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The Thousand Dollar Per Pound Dog

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This is a story about an owner's attachment to a stray dog that cost her $55,000 in attorneys' fees. It is also a story about the Court of Appeal's decision to support a community association's decision to enforce a 15 pound weight restriction on pets.

San Vicente Villas Homeowners Association was established in 1975. Marci Cohen became an owner at San Vicente Villas in 1985. The Association's CC&Rs state that "no dog, cat or other household animal in excess of fifteen pounds in weight may be kept in any condominium or the common area without the written consent of the Board of Directors of the Association…"

In November 1999, Cohen took in a sick, young puppy. She acknowledged that she was aware of the restriction on large dogs and said she intended to find a home for the animal; however, she fell in love with the dog and refused to have it removed from the Association. On March 15, 2000, the Board wrote Cohen a very thoughtful letter reminding her of the rules. In that letter, the Board stated that it was

> "sensitive to [her] desire to find another home for the dog, and [would] allow a one time 45 day extension in support of that effort. If the information received by the Board is correct, you are required to remedy the violation by April 28, 2000. The dog must vacate the premises by the above-mentioned date to prevent any further action as directed by the Association's governing documents. Due to the close living conditions within the development, it is imperative that the governing documents for the Association be respected and followed. As a member of the Association, you too will agree that these regulations are intended to protect your property values as well as the safety and enjoyment of all homeowners. Please view this letter in the positive and helpful manner in which it

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> is intended. The cooperation of each homeowner is necessary so that all owners may receive the maximum benefits of condominium living."

[This letter was quoted by the Court of Appeal in its unpublished opinion.]

The Board wrote several other letters to Ms. Cohen to resolve the matter, all without success, and even went to mediation with Cohen and her legal counsel hoping to resolve the matter. Ultimately, the Association filed a lawsuit against Cohen to compel her to comply with the Association's governing documents and remove the dog from the premises. The Association then filed a Motion for Summary Judgment. Although Cohen asserted several defenses, it was uncontradicted that her dog weighed in excess of fifteen (15) pounds and that Cohen had not sought or received approval to keep the dog. Accordingly, she was clearly in violation of the CC&Rs and the Court granted judgment in favor of the Association. Had Cohen sought prior approval for the dog, perhaps a different result would have occurred. Instead, Cohen had already violated the CC&Rs and her attempt to seek approval after the fact was too late, and was denied.

Cohen appealed the case, and the Court of Appeal rendered its decision on December 17, 2003. The Court of Appeal found in favor of the Association on every argument asserted by Cohen.

Relying on *Nahrstedt v. Lakeside Village Condominium Association*, (1994) 8 Cal.App.4th 361, the seminal case on Association CC&Rs enforcement, [Cohen used the same attorney as Nahrstedt did], the Court of Appeal confirmed that CC&Rs restrictions are upheld so long as they are not against fundamental public policy, are not arbitrary or capricious and the burdens of the restrictions do not outweigh the benefits and as long as the restrictions are applied in good faith, fairly and uniformly. Also relying on *Nahrstedt*, the Court stated,

> "anyone who buys a unit in a common interest development with knowledge of its owners association's discretionary power accepts 'the risk that the power may be used in a way that benefits the commonality but harms the individual.'"

The Court went on to state that

> "[g]enerally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy."

The Court found that the Association's enforcement of its CC&R weight restriction was not arbitrary. Again citing to *Nahrstedt*, the Court said,

> "[h]ere, the Association banned only pets weighing over 15 pounds. The Board said that 'our building was not conducive to having large dogs… There are very narrow hallways. There's a single elevator. There's a narrow back stairwell' and there were 'safety concerns.' In addition, the Board in its notice to Cohen alluded to the 'close living conditions within the development.' ***Thus, the distinction between large and small dogs is reasonable***." [Emphasis added.]

The Court also sided with the Board of Directors and stated that "the Association did not wish to be in the position of determining which large dog was safe and which was not. That is certainly a justifiable position. There is no basis to conclude that the restriction was arbitrary."

Cohen also claimed that the Association's weight restriction was not uniformly applied because the Association had previously allowed two (2) other oversize dogs in the past. The same situation affects many associations who feel that, because of prior lapses in the enforcement by the association, perhaps they have abandoned enforcement rights as to a particular provision of the CC&Rs forever. This Association was faced with that dilemma in 1998, and based on the advice of counsel, they wrote a letter to the members acknowledging that on two (2) occasions, prior Boards had allowed oversized dogs but asserted that it would thereafter "not tolerate" any

further violations and every homeowner was "put on notice" that the pet weight restriction would be "vigorously enforced."

The Court of Appeal in *San Vicente v. Cohen* did its own research and cited a treatise for the proposition that "even if a challenger cannot establish that a restriction is 'unreasonable' as applied to the development as a whole, he or she may still be successful because of the manner in which the Association has elected to enforce or not enforce the restriction." The CC&Rs for San Vicente Villas include a provision which states that the failure of enforcement would not constitute a waiver. However, the Court suggested that this provision would not 'immunize the Board from the assertion of unfair selective enforcement.'"

The Court of Appeal concluded that San Vicente Villas Association had not waived the right of enforcing the weight restriction inasmuch as it had clearly advised the owners that it was not going to tolerate any large animals. The Court concluded that Cohen had not supplied any evidence from which it could reasonably be found that there was any improper or selective enforcement of the restriction.

The Court of Appeal had some other interesting comments to make with respect to the Association's enforcement action. The Court stated,

> "[o]ne cannot help being sympathetic to Cohen. Her act of taking in a sick puppy was noble and her attachment to the dog understandable... [s]ome might wish that Cohen would have had a sympathetic response from the Board had she made a timely request, but under the circumstances, the Board had the right to act as it did. Other owners rely on the CC&Rs when they choose to live on the premises. Indeed, they might have a claim if the restrictions had not been enforced. There are justifiable reasons for the restriction. Cohen was at all times aware of the restriction and chose to ignore it."

Cohen's actions were expensive. Summary Judgment Motions are difficult, as the party who brings it must establish that there are no

questions of fact. After the Motion for Summary Judgment was granted, the Association was awarded its attorneys' fees in the sum of $32,000. That amount was so high because Cohen had taken several depositions, and because, by the time the Motion for Summary Judgment was heard, she was on her third attorney. She made the litigation expensive. Not satisfied with the Trial Court's decision, she appealed. After the Court of Appeal filed its decision in December of 2003, Cohen filed a petition to the California Supreme Court. The Supreme Court declined to hear the matter, and the decision of the Court of Appeal is now final. The Association spent approximately $19,000 in attorneys' fees through appeal and through opposing Cohen's application to the Supreme Court. In total, the Association had spent about $55,000 on attorneys' fees, which is approximately $1,000 for each pound that Cohen's dog weighs. Fortunately for this small association, Cohen was ordered to and did pay $55,000 for attorneys' fees and costs.

Unfortunately, the *San Vicente v. Cohen* Court of Appeal decision is an unpublished decision and cannot be relied on or cited in other cases. It was a well-written and thoughtful decision, and if nothing else, it is useful in educating associations on the limits of CC&R enforcement.

San Vicente Villas v. Cohen was successfully handled by Swedelson & Gottlieb attorney David Swedelson.