit sued the condominium association claiming exclusive rights to a parking space in the condominium's parking lot. The association argued that the plaintiff should be required to join all of the unit owners as indispensable parties to the action. The court held that plaintiffs could bring suit against the association as a representative of all the unit owners and, therefore, were not required to join all of the unit owners as parties to the action.

Affan v. Portofino Cove Homeowners Association, 189 Cal. App. 4th 930 (Cal. App. 2010). Condominium owners sued the condominium association and the association's managing agent for damages resulting from sewer backups in the main lines that were the maintenance responsibility of the association. The court applied the rule of judicial deference in reviewing the actions of the homeowners association. The court noted that the rule of judicial deference is an affirmative defense so that the defendant has the burden on establishing the requisite elements for applying the rule. The court found that the judicial deference rule is a rule of deference to the reasoned decision making of homeowners association boards concerning ordinary maintenance and that it does not create a blanket immunity for all the decisions and actions of a homeowners association. The court also found that the judicial deference rule only applies to homeowners associations and, therefore the managing agent of the association was not entitled to rely upon the rule. The court held that the judicial deference rule does not shield an association from the liability for ignoring problems. Instead, the rule protects the association's good faith decision to maintain and repair common areas in a certain manner. The court noted, however, that the judicial deference rule might be extended to an association's choice of inaction under certain narrow circumstances such as when the choice facing the association was between doing nothing or adopting a prohibitively expensive course of action. The court found that the association had failed to prove facts allowing it to invoke the judicial deference rule.

Kaung v. Board of Mangers of Biltmore Towers Condominium Association, 895 N.Y.S. 2d 505 (N.Y. App. 2010). The board of managers of a condominium association approved a lease to a wireless communication service provider permitting the provider to construct and erect cellular telephone antennas and related wireless communications equipment on the roof of the condominium. The court found that the relevant provisions of the condominiums bylaws restricted the common elements to uses for which they are reasonably suited and which were incident to the residential use of the individual units. The court held that allowing the installation of wireless communications antennas and equipment on the building for the purpose of allowing the provider to continue its business as a wireless communication service provider permitted a use of the common elements which was not incident to the residential use of the units. The court, therefore, held that board of managers had exceeded its authority in entering into the lease, and the lease was void.

Hollywood Towers Condominium Association, Inc. v. Hampton 40 So. 3d 784 (Fla. App. 2010). A condominium association filed suit seeking a permanent injunction requiring a unit owner to give the association access to her condominium to perform repair work on her balcony. The court held that courts must give deference to a condominium association's decision if that decision is within the scope of the association's authority and is reasonable – that is, not arbitrary, capricious or in bad faith. The court noted that there was no dispute that the association had the authority to repair the concrete on the balcony which was part of the common elements of the condominium. The court remanded the case to the trial court to determine whether the association had the authority to access the unit to repair the balcony and, if so, whether the association acted reasonably in choosing to perform the repair work from inside the unit.

Alternative Dispute Resolution

Pinnacle Museum Tower Association v. Pinnacle Market Development (US), LLC, 187 Cal. App. 4th 24, 113 Cal. Rptr. 3d 399 (Cal. App. 2010). The recorded covenants for a condominium contained provisions requiring arbitration of construction disputes. The purchase and sale agreements for the sale of the units in the condominium recited that the parties agreed to comply with the dispute resolution provisions of the recorded covenants. The covenants also contained a waiver of jury trial with respect to construction disputes and barred amendment of the dispute resolution provisions without the developer's written consent. The court held that the arbitration provisions and waiver of jury trial provisions of the covenants and the purchase and sale agreements were not binding on the association. The court also concluded that the jury waiver provisions and the purchase and sale agreements were not enforceable because they were unconscionable.

Mansouri v. Fleur Du LAC Estates Association, 181 Cal. App. 4th 633, 104 Cal. Rptr. 3d 824 (Cal. App. 2010). A declaration of covenants, conditions and restrictions contained an arbitration provision which specified arbitration by a three arbitrator panel. The association demanded that a homeowner submit a dispute to arbitration before a single arbitrator. The court held that the association was not entitled to compel arbitration of the dispute, because it had not requested arbitration pursuant to the provisions of the declaration of covenants, conditions and restrictions.

Saguaro Highlands Community Association v. Biltis, 229 P. 3d 1036 (Ariz. App. 2010). Homeowners installed a swing set in the backyard of their lot without obtaining approval of the homeowners association. The association filed a complaint seeking injunctive relief. The homeowners filed a motion to compel arbitration. The court found that the alternative dispute resolution provisions in the restrictive covenants only applied to construction defect claims, and therefore, the claim for an injunction by the association was not subject to arbitration.

