



CAI'S COLLEGE OF COMMUNITY ASSOCIATION LAWYERS PRESENTS

# Law Seminar

## Case Law Update Part I & II

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## 33RD ANNUAL COMMUNITY ASSOCIATION LAW SEMINAR

### CASE LAW UPDATE

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#### **Amendment of Covenants and Rules**

Hughes v. New Life Development Corporation, 2011 Tenn. App. LEXIS 215 (Tenn. App. 2011). A developer purchased 11 of 24 platted lots in a subdivision from the original developer. The new developer then conducted a voted of the owners of the lots in the subdivision to amend certain provisions of the restrictive covenants. The stated purpose of the amendments was to resolve issues pertaining to a lawsuit that had been filed by some of the homeowners against the new developer. The court found that although there was no express assignment of the original developer's rights to the new developer, the original developer transferred his position as developer under the restrictive covenants to the new developer. The amendments to the restrictive covenants were extensive and substantial and gave the new developer unfettered discretion to change the terms of the covenants, including the permissible use of land within the subdivision. The court reversed a summary judgment in favor of the new developer and remanded the case to the trial court with instructions to consider whether the amendments were reasonable in light of the original intent of the contracting parties and the totality of the surrounding circumstances, including whether the purchasers were apprised that such amendments could be made and whether the amendments would materially change the character of the development.

Cape May Harbor Village and Yacht Club Association, Inc. v. Sbraga, 22 A. 3d 158 (N.J. Super. 2011). The restrictive covenants for a small and exclusive community which included a marina permitted the leasing of the homes and boat slips in the marina. An amendment to the covenants was approved prohibiting the leasing of homes in the community. The association filed suit against a homeowner who wanted to lease her home. The homeowner argued that when she purchased the home, there was no prohibition against leasing and any subsequently imposed restriction on leasing could not apply to her because it would impermissibly deprive her of a property right and constitute an unreasonable restraint on the alienation of her property. Applying the reasonableness standard, the court found that the amendment to the declaration prohibiting leasing of homes was valid and was binding on the defendant since the defendant had notice that the restrictive covenants could be amended.

Klinow v. Island Court at Boca West Property Owners' Association, Inc., 64 So. 3d 177, (Fla. App. 2011). Homeowners challenged the validity of amendments to restrictive covenants authorizing the homeowners association to proceed with a beautification project to replace driveways and walkways on the individual lots at each lot owner's expense. The court noted that in determining the enforceability of an amendment to

restrictive covenants, the test is one of reasonableness. The court found that the amendments were approved by the required percentage of members and were reasonable.

Cusimano v. Port Esplanade Condominium Association, Inc., 55 So. 3d 931 (La. App. 2011). The owners one of two buildings in a condominium project adopted an amendment to the condominium declaration purporting to transfer certain common elements, such as a swimming pool and passageways, to the exclusive use (as limited common elements) to the owners in their building. The owners of the other building did not join in the adoption of the amendment. However, subsequently the other building was transferred, and the transfer was expressly made and accepted subject to the recorded amendment. The court found that the owners in one building could not re-designate the common elements as limited common elements for their exclusive use without the consent of the owners in the other building. However, the court concluded that the consent of the owners of the other building was obtained when that building was sold with the sale being made expressly subject to the recorded amendment.

Sui v. Price, 127 Cal. Rptr. 3d 99 (Cal. App. 2011). A homeowners association amended its rules to prohibit the parking of inoperable vehicles. A homeowner whose van was towed by the association filed suit against the association claiming that the association had breached the nondiscrimination provision of the restrictive covenants by amending the rules and had engaged in inappropriate enforcement of the rules. The homeowner claimed that the amended rule discriminated against him because he was the only homeowner with a disabled vehicle at the time the amended rule was adopted. The court noted that homeowner association rules must be reasonable but held that whether a rule is reasonable is determined not by reference to facts that are specific to an objecting homeowner, but by reference to the common interest development as a whole. The court found that there was nothing unreasonable about prohibiting the open, long-term parking of disabled vehicles.

