Study H-854 August 31, 2004

Memorandum 2004-38

Common Interest Development Law: Architectural Decisions and Land Use Law

This memorandum was prompted by a news report of a CID dispute involving a conflict between a CID's architectural restriction and fire safety law. A CID homeowner in a "very high fire hazard severity zone" sought to replace his wood shake roof with fireproof concrete tile, pursuant to state and local law. The association's CC&Rs prohibited use of fire-proof concrete tile. After some poor communication, the homeowner proceeded without association approval and installed the concrete roof. The association sued to enforce the restriction. See Lakiesha McGhee, *Raising Roof in Fair Oaks*, Sac. Bee, Nov. 5, 2003, at B1 (attached). Eventually the case was settled, but after considerable effort and expense.

The specific problem of a CC&R provision that conflicts with the law governing roofing materials in a very high fire severity zone is addressed in Assembly Bill 224 (Kehoe), 2004 Cal. Stat. ch. 318. However, there are other potential conflicts between CC&Rs and land use law that are not being addressed. For example, suppose that a local ordinance requires a vegetation-free zone within a certain distance of structures, so as to reduce the severity and spread of wild fires. It is quite conceivable that such a requirement would conflict with a CID's landscaping restrictions.

Enforcement of Restrictions

A recorded restriction is not enforceable if it is unreasonable. A restriction is unreasonable if it "[is] wholly arbitrary, [violates] a fundamental public policy, or [imposes] a burden on the use of affected land that far outweighs any benefit." *Nahrstedt v. Lakeside Village Condominium Ass'n,* 8 Cal. 4th 361, 382, 878 P.2d 1275, 33 Cal. Rptr. 2d (1994). A restriction that conflicts with a law enacted to regulate land use or safeguard public safety is against public policy and might well impose a burden (maintenance of an unsafe condition) that is far outweighed by the benefit conferred (e.g., aesthetic uniformity). Such restrictions should be unenforceable.

The problem is that a recorded restriction is *presumed* to be reasonable and enforceable. *Id*. A lawsuit would be required to definitively determine whether an apparently unreasonable restriction is enforceable. That presumption may lead to enforcement of a restriction that conflicts the law; a board may have doubts about the enforceability of a challenged restriction, but feel duty-bound to enforce it until a court rules that it is unenforceable.

Recommendation

It would be helpful, to both homeowners and association board members, if there were a clear statutory provision requiring that a CID's architectural review decision be consistent with land use law, regardless of whether the association's governing documents conflict with the law.

The Commission has already taken a large step in that direction. With the Commission's agreement, the following provision was added to AB 2376 (Bates), 2004 Cal. Stat. ch. 346:

> A decision on a proposed change shall be consistent with any governing provision of law, including, but not limited to, the Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code.

Although the phrase "any governing provision of law" is broad enough to encompass land use laws, the provision was drafted with fair housing law in mind. It might be helpful to add further illustrative language, to make the provision's application to land use law clear:

> A decision on a proposed change shall be consistent with any governing provision of law, including, but not limited to, the Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government ~~Code~~ Code), or a building code or other applicable law governing land use.
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> **Comment**. Subdivision (a)(3) of Section 1378 is amended to make clear that a decision on a proposed change must be consistent with building codes and other land use laws. A restriction that requires violation of such a law is against public policy and is unenforceable. See Nahrstedt v. Lakeside Village Condominium Ass'n, 8 Cal. 4th 361, 382, 878 P.2d 1275, 33 Cal. Rptr. 2d (1994). As used in this section, "law" is intended to be construed broadly and includes a constitutional provision, statute, regulation, local ordinance, and court decision. This does not imply a narrower construction of the term "law" as it is used in other sections.
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> Subdivision (a)(3) is consistent with other laws that subordinate an association restriction to important public policies. See, e.g., Sections 712 (restraint on display of sign advertising real property void), 714 (prohibition of solar energy system void), 782 (racially

restrictive covenant void), 1353.6 (prohibition on display of certain noncommercial signs unenforceable), 1376 (prohibition on installation of television antenna or satellite dish void); Health & Safety Code §§ 1597.40 (restriction on use of home for family day care void), 13132.7(*l*) (rules governing roofing material in very high fire hazard severity zone supersede conflicting provision of common interest development's governing documents).

The staff recommends that a tentative recommendation be circulated soliciting public comment on the proposed revision.

Other Types of Unenforceable Restrictions

This memorandum was prompted by a specific case involving architectural restrictions and is intended to address only that type of restriction. There may be other contexts in which CC&Rs conflict unreasonably with the law. Should we cast our net wider? Or should we restrict ourselves to addressing a problem in an area that we have already studied closely (architectural review)? Given the existing constraints on our resources, the staff recommends against broadening the scope of this inquiry, at least for now.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

Exhibit

RAISING ROOF IN FAIR OAKS: HOMEOWNERS GROUP SUES MAN AFTER WOOD REPLACED WITH CONCRETE TILES FOR FIRE SAFETY

(Lakiesha McGhee, Sac. Bee, Nov. 5, 2003, at B1)

Long before deadly wildfires in Southern California destroyed more than 3,400 homes, residents of a gated Fair Oaks community had become increasingly aware of the fire hazards surrounding their neighborhood.