Murtha v. Ravines of McNaughton Condominium Association, 2010 Ohio App. LEXIS 1106 (Ohio App. 2010). The owner of a condominium unit entered into a lease agreement to rent his unit even though an amendment to the condominium declaration that was recorded shortly prior to the owner's purchase of the unit prohibited unit owners from leasing their unit except in cases of hardship. The unit owner claimed that the amendment was invalid because it had not been approved by a vote of 100% of the unit owners. The condominium declaration contained a provision requiring the arbitration of disputes. The applicable statute provided that arbitration clauses in contracts do not apply to controversies involving the title to or the possession of real estate. The plaintiff claimed that the controversy regarding the validity of the amendment to the condominium declaration involved title to or possession of his unit and, therefore, the dispute was not subject to arbitration. The court held that the dispute with respect to the validity of the amendment did not involve title to or possession of real estate and, therefore, was subject to the arbitration provisions of the condominium declaration. The court further held that the association had not waived its right to arbitrate the dispute and that the arbitration provisions of the condominium declaration were not unconscionable.

Barkley Estate Community Association, Inc. v. Huskey, 30 So. 3d 992 (La. App. 2010). A community association brought an action for damages and an injunction against a defendant property owner for constructing certain improvements without approval of the association and for certain other violations of the recorded covenants. The defendant homeowner claimed that the association's claims were subject to binding arbitration under the terms of the dispute resolutions provisions set forth in the recorded covenants. The court held that the association's claims did not fall within the exceptions to the binding arbitration provisions of the recorded covenants and, therefore, the association's claim had to be resolved by binding arbitration.

Covenant Enforcement

Sharp v. DeVarga, 2010 Tex. App. LEXIS 91 (Tex. App. 2010). The court held that where the restrictive covenants did not contain any express prohibition on replatting or subdividing, the replatting and subdividing of a lot was not prohibited so long as the manner in which the replatting and subdividing was done complied with all the existing restrictions.

South Ridge Homeowner's Association v. Brown, 226 P. 3d 758 (Utah App. 2010). The restrictive covenants provided that no timeshare, nightly rental or similar use was allowed on any single family residential lot. The court found that a weekly rental was similar to nightly rentals and timeshares because it involved multiple people coming and going for short periods of time. Thus, the court found that weekly rentals violated the restrictive covenants.

Lakewood Racket Club, Inc. v. Jensen, 232 P.3d 1147 (Wash. App. 2010). Approximately 10 acres of land were sold by a deed which contained covenants prohibiting the grantee from subdividing, building residences, or using the land for any purposes other than a tennis, swimming and squash club without the consent of the grantor or his heirs. The court held that the grantor's heirs lacked standing to enforce the covenants, because they no longer owned any of the property benefited by the covenant.

Moss Creek Homeowners Association, Inc. v. Bisette, 689 S.E. 2d 180 (N.C. App. 2010). The defendant acquired two adjoining lots in a subdivision. The defendant then recorded an instrument combining the two lots and thereafter recorded a plat which split one of the former lots into two pieces and recombined the other lot and a portion of the adjoining lot to create a new lot. The recorded restrictions for the subdivision provided that no lot could be subdivided by sale or otherwise to reduce the total area of the lot as shown on the recorded maps and plats without the written consent of declarant under the covenants. The court held that the defendant's actions reduced the total area of one the lots as shown on the maps and plats, and therefore, violated the restrictive covenants.

Cumberland Trial Homeowners' Association, Inc. v. The Pataskala Banking Company, 2010 Ohio App. LEXIS 3909 (Ohio App. 2010). A homeowners association sued a property owner alleging that construction and commercial use of a road across the owner's parcel violated the recorded restrictions for the subdivision. The court held that although the owner's parcel was subject to the restrictions, the owner's parcel did not

constitute a “Lot” within the meaning of the restrictions. The court held that the recorded covenants did not contain any restrictions with respect to the owner’s parcel and, therefore, the defendant did not violate the restrictions by construction and use of a road.

Irby v. Freese, 696 S.E. 2d 889 (N.C. App. 2010). A homeowner filed suit against the owner of a neighboring lot to halt the construction of certain improvements that the homeowner claimed were in violation of the restrictive covenants recorded against the property. The adjoining property owner argued that the claims were barred by the equitable defense of laches, because the plaintiffs did not act promptly to enforce their rights. The court found that the plaintiffs acted promptly and without undue delay once they learned of the existence of the grounds for their claim that the construction violated the restrictive covenants.

