Kriger LAW FIRM News

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Hostile Housing Environment Claims

By Joel Kriger, Esq.

An Association may be held liable by a resident who claims that as a result of harassment, a severe or pervasive interference with the use or enjoyment of their dwelling has occurred. This is similar to a claim of hostile work environment in the employment setting. Similar principles apply in a homeowners association.

This issue was addressed in the *Reeves v. Carollsburg Condo Unit Owners Association* 1997 U.S.Dist. LEXIS 21726. Ms. Reeves is an African-American female who was harassed by a Caucasian male neighbor who began a course of conduct which subjected her to racial and sexual harassment. She alleged that the neighbor yelled racist and sexist epithets at her, prevented her from using the common areas, physically intimidated her and threatened to rape and kill her. She alleged that the Association had knowledge of the conduct of the neighbor and tolerated it resulting in a hostile housing environment.

The issue before the court was whether there was a basis for holding the Association liable for its alleged failure to take action reasonably calculated to resolve Ms. Reeve's complaints. The court held the Association could be liable because it had knowledge of the neighbor's conduct and had several alternative courses of action at its disposal to correct the misconduct. Specifically the Bylaws authorize the Association to address and curtail certain conduct that contravenes the law. The Association could have imposed a variety of

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Kriger LAW FIRM *Is pleased to announce…*

Luis E. Ventura

Has joined the firm as a Senior Associate.

Born in Santiago, Cuba, Luis completed his undergraduate studies at the University of San Diego in 1991, and received a Bachelor of Arts degree in philosophy with departmental honors. He attended California Western School of Law in San Diego, earning his law degree in 1994. Since 1996, he has been representing community associations in matters ranging from association governance, CC&Rs and rules enforcement, litigation, assessment collection, and insurance issues. Luis has developed an expertise in dealing with challenging clients with an emphasis on resolving disputes without the necessity of litigation whenever possible.

Steven L. Banks

Has joined the firm as a Senior Associate.

Steve has been practicing law for over thirty years. Practicing primarily in litigation, his experience also includes homeowners association law, construction defects, product liability and personal injury. Steve obtained his law degree from the University of San Diego, where he was a member of the San Diego Law Review and justice of the Phi Alpha Delta Legal Fraternity. He has a Bachelor of Arts in Political Science from the University of Southern California and is a member of the San Diego County Bar Association as well as the Foothill Bar Association, where he is co-chair of the Litigation Section.

Our attorneys and collection specialists are committed to providing you with professional and personal service.

Unambiguous Restrictions in Governing Documents are not Subject to Board Interpretation

By Steve Banks, Esq.

A recent unpublished Court of Appeal opinion holds that a homeowners association's board of directors does not have the authority to interpret an unambiguous restriction in the association's governing documents. The case, *Lingenbrink v. Del Rayo Estates Homeowners Association,* cannot be cited or relied on by a court or a party in any other action, but provides insight into how courts may handle similar issues in the future.

Lingenbrink involved a view dispute between two homeowners in a high-end home development in Rancho Santa Fe, Lingenbrink (who had the view) and Pardee (across the street, whose ARC-approved trees, while annually trimmed, blocked the view).

Boards must not put their own "spin" on unambiguous provisions in the governing documents and then expect "judicial deference" to their improper interpretation.

The Association's Declaration provided that:

No *trees*, hedges or other plant materials *shall be* so located or allowed to reach a size or height which will interfere with the view from any Lot and, in the event such trees, hedges or other plant materials do reach a height which i*nterferes with the view from another Lot*, then the Owner thereof shall cause such tree(s), hedge(s) or other plant material[(]s) to be trimmed or removed as necessary. (Italics added.)

During the period February 2001 through December 2013 when the lawsuit was filed, Lingenbrink repeatedly complained to the Association that Pardee's trees and foliage blocked his view, and Pardee repeatedly trimmed the trees. The Association's Board responded inconsistently to Lingenbrink's complaints over the years, waffling between findings that no violation of the restriction existed and that the trees violated the restriction. Ultimately, the Board determined, after balancing Lingenbrink's and Pardee's concerns, that the view was not "unreasonably" impeded by the trees. The lawsuit followed, and the trial court issued a mandatory injunction requiring the Association to enforce the Declaration by requiring Pardee to trim his trees so that they did not block the view. The Association appealed.