### **Architectural Control**

La Ventana Ranch Owners' Association, Inc. v. Davis, 2011 Tex. App. LEXIS 4240 (Tex. App. 2011). The restrictive covenants established an architectural committee that had the power to approve improvement requests and well as grant variances from compliance with any provision of the covenants which the architectural committee determined in its sole and absolute discretion would not impair or detract from the high quality development of the subdivision and was justified due to the unusual or aesthetic considerations, topographic or septic considerations or unusual circumstances. The covenants required all variances to be in writing and signed by a majority of the voting members of the architectural committee. The architectural committee approved numerous variances based on a vote of two members of the architectural committee. The homeowners association filed suit claiming that the variances were invalid because there were four voting members of the architectural committee and, therefore, the vote of two of the members did not represent a majority of the voting members of the architectural committee. The court found that there were only three voting members of the architectural committee at the time the variances were signed. The court, therefore, upheld the granting of the variances as being in accordance with the requirements of the

covenants. The court also found that because the covenants gave the architectural committee the right to grant variances in their sole and absolute discretion, the decisions of the architectural committee were not reviewable for reasonableness.

Grove Hill Homeowners' Association, Inc. v. Rice, 2011 Ala. Civ. App. LEXIS 196 (Ala. Civ. App. 2011). The court found that a driveway constructed by a homeowner violated the restrictive covenants, because the homeowner failed to obtain the pre-approval of the architectural review committee for the construction of the driveway. The court held that the trial court erred in not granting a permanent injunction to the homeowners association. The court found that the doctrine of "relative hardship" is unavailable to defeat a request for a permanent injunction in cases in which the violator of the restrictive covenant had notice of the restrictive covenant before the violation occurred.

Jensen v. Lake Jane Estates, 2011 WL 5842791 (Wash. App. 2011). The owner of two subdivided lots sought approval from the homeowners association to subdivide the two lots into six lots. The association rejected the request. The homeowner argued that only the original developer could approve the subdivision of lots, and the developer no longer existed so no approval was required. The court held that the homeowners association created by the developer had the right to approve the subdivision of lots. The court also rejected the homeowner's contention that the association had acted unreasonably and in bad faith when it denied the request. The court found that the reasonableness of a decision to grant or deny a proposed building-related plan is determined by the decision maker's process in reviewing the application. Even if the entity authorized to enforce the covenant has a personal bias against the proposed project, the entity can properly deny an application as long as its review process is reasonable.

Waller v. Golden, 706 S.E. 2d 403 (Ga. 2011). The restrictive covenants required that pools be constructed in the back yard of a lot. Unaware of the restriction, the homeowners association's architectural review board gave homeowners permission to build their pool on the side yard. Their neighbors became aware that the pool was being constructed and voiced objections. The neighbors did not file suit to stop the construction of the pool until 24 days after they had notice that the pool was being constructed by which time the homeowners were nearly halfway into the project, had expended over \$20,000 on the pool construction and landscaping and were committed to pay the remaining balance of their contract for the construction of the pool. The court found that the neighbor's claim for an injunction was barred by the doctrine of laches.

### **Assessments**

Duncan v. Dominion Estates Homeowners Association, 2011 Tex. App. LEXIS 6274 (Tex. App. 2011). An architectural review committee assessed fines against a homeowner for failing to keep and maintain their property in a safe, clean and attractive condition. The fines were imposed pursuant to design guidelines adopted by the architectural review committee permitting the architectural review community to levy fines for violations of the design guidelines. The homeowners association imposed a \$250 special assessment against all homeowners to pay for legal fees with respect to the

dispute with the homeowner who allegedly violated the design guidelines. The court found that the special assessment levied by the association had to be approved by a vote of the members of the association. Since no such vote was taken, the court found that the special assessment was unauthorized and invalid. The court further upheld the jury's finding that the association had failed to comply with the restrictive covenants when it imposed the fine and late fees, because the association had not provided the homeowner adequate notice of the design guidelines or the alleged violation or a reasonable amount of time in which to correct the violation before imposing the fines.

DeBaliviere Place Association v. Veal, 337 S.W. 3d 670 (Mo. 2011). The DeBaliviere Place Association was a nonprofit corporation with the right to collect assessments on property within a subdivision pursuant to recorded covenants. The DeBaliviere Place Association was dissolved by the Secretary of State of Missouri in 1992 for failing to file its annual registrations. A new nonprofit corporation with the same name was incorporated 11 years later. The former association assigned its rights and obligations to collect the assessments and other fees imposed under the recorded covenants to the new association about 14 years after the former association was dissolved. The new association filed an action against a property owner to foreclose on recorded liens for assessments, interest, late fees and attorney's fees. The liens were for amounts due both prior to and after the assignment of rights from the former association to the new association. The court found that the former association had the authority to execute an assignment of its rights under the recorded covenants after it was dissolved pursuant to its right to wind up its affairs. The applicable statutes had no set time period for winding up the affairs of a dissolved corporation.