Willow Lake Residential Association, Inc. v. Juliano, 2010 Ala. Civ. App. LEXIS 248 (Ala. App. 2010). Homeowners built a set of steps from their property to a lake in the common area of a subdivision. The homeowner argued, among other things, that the association could not enforce the restrictions because the association had never been properly incorporated as a nonprofit corporation as contemplated by the recorded covenants, conditions and restrictions. Prior to filing its claim to enforce the restrictions, the association formally became a nonprofit corporation. The court held that at the point the association became a nonprofit corporation, the association assumed all the enforcement powers contained in the restrictive covenants. The court found that the association assumed those powers prior to the time that the association filed the action to enforce the restrictive covenants and, therefore, the association had standing to enforce the covenants.

College Book Centers, Inc. v. Carefree Foothills Homeowners’ Association, 241 P. 3d 897 (Ariz. App. 2010). The architectural committee for a subdivision denied a lot owners request to construct a roadway across his lot. The lot owner did not dispute that the roadway he wanted to build was a non-residential structure prohibited by the restrictive covenants. Instead, the lot owner argued that the homeowners association had waived its right to enforce the restrictive covenant, because there were two prior similar violations of the restrictive covenants. The court found that the two prior violations did not constitute frequent violations that would constitute a waiver of the covenant. In addition, the court found that because the restrictive covenants contained a non-waiver provision, the restriction remained enforceable despite prior violations, so long as the violations did not constitute a complete abandonment of the restrictive covenants. The court rejected the lot owner’s argument that the non-waiver provision in the restrictive covenants was intended only to protect the homeowners association from unintentionally waiving its enforcement rights through inaction and was never intended to shield a homeowners association from the consequences of affirmatively approving violations of the covenants.

Board of Managers of Village View Condominium v. Forman, 2010 N.Y. App. Div. LEXIS 7959 (N.Y. App. 2010). The board of managers of a condominium adopted a rule stating that no pets were allowed in the condominium. A homeowner refused to remove her dog from the condominium, and the condominium association filed suit to enforce the rule against pets. The court held that the board of managers did not have the authority to

adopt a rule prohibiting pets within the condominium units, since under applicable law such restrictions had to be set forth in the condominiums bylaws which required approval of 80% of the unit owners to amend.

Covenant Interpretation

Gray v. The Key Ranch at the Polo Club Home Owners Association, Inc., 2010 Tex. App. LEXIS 237 (Tex. App. 2010). The court found that the provisions of the covenants and plats evidenced a clear intention by the declarant to accomplish a conveyance of the streets and roadways to the association by plat dedication, and, therefore, the streets and roads were conveyed to the association upon the recording of the plats. Accordingly, the declarant did not have the authority to grant easements over the streets and roads within the subdivision after the plats were recorded.

Cullen v. McNeal, 2010 S.C. App. LEXIS 217 (S.C. App. 2010). Declarations of covenants, conditions and restrictions and easements were recorded subjecting four parcels of property to the covenants, conditions and restrictions and easements set forth in the declarations. Pursuant to the declarations, a homeowners association was incorporated to administer the project and enforce the declarations. All construction of improvements within the project were subject to review and approval by an architectural committee. A group of homeowners within Phase 1 of the project held a meeting and formed a separate homeowners association asserting that Phase 1 should be a separate and independent area from the remaining phases of the project. The homeowners filed suit against the developer for a declaratory judgment with respect to their respective rights under the declarations. The court found that all phases of the project were subject to the recorded declarations. The court also found that the declarations permitted the developer rights under the declarations to be assigned. The court held that the successor developer had not surrendered its authority to control the homeowners association during the period of time specified in the declarations. The court held that the developer was entitled to continue to appoint and remove officers and directors of the association and control the architectural committee.

Fieldstone Farms Homeowners Association v. Cavender Enterprises, LLC, 2010 Tenn. App. LEXIS 746 (Tenn. App. 2010). The defendant purchased a parcel in a planned development from the developer. The parcel had been operated as a recreational facility since the original development of the project. The defendant intended to subdivide and develop the parcel as residential lots. The parcel was not part of the original development but was annexed into the development by a supplementary declaration of covenants, conditions and restrictions. The court concluded that the recreational parcel was not a "Lot" within the meaning of the recorded covenants and, therefore, the provision in the supplementary declaration that prohibited the subdivision of lots was not applicable to the parcel. The court found, therefore, that since no other provision in the recorded covenants prohibited the subdivision of the recreational parcel into residential lots, the subdivision and conversion of the parcel to residential use was not prohibited.