In upholding the trial court's decision, the Court of Appeal found that (1) the Declaration's view obstruction language was "unambiguous" and should be enforced; (2) the Board erred in requiring that landscaping "unreasonably" interfere with a view before enforcing the restriction; and (3) the Board impermissibly balanced the interests of only Pardee and Lingenbrink instead of the community as a whole. The appellate court also ruled the "judicial deference rule" did not apply to an improper interpretation of an unambiguous provision of the Declaration. Finally, the Court of Appeal found substantial evidence supported an implied finding that the Board failed to act in good faith, given testimony by Board members the change in the Board's position was motivated by dislike for Lingenbrink, who was viewed as a "difficult" troublemaker who was wasting the Association's time and money, while Pardee was considered a popular and "extremely nice gentleman" well-known in the community.

In summary, Boards must not put their own "spin" on unambiguous provisions in the governing documents and then expect "judicial deference" to their improper interpretation. Also, the enforceability of use restrictions is determined by reference to the community as a whole – not just as between neighbors. ■

When it comes to "Reasonable Accommodations"

OWNERS DO NOT HAVE TO BE REASONABLE IN DISCUSSING ALTERNATIVES

By Bradley A. Schuber, Esq.

When an association receives a request for a "reasonable accommodation," it is important to promptly and fairly evaluate the request. However, it appears that residents do not necessarily have to be reasonable in discussing alternatives. Moreover, failure by an association to approve a reasonable accommodation, even where there might be a less burdensome alternative, could subject an association to liability for claims of discrimination. This situation arose in a homeowners association in Oregon earlier this year.

In *Kuhn v. McNary Estates Homeowners Association, Inc., No.6:16-cv-00042-AA (D.Or. Jan. 12, 2017),* Gary and Renee Kuhn owned a home in the McNary Estates Homeowners Association, Inc. ("Association"). Their daughter Khrizma suffered from significant physical and mental disabilities, including severe incontinence. After consulting with Khrizma's doctors, the Kuhns decided to purchase a small recreational vehicle (RV) for her transportation. The RV would be equipped with a toilet, shower, and a place to lie down, which the doctors recommended to assist Khrizma with her medical condition.

In reviewing the governing documents, the Kuhns learned that the McNary Estates CC&Rs prohibited parking large vehicles, including RVs, in front of homes in the community. As the RV would not fit in the Kuhns' garage, they applied to the Association for an exception or "reasonable accommodation" to the restriction.

In responding to the application, the Association suggested two alternatives. First, the association proposed parking the RV at a nearby storage facility. Second, the Association suggested installing a chemical toilet in a smaller van. The Kuhns rejected both alternatives. The Kuhns argued that since Gary was at work with the family car during the day, Renee would be without means of transporting Khrizma to the storage facility to get the RV. In addition, the Kuhns argued that the small van did not have a shower, access to the toilet would be more difficult, and there would not be adequate space for Khrizma to lie down.

The Association also raised safety concerns that the RV would protrude into the street when parked on the driveway and would block

WHEN IT COMES TO "REASONABLE ACCOMMODATIONS" OWNERS DO NOT HAVE TO BE REASONABLE IN DISCUSSING ALTERNATIVES

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sightlines; however, the Kuhns took photos and measurements showing that the RV was one foot shorter than the driveway and would not protrude on the street. In addition, the Kuhns purchased a parabolic mirror and offered to install it to address the sightline issue for a neighbor who might be impacted.

Eventually, the Association rejected the Kuhns application, stating that the accommodation requested related to Khrizma's transportation and was not necessary for her use and enjoyment of the home. Notwithstanding, the Kuhns purchased the RV, parked it in their driveway, and thereafter, sued the Association and its president for negligence and violations of the Federal Fair Housing Act ("FHA") and the Oregon Fair Housing Act.

In deciding the case, the court held that the Kuhns provided reasonable explanations as to why the association's alternatives were rejected, and clarified that the association is not permitted to select which accommodation it deems most reasonable. The court also explained that it was not the Kuhns' burden to show that they chose the best or the least burdensome accommodation. More specifically, the FHA does not require persons requesting an accommodation to be reasonable in discussing alternatives; rather, it merely requires them to prove the accommodation requested may be necessary for her use and enjoyment of the home. Based on this reasoning, the Court entered judgment in favor of the Kuhns on the federal and state fair housing claims.

As a result, if your association is facing a request for a reasonable accommodation, then it is important to handle such applications carefully. While it is alright to suggest alternatives, if the person claiming the disability can demonstrate that the accommodation requested may be necessary for her use and enjoyment of the home, then denying such a request, or insisting on a less burdensome accommodation, can subject an association to liability. ■

Associations Can Petition The Court To Approve Amended CC&Rs Containing Rental Restrictions

By Jamie Handrick, Esq.