Saar v. Wellesley at Lake Clarke Shores Homeowners Association, Inc., 2011 Fla. App. LEXIS 14056 (Fla. App. 2011). A homeowner challenged a final judgment foreclosing a claim of lien for unpaid condominium assessments. The homeowner claimed that she had paid the assessments and that the association failed to prove that the claim of lien amount had not been paid. The court found that the association and its accounting methods were woefully inadequate to correctly ascertain and give notice of the amounts claimed to be due. Because of the imperfect record keeping, the association did not make a proper claim of lien nor did it give sufficient notice in its complaint of its claim. The homeowner showed that she had consistently made the required payments and had detailed records to support her payments, many of which were not properly credited by the association.

In Re: Spencer, 2011U.S. Dist. LEXIS 96219 (E.D. Mich. 2011). Assessments of condominium fees levied by a condominium association after the debtor's Chapter 13 petition were not pre-petition claims subject to discharge but were post-petition claims. The obligation to pay assessments was a covenant running with the land, and the debtor remained the owner of the property at all relevant times.

In Re: Kimberly Denise Hall, 2011 Bankr. LEXIS 2700 (N.D. Ga. 2011). A homeowner filed bankruptcy and after receiving his bankruptcy discharge, the property manager for the debtor's condominium association contacted the debtor seeking payment of assessments which the debtor had failed to pay. The debtor claimed that such contact

violated the automatic bankruptcy stay. The court found that the manager's attempt to collect the assessment which arose after the debtor's discharge did not violate the stay. The debtor's obligation to pay the assessments was a covenant running with the land rather than a contractual debt, since the obligation was for debtor's post-petition ownership of the property and not from the pre-petition contractual obligation.

Superior Shores Lakehome Association v. Jensen-Re Partners, 792 N.W. 2d 865 (Minn. App. 2011). The board of directors of a condominium association permitted the owners of a condominium unit to divide the unit into two living areas with separate walkways, entrances and kitchens. The owner of the unit at the time agreed to pay two assessments for the condominium unit. However, the unit was never properly subdivided in accordance with the provision of the Minnesota Condominium Act. The court found that the unit remained one unit and, therefore, was only liable for one assessment.

Coral Way Condominium Investments, Inc. v. 21/22 Condominium Association, Inc., 66 So. 3d 1038 (Fla. App. 2011). A condominium association levied a special assessment to pay for flood damage repairs and cleaning of the air conditioning system of the condominium. One of the unit owners disputed the validity of the special assessment on the basis that the board of directors had violated their fiduciary duty and that the special assessment would not have been necessary were it not for the alleged breach of fiduciary duty which depleted the association's funds. The court found that the special assessment was passed by the required percentage of members of the association. The court also held that avoidance of the payment of a valid assessment is not a remedy available to unit owners to cure unauthorized acts by officers or directors of an association.

In the Matter of the Proposed Foreclosure of Claim of Lien Filed Against Jeffrey J. Johnson, Donna N. Johnson, Gary Proffit and Jo Profit by Starboard Association, Inc., 714 S.E. 2d 169 (N.C. 2011). A condominium association decided to make certain renovations to one of the buildings in the condominium. The board of directors approved a special assessment to be levied against the units in the building in which the renovations were to be made instead of against all the owners in the condominium. The court concluded that under applicable law and the documents for the condominium, the assessment was required to be made against all the units in the condominium and computed in accordance with each unit's percentage of undivided interest in the common areas, except for the exterior doors and windows which the court concluded could be assessed against only the owners in the building in which the renovations were made.

The Manners at Village Green Condominium, Inc. v. Webb, 341 S.W. 3d 162 (Mo. App. 2011). A condominium association filed suit to collect unpaid assessments. The association's claim was based upon a ledger created by the association that contained starting balances which the association admitted were unsubstantiated and unverified. The court ruled that the association failed to prove the existence and amount of damages with reasonable certainty.

Villa de Jardines Association v. Flagstar Bank, FSB, 253 P.3d 288 (Ariz. App. 2011). The court rejected an argument by a homeowners association that a state statute providing that the assessment lien of a homeowners association was subordinate to a

recorded first mortgage only made the assessment lien subordinate to a mortgage recorded prior to the recording of any other liens. The court held that the statute was clear and unambiguous and made the assessment lien subordinate to a first mortgage regardless of when the assessment lien was perfected.