Solowicz v. Forward Geneva National, LLC, 780 N.W. 2d 111 (Wisc. 2010). The court held that a community declaration that established a master planned community which

included numerous condominium developments was not subject to the Wisconsin Condominium Ownership Act. The court further held that because the terms of the community declaration was unambiguous, the terms did not have to pass a test as to their reasonableness in order to be enforceable.

Fair Housing

Bailey v. Stonecrest Condominium Association, Inc., 696 S.E.2d 462 (Ga. App. 2010). A condominium owner filed an action against the condominium association and the members of its board of directors alleging that amendments to the association's bylaws prohibiting leasing constituted racial discrimination in violation of the Georgia Fair Housing Act. After the condominium owner entered into a lease agreement to lease their condominium unit to an African-American woman, the members adopted amendments to the bylaws that included a restriction on a unit owners' ability to lease their property. The court held that the granting of summary judgment to the defendants was inappropriate, because the comments made by the president of the association and by another resident combined with the timing of the amendment's adoption established a prima facie case for a fair housing violation.

Fair Debt Collection Practices Act

Vogler v. Grier Group Management Co., 309 S.W. 3d 328 (Mo. App. 2010). A condominium owner filed suit against the condominium association's property management company for violation of the Fair Debt Collection Practices Act. The court held that the management company was not a debt collector under the Fair Debt Collection Practices Act, since its principal purpose was not the collection of debts but instead was the management of property. The management company spent less than 2% of its time on delinquent assessments. The court held that the management company did not regularly collect or attempt to collect debts as defined the Fair Debt Collection Practices Act.

Astralis Condominium Association v. Secretary, United States Department of Housing and Urban Development, 620 F. 3d 62 (1st Cir. 2010). Condominium unit owners who claimed they were handicapped requested the exclusive use of two handicapped parking spaces. The board of directors of the condominium association refused the request. The unit owners filed a complaint with HUD alleging that the association violated the Fair Housing Amendments Act of 1988 by refusing to grant a reasonable accommodation for their handicap. The court upheld the ruling of the administrative law judge that the association's failure to grant the homeowners exclusive use of the handicapped spaces constituted a violation of the Fair Housing Amendments Act of 1988.

Jerman v. Carlisle, 130 S. Ct. 1605 (S. Ct. 2010). The court held that the bona fide error defense in Section 1692K(c) of the Fair Debt Collection Practices Act did not apply to a violation of the Act resulting from an attorney's incorrect interpretation of the requirements of the Act.

Developer Liability

Dean v. Barrett Homes, Inc., 2010 N.J. LEXIS 1219 (N.J. 2010). Subsequent owners of a residence filed suit against the builder of the residence, a manufacturer and others for damages caused by an allegedly defective exterior finishing system on the home called synthetic stucco. The court held that the economic loss rule, as embodied in the New Jersey Products Liability Act, precluded the plaintiffs from recovering any damages for harm that the product caused to itself. The court found that the product was not so fully integrated into the structure of the house that the house effectively became the product for purposes of the economic loss rule. The court held that the plaintiffs retained a cause of action against the manufacturer to the extent that the product caused damage to the structure of the house or surroundings.

Southwick at Milford Condominium Association, Inc. v. 523 Wheelers Farm Road, Milford, LLC, 984 A. 2d 676 (Conn. 2010). The court held that the developer of a phased condominium project was obligated under the Connecticut Common Interest Ownership Act to build all improvements depicted in phase 2 of the site plan that were not labeled “may not be built” and, therefore, the developer could not remove the land on which the structures were to be built from the condominium.

Lakeview Reserve Homeowners, ETC. v. Maronda Homes, Inc., 2010 Fla. App. LEXIS 16554 (Fla. App. 2010). The court held that a homeowners association could sue the developer of the subdivision for defects in the construction of roads, retention ponds, underground pipes, drainage systems and other portions of the common area of the subdivision under the implied warranty of habitability. The court held that implied warranties of fitness for a particular purpose, habitability and merchantability applied to structures in common areas of a subdivision that immediately supported the home in the form of essential services.

This Case Law Update is not intended to be a complete list of all cases decided in 2010 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.