One man took action.

Now he is being sued for replacing his heavy wood shake roof with a roofing material not approved by his homeowners association.

But Ken Murray maintains that he simply chose a roofing material considered by Sacramento County fire officials to be safer in a catastrophic fire.

Homes in the affluent Westridge-Fair Oaks development - at Saddle Ridge Way and Ridgeline Lane - are nestled in an area designated by fire officials as a "very high fire hazard severity zone."

Trees and brush are abundant in the private community. Homes border state-owned vernal pools, which are often dry. In recent months, suspected arson fires that started less than a mile from the site have torched two homes on Filbert Avenue, burned 25 acres of the American River Parkway, and caused $20,000 in damage at nearby Little Phoenix Park on Phoenix Avenue.

Under such conditions, some residents have gained a new perspective on the heavy wood shake roofs that cover many of the community's 59 residences.

"Fires are happening all over the place, and I'm scared to death," resident Joyce Stevenson said.

Stevenson and some other Westridge residents are questioning their homeowners association rules, which were set to maintain a level of conformity in the community.

They must determine if such rules, set to protect their property, are putting their lives at greater risk.

Stevenson, who has lived at Westridge for nearly five years, said she supports a proposal by Murray to allow concrete tile roofing as a new option for

homeowners. She said Westridge homeowners currently have two options: Celotex heavy shake roofing and Elk Prestique 40-year asphalt tile.

Because of state laws passed several years ago, heavy wood shake roofing - even when treated with fire retardant - is banned in areas designated as very high fire hazard severity zones, Sacramento Metropolitan Fire District officials said.

When re-roofing their homes, residents in these areas must use the highest level of fire-resistant roofing, known as Class A. County fire officials said, in the long run, that treated shakes are not comparable to the more durable concrete tile roofs.

“Treated shakes can be more expensive,” Battalion Chief Tom Perkins said. “And after a while, the fire retardant begins to wear, and you have to re-treat it.”

Perkins said some manufacturers of asphalt tile roofing, however, may meet state standards.

“The real issue is safety,” said Murray, who has lived in the neighborhood for 18 years. He explained that concrete tile roofs, such as the gray one he installed in July, are less attractive but safer.

Rod Baydaline, of Stein & Baydaline LLP law offices in Sacramento, is representing the Westridge-Fair Oaks Homeowners Association in its lawsuit against Murray. He said the association’s board has to enforce action against any violation of its regulatory documents.

Murray said that homeowners have the right to amend the association’s declaration of covenants, conditions and restrictions, or CC&Rs, but that Murray exercised the right after installing the concrete tile roof and violating the rules.

Westridge residents have been asked to vote on the proposed amendment to their CC&Rs and return their ballot to the association’s management company by today.

Murray recalls discussing his roofing plans and taking a roofing sample to the association board in June. Murray said he told the board he wanted to rent one of his two properties in the development by Aug. 1 but that he needed to first replace the old wooden roof. The board agreed to poll the neighbors before voting on the issue, he said.

Murray said he didn’t get a response from the board by the end of July, so he ordered the concrete tile roof to be installed.

“They gave what I thought was a green light,” Murray said.

But in a Oct. 10 letter to West- ridge residents, the association directors opposed Murray’s proposal and urged residents to vote against the tile roof option. Their reasoning: The new roofing option threatened the “consistency and existing standardized appearance of the roofing within the single-family homes.”

Sacramento County officials said conflicts between county codes and CC&Rs are common. However, the county does not provide any management or oversight for homeowners associations.

“When someone does something contrary to the CC&Rs and consistent with county code, other owners in the subdivision may take (him or her) to court to enforce CC&Rs,” county planner Dick Fraschetti said.

Despite the growing number of homeowners associations in California, few have any public agency or board providing oversight or enforcement of CC&Rs.

One of those few agencies, the El Dorado Hills Community Service District’s Design Review Committee, made headlines when homeowners challenged the rules against using yellow paint.

Wayne Lowery, the district’s general manager, said that in 1983 voters there gave the district the authority to enforce CC&Rs throughout the community.

Before the passage of state laws and county ordinances several years ago that require fire-resistant roofing, Lowery said it was common for homes in El Dorado County to use wood roofing. Many of the newer developments now choose the highest-quality tile roofs, while other developments are converting to tile, he said.

“Because of the dry wild land here, a fire can wipe out all sections of our ‘town,’ “ Lowery said. “I don’t think all of Sacramento County has the same level of fire danger as we do up here.”

However, in the Fair Oaks neighborhood, fire officials warn that a highly flammable roof could cause a fire to move fast.

“We’re just people trying to live,” Stevenson said. “Even if Mr. Murray did something wrong, it doesn’t matter. It’s a safety issue now.”