### **Association Powers and Operations**

Roberts v. Nine Island Avenue Condominium Association, Inc., 2011 WL 4374452 (Fla. App. 2011). The court held that a condominium association was not required by the condominium declaration and applicable law to insure the marina and boat slips which were part of the condominium that were designated limited common elements. The court found that the provisions of the condominium declaration only required the association to purchase insurance on the land-based elements of the condominium which did not include the marina and boat dock.

Bosch v. Cedar Village Townhomes Homeowners Association 2011 Tex. App. LEXIS 804 (Tex. App. 2011). The court found that a condominium association was only obligated to obtain insurance on the common elements of the condominium and was not obligated to obtain insurance on the units.

Watson v. The Homeowners Association of Heritage Ranch, Inc., 2011 Tex. App. LEXIS 5823 (Tex. App. 2011). The court found a homeowners association did not deny a homeowner's written demands to examine and copy the relevant books and records of the association as required by applicable law and the association's bylaws.

Board of Directors of Queens Towers Homeowners' Association, Inc. v. Rosenstadt, 2011 N.C. App. LEXIS 1636 (N.C. App. 2011). The board of directors of a condominium association voted to purchase and install awnings outside the balconies adjacent to certain condominium units. The owners of one of the units refused to allow the installation of the awnings. The condominium association filed suit to obtain an injunction prohibiting unit owners from denying the association access to the balconies for the installation of the awnings. The court found that the balconies were not part of the units but were part of the common areas. The court further found that the board of directors acted within the scope of its authority in electing to install the awnings and, therefore, the unit owners could not deny the association access to the units to install the awnings.

Greenstein v. Council of Unit Owners of Avalon Court Six Condominium, Inc., 2011 Md. App. LEXIS 130 (Md. App. 2011). Individual unit owners within a condominium filed suit against the condominium association alleging negligence in failing to timely investigate water leakage in the individual units and failing to file a lawsuit against the developer of the condominium within the statute of limitations. The court held that the duty to maintain, repair and replace the common elements, together with the exclusive right to initiate litigation regarding the common elements, created an obligation on the part of the association to pursue recovery from the developer on behalf of the unit owners for damage to the common elements caused by the developer's negligence, breach of contract or violation of any applicable law. The association argued that the claims of the

unit owners were barred by the statute of limitations which should have begun to run at the time the unit owners had notice of the water problems in the units. The court disagreed and held that the claim against the association was a claim based on the association's failure to properly pursue a legal remedy against the developer not for the developer's deficient design or construction of the common elements and, therefore, the statute of limitations did not begin to run until the statute of limitations for the claim for defective construction against the developer had expired.

Campbell v. The Landings Association, Inc., 2011 Ga. LEXIS 564 (Ga. 2011). Homeowners claimed that they had acquired title to a parcel of land owned by a homeowners association for the subdivision by adverse possession. The court found that the property in question was properly conveyed to the homeowners association. The homeowners association had permitted the plaintiffs and all other residents of the subdivision to enjoy the property as common property. The homeowners association never permitted the plaintiffs to take over the common property for their own personal use. Therefore, the court held that the plaintiffs had not acquired title to the common property by adverse possession.

Swain v. The Meadows at Martin Downs Homeowners Association, Inc., 59 So. 3d 258 (Fla. App. 2011). Homeowners challenged the homeowners association's authority to construct a maintenance facility on the common area of the subdivision without a vote of the members of the association. The court found that although the covenants provided that the association shall be responsible for the management, maintenance and operation of the common areas, there was no express provision in the covenants granting the board of directors permission to authorize the construction of the maintenance facility. The court reversed a summary judgment in favor of the homeowners association, because the court found that different inferences could reasonably be drawn from the application of the covenants with respect to the authority of the board of directors to construct the maintenance facility.

Board of Managers of Old Colony Village Condominium v. Preu, 956 N.E. 2d 258 (Mass. App. 2011). A condominium association sought to recover expenses from a unit owner as a result of the unit owner posting signs critical of the management of the association in the common elements of the condominium. The bylaws of the association prohibited the posting of signs in the common areas. The court found that restrictions of a condominium association on speech and expressive conduct are subject to scrutiny under the First Amendment.

Picerno v. 1400 Museum Park Condominium Association, 2011 IL. App. (1<sup>st</sup>) 103, 505 (Ill. App. 2011). The owners of two corner condominium units at the end of a common element hallway sought a declaratory action against their condominium association alleging that they had the right to incorporate as much as 8 feet of the hallway into their units as a private foyer accessible only to them for a common front door for the two units. The court held that access to any part of the common elements could be cut off only with the unanimous approval of all of the owners within the condominium.

