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DECISIONS OF BOARDS OF DIRECTORS REGARDING ENFORCEMENT OF THE GOVERNING DOCUMENTS CANNOT USUALLY BE SECOND-GUESSED UNLESS THE DECISION IS MORE RESTRICTIVE THAN THE CC&RS

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Board members of homeowners associations are entitled to use a certain amount of discretion in performing their duties as a director. They do not want their decisions to be second-guessed by any of the owners nor the Courts. But they need to understand that this privilege is not limitless. Rather, it has been methodically delineated by a series of court cases that have examined the deference that should be given to decisions made by boards relating to their association's CC&Rs and rules and regulations.

In the pivotal case on this topic, the California Supreme Court, in *Lamden v. La Jolla Shores Clubdominium Association* (1999) 21 Cal. 4th 249, held that a court should defer to a board's authority and presumed expertise in discretionary decisions regarding the association's maintenance and repair issues. In *Lamden*, the decision was whether to spot treat or fumigate for termites (Lamden sued to force her association's board to tent/fumigate), and because the association's CC&Rs did not specifically state what method was required, the court deferred to the board's judgment despite evidence presented by a homeowner that it may not have been the best choice.

For almost a decade, it was unclear whether the *Lamden* holding only applied to maintenance decisions, or to all decisions that boards of directors are required to make as a part of their duties to their associations. However, in 2007 and 2008, California appellate courts published two decisions that made it clear that directors could use their discretion in making other decisions as well. In *Harvey v. The Landing Homeowners Association* (2008) 162 Cal. App. 4th 809, the court used the "judicial deference" rule established in *Lamden* to apply to the decision of the board to grant exclusive use of common area attic space to certain homeowners because the association's governing documents granted the board the authority to maintain and control the common area. Also citing the *Lamden* decision, the court in *Haley v. Casa Del Rey Homeowners Association* (2007) 153 Cal. App. 4th 863, upheld the board's decision to allow some owners' patios to encroach into the common area. Although the plaintiff sought to force the board to strictly enforce the association's governing documents, the court held that the board had the discretion to select among means for remedying violations of the CC&Rs without necessarily resorting to litigation, and the court should defer to its decision.

Although California courts have firmly established that they will defer to decisions made by boards of directors when such decisions are made within the scope of authority granted to the boards, this freedom is not without limits. Boards have long been confined by the authority given to them in the CC&Rs. In 1986, a California appellate court, in *Ticor Title Ins. Co. v. Rancho Santa Fe Association* (1986) 177, Cal. App.3d, held that a board of directors cannot enact rules that are more restrictive than the provisions of the CC&Rs. Rather, it held that rules and regulations can only serve to clarify restrictions that exist in the CC&Rs.

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The court's rationale was that because an association's CC&Rs are a recorded document, with an established amendment procedure, it was fair to enforce its restrictions against homeowners. Because the rules are not recorded, and can be changed without a vote of the homeowners, it would be unfair to subject the owners to restrictions decided upon by the board which they did not expect when they purchased their units.

If a board wants to enact a rule or regulation that is more restrictive than, or not addressed in, the association's CC&Rs (for example, prohibiting hard surface flooring or large dogs), it must undergo the amendment process as such procedure is set out in the CC&Rs. Although the passing of an amendment could result in homeowners being subject to restrictions that they did not expect when they purchased their homes, the court in *Villa de Las Palmas Homeowners Association* (2004) 33 Cal. 4th 73, held that such amendments are enforceable. The court decided that because the owners had notice of the CC&Rs' amendment procedures when they purchased their homes, it was not unfair for them to be subject to subsequently enacted regulations that were enacted by way of that process.

These restrictions on the ability of boards of directors to enact rules that are outside the scope of the board's authority have not been affected by the decision in *Lamden*. In *Ekstrom v. Marquesa at Monarch Beach Homeowners Association* (2008) 168 Cal. App. 4th 1111, the court encountered a situation in which it did not believe the board had the authority to make the decision that it did. In *Ekstrom*, although the association's CC&Rs required that all trees be trimmed to a certain height to preserve views, the board made a rule that created an exception for palm trees. While the court acknowledged that under the *Lamden* decision, it was bound to defer to decisions made by the board in the exercise of the discretion granted to it by the CC&Rs, it held that this rule does not apply when the decision made by the board is directly in conflict with a clear provision of the CC&Rs. The court in this case clarified that the *Lamden* rule of judicial deference does not apply to acts taken by the board that are beyond the authority explicitly granted to it by the governing documents.

Read together, these cases provide a clear message to boards of homeowners associations. Directors are free to use their discretion in deciding how to carry out their duties under the association's CC&Rs, but must only act within the confines of the authority that is granted to them.

If you have questions regarding this subject or about community association legal matters, contact David Swedelson at dcs@sghoalaw.com. And for more information on community association legal matters, be sure to visit www.hoalawblog.com.