In a recent California case, *Ocean Windows Owners Association v. Spataro* the Court of Appeal confirmed the Trial Court's decision to approve the Association's petition to amend its CC&Rs allowing rental restrictions.

Ocean Windows Owners Association located in Del Mar, California, had 45 condominium units. Anna Spataro owned one unit within the Association. The Association asked the members to vote regarding amending its CC&Rs which contained changes related to eliminating legal jargon, clarifying maintenance and repair responsibilities, adding short-term rental restrictions, and reducing the vote required for future amendments. The amendment included a prohibition on short term rentals in order to protect property values, facilitate unit financing and reduce wear and tear on the common areas from tenant move-ins and move-outs.

The Association did not receive enough votes to pass the amendment because 75% of the membership needed to approve the amendment. The Association petitioned the court asking the court to approve the amended CC&Rs. Pursuant to Civil Code Section 4275, Associations who receive 51% approval of the membership to amend their governing documents can petition the court for approval of the amendment even though the higher percentage required in the governing documents to amend is not obtained because of voter apathy or other reasons.

Spataro opposed the Association's petition because she used her unit for short-term rentals. She objected to the rental restrictions in the amended CC&Rs. The trial court found the amendment was reasonable and granted the Association's petition. Spataro appealed arguing the changes to the CC&Rs were not necessary for the good of the Association's members. She said the amendment would cause harm to those who rented their units.

The amendment included a prohibition on short term rentals in order to protect property values, facilitate unit financing and reduce wear and tear on the common areas from tenant move-ins and move-outs.

The Court of Appeal said the relevant test is not whether the proposed amendment is necessary, but whether it is reasonable. The Court of Appeal found plenty of evidence that the rental restrictions were rationally related to protecting and preserving the Association as a whole. Association members complained to the Association about noise, public drunkenness by renters, and property damage. Some owners also had difficulty refinancing their units because lenders perceived the project as a "condohotel."

Our firm had a similar situation where we petitioned the court on behalf of an Association seeking to prohibit short-term rentals. One owner who used his unit as a vacation rental opposed the Association's petition. The court agreed with the Association that it was in the best interest of that particular community to allow rental restrictions. The Association's petition was awarded by the court. ■

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HOSTILE HOUSING ENVIRONMENT CLAIMS

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sanctions, including cease and desist requests, fines, hearings, and suspension or revocation of the right to use common facilities. Additionally, the Association has the authority to litigate claims for any breach of its rules.

Recently, the Department of Housing and Urban Development (HUD) adopted a new rule as guidance in determining liability for claims of this nature. The rule can be found in 24 CFR 100.7 (a) (iii) which provides that an Association is directly liable for failing to take prompt action to correct and end a discriminatory housing practice by a third party (such as another resident), when it knew or should have known of the discriminatory conduct and had the power to correct it.

This rule does not address all forms of harassment between neighbors. It only addresses allegations of harassment on the basis of race, color, religion, national origin, sexual orientation, familial status, or disability. If the harassment creating the hostile housing environment is unrelated to these factors then this rule would not apply. Not every disagreement between neighbors constitutes unlawful harassment because of a protected characteristic. It is only unlawful when the harassment is sufficiently severe or pervasive enough to interfere with the use or enjoyment of a dwelling.

An Association can be held liable under the Fair Housing Act for third-party conduct, such as neighbor to neighbor harassment, if the Association knew or should have known of the discriminatory conduct, had the power to correct it, and failed to do so.

HUD received public comments regarding the rule and responded to them. One of the concerns expressed is that this rule creates liability on the part of a community association for the illegal acts of residents over whom they have no control. HUD was urged to remove or revise the rule's extension of direct liability to community associations for the discriminatory actions of residents. HUD responded that the community association is not directly liable for the actions of the resident, but, for its own conduct or negligence in failing to take prompt action to correct the discriminatory housing practice by a resident. HUD indicated that the rule requires a community association to take whatever actions it legally can take to end the harassing conduct. This would involve utilizing the powers granted to it from its Governing Documents. These powers would include imposition of fines, suspension of common area privileges, hearings, use of alternative dispute resolution and litigation, if necessary.

For many years it was common in the industry for community associations to stay out of "neighbor to neighbor" disputes. This is no longer the case if those disputes involve harassment predicated on the basis of race, color, religion, national origin, sexual orientation, familial status, or disability such that it is creating a hostile housing environment Failure of a community association to act once it has received complaints of this nature could subject it to liability under the Fair Housing Laws. ■