### **Covenant Interpretation and Enforcement**

Davis v. Canyon Creek Estates Homeowners Association, 2011 Tex. App. LEXIS 5254 (Tex. App. 2011). A property owner brought a declaratory judgment action claiming that property within a subdivision should no longer be burdened by restrictive covenants limiting the use of the property for residential purposes due to changed circumstances. The court held that residential only restrictions will not be abrogated absent proof of a radical change that makes it impossible to secure in a substantial degree the benefits sought to be realized through the covenant. The court found that the owner had failed to present any evidence to show changes in circumstances so radical and grand that it was no longer possible for the owner or any other homeowner to secure the benefits sought to be realized by the restrictions within the subdivision. The court found that increased commercial growth and increases in traffic and congestion of the streets bounding a restricted subdivision are alone insufficient to warrant nullification of the residential restriction.

In Re: G Christian Corcoran and Peggy Corcoran, 2011 Tex. App. LEXIS 2294 (Tex. App. 2011). An architectural control committee denied a homeowner approval to construct a basketball court and batting cage. The homeowner appealed to the homeowners association which granted the homeowner permission to build the basketball court and batting cage. One of the neighbors brought suit against the homeowner seeking damages and an injunction. The homeowner who constructed the basketball court and batting cage filed a counterclaim as well as a third party action against the homeowners association. The neighbors who brought the suit requested joinder of all homeowners in the six additional subdivisions governed by the homeowners association. The court held that a declaration regarding the homeowners association's authority to override the decision of the architectural control committee would not affect the rights of other homeowners and, therefore, their joinder was not required.

Flume v. Bassett, 2011 Tex. App. LEXIS 7474 (Tex. App. 2011). The recorded covenants for a subdivision prohibited encroachment of buildings or other structures on the private drainage easements within the subdivision and provided that no owner could alter, change or modify the drainage easements without prior approval of the architectural review committee. A homeowner constructed not only a barrier across a drainage easement, but also constructed flower beds, a hot tub and a deck that encroached on the easement. The owner of an adjoining lot filed suit to have the encroachments removed. The homeowner who constructed the improvements claimed that the doctrine of laches barred the granting of an injunction. The court found that a delay of less than one year in asserting the claim was not an unreasonable delay and, therefore, the doctrine of laches did not apply. However, the court found that the balance of equities weighed in favor of denying the injunction, because the record contained evidence that the encroachment did not impede the flow of water through the drainage easement and the cost to remove the additions would be great.

4215 Harding Road Homeowners Association v. Harris, 2011 Tenn. App. LEXIS 188 (Tenn. App. 2011). A homeowners association of a high rise condominium building filed an action against an owner of a condominium unit alleging the owner was in violation of

the restrictive covenants and bylaws of the association due to grossly unsanitary conditions in the owner's unit and extremely offensive odors that emanated from her unit onto common areas. The court found that the homeowner had violated the provisions of the restrictive covenants and the bylaws of the association because of grossly offensive odors that permeated the common area on numerous occasions. The restrictive covenants contained a provision granting the homeowners association the power to sell the unit of any homeowner who violated the restrictive covenants at a judicial sale with the proceeds of the sale being applied first to the reasonable attorneys fees and other expenses of the association in connection with the sale and the balance of the proceeds being paid to the defaulting owner. The homeowner challenged the enforceability of the provisions of the restrictive covenants that permitted the association to sell her property. The court upheld the sale of the property because the right of the association to sell the unit was a remedy expressly provided in the restrictive covenants and, under the unique circumstances of the case, was the only remedy that would cure the problem created by the homeowner.

Roberts v. Bridges, 2011, Tenn. App. LEXIS 256 (Tenn. App. 2011). Homeowners sued their neighbor to prevent the neighbor who was a musician from using his property for non-residential purposes in violation of the restrictive covenants for the property. The court found that the gathering of employees, the parking of their vehicles for extended periods, the parking of a large tour bus and the parking of panel trucks on the musician's property in furtherance of his music business constituted use of the property for commercial purposes. However, the court concluded that the commercial use was incidental to the principal use of the property as a residence because most if not all of the commercial activity occurred off-site. The court held that the extent and nature of the incidental commercial use of the property violated the restrictive covenants. But the court found that nothing in the restrictive covenants prohibited the construction of a large parking lot or driveway, and that the mere existence of the large parking lot or driveway on the property, no matter how unusual or unsightly others may consider them, did not amount to the use of the property for non- residential purposes.

