
COMMON INTEREST DEVELOPMENT UPDATE

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COURT OF APPEALS FINDS THAT ROAD TO LITIGATION CAN BE PAVED WITH GOOD INTENTIONS

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In *Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, the Court of Appeal recently held that a board of directors' decision not to enforce CC&Rs was not entitled to judicial deference—even if the decision was made in good faith and in furtherance of the interests of the community as a whole. This decision is significant, because it quite arguably delineates a strict limit to a board's discretion in enforcing CC&Rs.

The seminal case concerning a board's discretion in enforcing CC&Rs is *Beehan v. Lido Isle Community Assn.* (1977) 70 Cal.App.3d 858. *Beehan* concerned a board's decision not to file suit to enforce a setback requirement, under circumstances where it was unclear whether the amendment imposing the requirement had been validly enacted. The Court of Appeal held that the board acted within its discretion in declining to file suit, and in doing so alluded to the business judgment rule, applicable to corporations, which provides that "neither a court nor minority shareholders can substitute their business judgment for a corporation where its board . . . has acted in good faith with a view to the best interests of the corporation of all its shareholders." *Id.* at 865 (citations omitted). According to the Court of Appeal in *Beehan*, the board could have properly concluded that filing suit was not in association's best interests because of the "difficulty in proving the . . . amendment was validly enacted" and because it was "doubtful whether the Association could prevail in an injunction action." The Court of Appeal further found that the association's resources were primarily committed "to

pay for services which benefited the entire community," and the board had "[a]pparently . . . believed that the utility of incurring substantial attorney fees prosecuting a lawsuit of questionable merit was outweighed by the possible curtailment of normal services." *Id.* at 866.

In *Ekstrom*, the Court of Appeal found that a board's decision not to enforce CC&Rs was not entitled to judicial deference "[e]ven if the Board was acting in good faith and in the best interests of the community as a whole . . ." *Ekstrom, supra*, 168 Cal.App.4th at 1123. The CC&R provision at issue in *Ekstrom* required "[a]ll trees" in the project be trimmed such that they did not exceed the height of the house on the lot on which they were situated. Because requiring palm trees to be trimmed would effectively require their removal, the board took the position that the CC&Rs' reference to "all trees" did not apply to palm trees. Several owners, whose views were obstructed by palm trees, subsequently demanded that the CC&Rs be enforced and the offending palm trees be trimmed or removed. The board declined to do so, after finding that the palm trees provided an "aesthetic benefit to the entire community" which "outweighed the value of preserving views of just a few homeowners." *Id.* at 1116. The trial court issued an injunction compelling the association to comply with the CC&Rs and remove or trim the palm trees at issue. On appeal, the association argued that the board's decision not to enforce the CC&Rs was not subject to judicial review pursuant to the Supreme Court of California's decision in *Lamden v. La Jolla Shores Condominium Homeowners Assn.* (1999) 21 Cal.4th

249. In *Lamden*, the Supreme Court adopted a “judicial deference rule,” similar to the business judgment rule referenced by the Court of Appeal in *Beehan*, which applies to decisions made by associations. The Supreme Court held in *Lamden* that “where a . . . board, upon reasonable investigation, in good faith and in regard for the best interests of the community association and its members, exercises discretion within the scope of its authority . . . courts should defer to the board’s authority and presumed expertise.” *Lamden, supra*, 21 Cal.4th at 265.

The Court of Appeal in *Ekstrom* rejected the notion that the board’s decision was subject to judicial deference pursuant to *Lamden*, and effectively found that the board had no discretion to decline to enforce the CC&R provision at issue. According to the Court of Appeal, “[n]othing in the CC&Rs permits the Association to simply exclude an entire species of trees from . . . application [of the CC&Rs] simply because it prefers the aesthetic benefit of those trees to the community.” *Ekstrom*,

supra, 168 Cal.App.4th at 1123. “Even if the Board was acting in good faith and in the best interests of the community as a whole,” the Court of Appeal continued, “its policy of excepting all palm trees . . . was not in accord with the CC&Rs.” *Id.* The Court of Appeal concluded that the “Board’s interpretation of the CC&Rs was inconsistent with the plain meaning of the document and thus [was] not entitled to judicial deference.” *Id.*

In short, the Court of Appeal’s decision in *Ekstrom* indicates that boards, in exercising their discretion whether to enforce CC&Rs, may not decline to enforce unambiguous provisions in the face of clear violations, on the basis that they believe that declining to do so would benefit the association as a whole. Rather, a board has discretion to decline to enforce CC&Rs only in situations more analogous to the situation present in *Beehan*, *i.e.*, a situation where the board can properly determine that the likelihood of prevailing in an enforcement action is doubtful, and it is therefore not in the association’s best interests to pursue such a questionable claim.

Roseman & Associates, APC, is a full service law firm representing common interest developments, including homeowners associations and property management companies.

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