Cullen v. Tarini, 15 A. 3d 968 (R.I. 2011). The plaintiff owned and resided on a parcel of real property which had an ocean view. The plaintiff also owned an improved parcel of real property adjacent to the property on which the plaintiff's residence was situated. In contemplation of a possible sale of the unimproved parcel, the plaintiff recorded certain restrictive covenants against the unimproved parcel. The plaintiff then sold the unimproved lot. The defendants, the subsequent owners of the unimproved property, designed and constructed a residence on the unimproved property which violated several provisions of the restrictive covenants. The court held that injunctive relief was properly granted and that balancing of the equities was not required because the defendants knowingly violated the restrictive covenants.

Steiner v. Windrow Estates Home Owners Association, Inc., 713 S.E. 2d 518 (N.C. App. 2011). Homeowners filed suit against their homeowners association seeking a declaratory judgment that two goats which the homeowners kept on their property were "household pets" under the provisions of the restrictive covenants. The restrictive covenants provided that no animals, livestock or poultry of any kind shall be raised, bred or kept on any lot except that horses, dogs, cats or other pets may be kept provided they

are not kept, bred or maintained for any commercial purposes. The homeowners contended that the goats were purchased as comfort pets and were treated much like their dogs. The court concluded that the goats were “household pets” within the meaning of the restrictive covenants.

Crouch v. Bent Tree Community, Inc., 713 S.E. 2d 402 (Ga. App. 2011). A homeowner who owned a lake front home began storing a pontoon boat at the lake near the waters’ edge. The homeowners association for the community notified the homeowner that he was in violation of the covenants and the rules against storing boats in the greenbelt areas of the development. The homeowner failed to correct the violation so the homeowners association assessed fines against him. The homeowner filed suit against the association seeking a declaratory judgment that the covenants were vague and unenforceable. The court found that the unambiguous terms of the covenants and rules prohibited the storage of boats on the greenbelt areas.

Interchange Drive, LLC v. Nusloch, 2011 Ga. App. LEXIS 786 (Ga. App. 2011). The plat for a subdivision showed lot, streets and areas designated as common area and active recreation areas. The plat stated that all common areas were to be maintained by a homeowners association. The covenants for the subdivision granted all the lot owners a non-exclusive right and easement to use the common areas. All the lots and common areas were encumbered by a deed of trust to secure a loan to the developer of the subdivision. The developer began selling lots to individual purchasers but then subsequently defaulted on the loan. The lender foreclosed and obtained title to the unsold lots and the common areas. The lender then sold the property acquired by foreclosure. The purchaser claimed that it had no obligation to allow the lot owners to use any of the recreational facilities and intended to use those facilities for its own purposes. The other owners filed suit seeking a declaratory judgment that their rights to use the common area were not extinguished by the foreclosure. The court found that the common areas were subject to the covenants and the easements granted to the lot owners by the covenants and that the foreclosure sale did not extinguish those easement rights. The court noted that the deed to the lender following the foreclosure expressly made the lender’s interest subject to the recorded covenants and that by accepting the deed, the lender had consented to be bound by the covenants.

Long Meadow Homeowners’ Association Inc. v. Harland, 2011 Miss. App. LEXIS 233 (Miss. App. 2011). The purchasers of three lots in Phase 3 of a residential subdivision purchased the lots with the intention of building a church on the property. The homeowners association for the subdivision objected to the building of a church and claimed that the protective covenants applicable to the lots within Phases 1 and 2 of the subdivision did not permit the building of a church. The recorded protective covenants for Phases 1 and 2 restricted the lots to residential use. However, no protective covenants were filed at the time the plat for Phase 3 was recorded. Instead, covenants were included in the deeds to each individual lot. Of the 12 lots located in Phase 3, 9 were conveyed by a deed which included a covenant that permitted only residential use and defined the term residential use to include churches and schools. The court concluded that the intent of the developer was not to impose the same covenants on Phase 3 as were imposed on Phases 1 and 2, but to vary the covenants within Phase 3 according to the

individual lots. The covenants included in the deed for the three lots in question specifically permitted the construction of a church.

K9Shink, LLC v. Ridgewood Meadows Water and Homeowners Association, 2011 Colo. App. LEXIS 840 (Colo. App. 2011). A homeowner had clients bring their dogs to her home where she counseled the owners to help them communicate with and train their dogs. The homeowners association claimed that such activity violated the restrictive covenants for the property which prohibited homeowners from conducting commercial pet-related activities on their property. The court held that the activities conducted by the homeowner clearly fell within category of prohibited commercial pet-related activities described in the restrictive covenants.

Nickerson v. Green Valley Recreation, Inc., 622 Ariz. Adv. Rep. 23 (Ariz. App. 2011). The court held that covenants requiring membership in a recreational association touched and concerned the land and were enforceable servitudes. The court rejected the plaintiff's argument that the covenants were procedurally or substantively unconscionable.

Rawan v. Massad, 957 N.E. 2d 248 (Mass. App. 2011). The court held that the use of a subdivided lot as a baseball field for organized league baseball violated the restrictive covenants which provided that the lots could only be used for single family residential purposes. The court rejected the homeowner's contention that the lot could be used for any use that was consistent with the applicable zoning ordinance. The court held that the covenants could impose greater restrictions than those imposed by zoning laws.

### **Fair Housing**

Scoggins v. Lee's Crossing Homeowners Association, 2011 U.S. Dist. LEXIS 111980 (E.D. Va. 2011). A resident who was confined to a wheelchair filed suit against the homeowners association for the subdivision in which the person resided claiming that the homeowners association violated the Fair Housing Act by refusing to grant reasonable accommodations necessary to afford the resident equal opportunity to use and enjoy his dwelling. Specifically, the resident had sought approval to install a wheelchair ramp in the front of the home and to permit him to use an all-terrain vehicle on the common private roads of the community to travel to and from a neighbor's house. The court noted that in order for a person to prevail in a claim of discrimination based upon the refusal to make reasonable accommodations, the person must demonstrate a direct linkage between the proposed accommodation and the equal opportunity to be provided to the handicapped person. If the proposed accommodation does not directly relieve the effect of the disability, it cannot be said to be a "necessary" accommodation. The court found that the home in which the handicapped person resided already had a wheelchair access ramp which permitted the handicapped person to enter and exit the home through the garage as well as a walk-out basement constructed to accommodate the disability. The existing ramp provided the disabled person with access to the home. The court found that while having an additional ramp on the front of the home may be preferred, it was not causally connected to ameliorating the effect of resident's disability. Accordingly, the court found that the accommodation was not necessary. The court also found that the waiver of the all-terrain vehicle prohibition was not necessary to ameliorate the effects of

the disability. The court found that the disabled person had failed to produce competent evidence demonstrating that he needed to use an ATV on the roads in order to enjoy the community equally with other residents and, therefore, had the plaintiff had failed to prove that the requested accommodation was necessary under the Act.

Balvage v. Ryderwood Improvement and Service Association, Inc., 642 F. 3d 765 (9<sup>th</sup> Cir. 2011). The court held that a community could become exempt from the familial status discrimination provisions of the Fair Housing Act by satisfying all of the requirements for Housing for Older Persons under the Act even though the community had not previously been exempt during time periods that it operated as a retirement community for persons age 55 or older.

### **Fair Debt Collection Practices Act**

O'Brien v. Moores, U.S. Dist. LEXIS 32448 (S.D. Ind. 2011). A debtor class was granted summary judgment on the issue of liability in their class action against an attorney under the Fair Debt Collection Practices Act. The attorney was acting as a debt collector in collecting homeowners association assessments. Calls to a phone number provided by the attorney to the debtors went to voice mail. A voice mail message told the caller that the attorney would only discuss each homeowner's case at their court date. The court found that the pre-recorded voice mail message constituted the initial communication with the debtor under the Act and that the attorney violated the Act by not sending the debtor a written notice containing certain information about the debt (including that the debtor had 30 days to dispute the validity of the debt or the debt would be assumed valid) within 5 days after the debtor heard the voice mail message.

Long v. McMullen, Drury & Pinder, P.A., 2011 U.S. Dist. LEXIS 108402 (D. Md. 2011). The court found that the defendant law firm did not violate the Fair Debt Collection Practices Act by including a statement in a collection letter requesting payment of the alleged debt within 30 days from the date of the letter as opposed to within 30 days of the receipt of the letter which is the time period under the Act in which the debtor has a right to dispute the validity of the debt. The court found that a notice enclosed with the letter correctly advised the debtor of the debtor's rights under the Act and the time period in which the debtor could dispute the debt. Also, the court found that the bona fide error defense under the Act protected the law firm from a claim based upon a clerical error in the letter with respect to the amount owed.

Seeley v. Nevada Association Services, Inc., 2011 U.S. Dist. LEXIS 111033 (D. Nev. 2011). Using the "least sophisticated debtor" standard under the Fair Debt Collection Practices Act, the court found that a debt collector had violated the Act by including in the initial communication with the debtor a statement that the debtor had to pay the debt within 10 days.

### **Developer Rights and Liabilities**

The Marina Condominium Homeowner's Association v. The Stratford at the Marina, LLC, 254 P.3d 827 (Wash. App. 2011). A developer undertook a conversion of an apartment complex into condominiums. The condominium association brought an action

against the developer alleging defects in the property and claiming a breach by the developer of the implied warranty of quality construction contained in the Washington Condominium Act. The court found that the warranty of quality construction applies only to any improvements made or contracted for by the developer. The court found that the claimed defects were not the result of the developer's work but instead were problems related to the original construction of the buildings.

Larson v. Lakeview Lofts, LLC, 2011 Minn. App. LEXIS 122 (Minn. App. 2011). An individual developer and his solely owned development company developed a condominium project composed of 39 residential units and 1 commercial unit. The condominium declaration required that the residential condominium units be 75% owner occupied. The individual developer served as president and director of the condominium association. The developer commenced sales of the condominium units but ran into financial trouble. By that time 17 residential units remained unsold. The developer then entered into an agreement with a marketing company who offered to assist selling the remaining 17 condominium units. The marketing company found purchasers for 14 of the units and the marketing company purchased the 3 other units. Although the condominium declaration required that 75% of the units to be owner occupied, only one of the 17 units marketed by the marketing company was owner occupied. Neither the marketing company nor any of the purchasers it found made a single mortgage, property tax or condominium association payment, and all the units were foreclosed by the mortgage lenders. Two of the unit owners who had purchased their units from the developer sued the developer and the developer's solely owned development company for breach of contract and breach of fiduciary duty. Under the Minnesota Common Interest Ownership Act, the declarant and any of the declarant's representatives who are acting as officers or directors of the association during any period of declarant control are subject to all fiduciary obligations and obligations of good faith applicable to any person serving a corporation in that capacity. The court concluded that in selling the remaining condominium units, the developer had fiduciary and good faith obligations not to violate the declaration and not to harm the interests of the homeowners association and other unit owners. The court concluded that the developer had breached its fiduciary and good faith obligation when it initially entered into the arrangement with a marketing company to sell the remaining 17 units.

Davis v. Foreman, 2011 Ga. App. LEXIS 844 (Ga. App. 2011). The developer of a subdivision recorded a plat showing a common area for use by residents of the subdivision. The common area was deeded to the homeowners association. The developer then sold lots with deeds that referenced the plat. Thereafter, the developer recorded a new plat for the same subdivision that omitted the common areas shown on the first plat and created a different common area. The second plat included the original common area in a new lot. The court held that the grantees of an easement cannot be deprived of their easement rights except upon abandonment of the easement. In order for the subdivider to properly exchange one common area for another common area, the grantees of the original easement over the original common area must have expressly abandoned their easement. The court found that there was no evidence that the grantees had abandoned their easements over the common areas shown on the original plat.

Harbour Pointe, LLC v. Harbour Landing Condominium Association, Inc., 14 A. 3d 284 (Conn. 2011). A condominium declaration set out five different phases for expansion and development. The last three phases were never completed. Through a foreclosure, a developer acquired title to the land on which the three undeveloped phases would have been constructed. The condominium association sought to prevent the developer from using the private roadway within the first two phases for access to the undeveloped phases and for the installation of utilities to serve the undeveloped phases. The court held that the condominium declaration granted easements for access and utilities for the benefit of the undeveloped phases and that such easements would terminate only if the undeveloped phases were added to the condominium.

### **Alternative Dispute Resolution**

Promenade at Playa Vista Homeowners Association v. Western Pacific Housing, Inc., 133 Cal. Rptr. 3d 41 (Cal. App. 2011). A condominium association filed suit against the developer for construction defects. The developer sought to compel binding arbitration under the arbitration provisions set forth in the recorded covenants. The court held that because the developer no longer owned any of the property subject to the covenants, the developer lacked standing to enforce the arbitration provision.

***This Case Law Update is not intended to be a complete list of all cases decided in 2011 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.***