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Community Association LawLetter

Thomas Schild Law Group, LLC provides legal services to community associations – condominiums, homeowner associations, and cooperatives – in **Maryland and the District of Columbia.**

Our attorneys advise community associations on all aspects of association governance such as covenant interpretation and enforcement, assessment collection, construction and contract warranties, and fair housing compliance. We also represent associations in court litigation and administrative proceedings.

With more than 30 years' experience working with condo, HOA and co-op communities, our attorneys are recognized locally and nationally as leaders in the field of community association law.

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HUD URGED TO LIMIT ASSOCIATION FAIR HOUSING LIABLILITY

More than two years after new fair housing rules regarding discriminatory actions of residents which create a **hostile housing environment** for other residents were adopted by the United States Department of Housing and Urban Development (HUD) in October 2016, it remains uncertain what community association boards and managers must do to avoid liability for not ending the discriminatory conduct of owners and other residents of condominiums, homeowner associations, and housing cooperatives.

The HUD rules establish nationwide standards which HUD will apply in enforcing the federal Fair Housing Act with respect to alleged harassment based on race, religion, national origin, sex, familial status or disability. In addition to liability for a person's own conduct and the conduct of that person's agents and employees, the 2016 fair housing rules also make community associations and landlords liable for **failing to take prompt action to end a discriminatory housing practice by residents** where the person knew, or should have known, of the discriminatory conduct and had the power to correct it. The HUD rule does not require that there be a discriminatory intent in not intervening to stop the resident's discriminatory conduct.

CAI Seeks Modified Rule or Additional Legal Guidance

The Community Associations Institute (CAI)--a national organization with members who include association volunteers, managers, attorneys and other service providers--has urged HUD to revise the rule to impose liability for hostile environment housing discrimination **only where there is a discriminatory intent** by the association board or manager.

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(Cont'd from Page 1, Fair Housing)

CAI contends that the HUD rule departs from established judicial precedent and exposes associations to increased litigation costs to defend fair housing claims which may not be covered by its liability insurance. It also explained that, unlike a landlord who can evict a tenant for conduct which violates a lease, the authority of an association to stop discriminatory conduct of a resident is far more limited.

Alternatively, if the HUD rule is not modified, CAI asked HUD to provide additional guidance concerning what reasonable actions a community association may take to comply with the 2016 housing environment harassment rule and what actions an association is not expected to take.

Federal Appeals Court Concludes Discriminatory Intent Is Not Required

Separately, a federal appellate court ruled in August, 2018 that discriminatory intent is not required for a landlord to be liable for violating the Fair Housing Act when it **knows of discriminatory harassment by a tenant and does not act to stop such conduct**. In *Wetzel v. Glen St. Andrews Living Community, LLC*, the United States Circuit Court for the Seventh Circuit based its conclusion on an analysis of the text of the Fair Housing Act and judicial guidance from the United States Supreme Court concerning sex-based discrimination in education.

The appeals court stated it was not relying on the 2016 HUD rule and suggested that HUD provide "more analysis" of its reliance on federal employment discrimination law as a basis for the rule.

The *Wetzel* decision applies in Illinois and other nearby states but does not apply in Maryland or the District of Columbia, where there is no precedential court ruling regarding the HUD rule, or landlord or community association liability for not taking action to prevent discriminatory conduct by a resident.

Maryland Trial Court OKs Assessment Increase Based on 80-Year Inflation

An assessment covenant first imposed in 1936 for a "sum equal to $5" to fund community road maintenance, repair and replacement should be interpreted to allow an assessment of $91 in 2018 dollars, according to a recent decision of a Calvert County, Maryland trial court.

The assessment covenant was included in the deeds to each lot in the Cove Point Beach community sold between 1936 and the early 1960s and required payment to the developer. Once all lots were sold, the assessment was payable to a homeowners association which also asked owners to pay additional voluntary dues to pay for the upkeep of other community facilities.

When an owner did not pay the road maintenance assessment in an amount which **factored in inflation over more than 80 years**, the association brought suit to collect unpaid assessments. The owner opposed the suit contending that the assessment covenant allowed only for an assessment of $5.

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(Cont'd from Page 2, Assessment)

In *Cove Point Beach Association, Inc. v. Collins*, the circuit court agreed with the association that the **intent of the developer** was to provide sufficient funds to maintain, repair and replace the roads over the extended life of the community.

In interpreting the covenant, the court explained that it must effectuate the intention which is clear from the context, the objective sought to be accomplished, and the result which would arise from a difference construction.

The court concluded that it would "strain logic" to believe the author of the covenant intended the construction, reconstruction and maintenance of the streets could be done for $5 per lot in perpetuity. Rather, a reasonable person in the position of the parties when the road covenant was first adopted would have understood that the cost for necessary road maintenance had to be adequate over time. Therefore, the court determined that **"the sum equal to $5" is not a cap on the assessment amount** and allows for increases in the assessment to take into account the effect of inflation.

Cove Point Beach Association was represented in this matter by Thomas Schild.

Maryland Appeals Court Upholds Architectural Review Board Denial of Over-Sized Garage

The Maryland Court of Special Appeals recently rejected a homeowner's challenge to the decision of an Architectural Review Board (Board) to deny the owner's request to build a 2-story, 3-car garage. In *Moore v. Roland Park Roads and Maintenance Corporation*, the homeowner contended that the architectural covenant did not apply and, if it did, the trial court should not have declined to review the Board action on the basis of the "business judgment rule".

Covenant Applies to Future Owners

The declaration of covenants for the Roland Park community in Baltimore City provided that that the restrictions would be "held and construed to run with and bind the land...and shall operate in perpetuity". However, several subsequent deeds conveying the owners' lot included a special warranty that the sellers had not done anything to "encumber the property hereby conveyed". The appeals court ruled that a reasonably prudent person would conclude that the original declaration of covenants were **intended to "run with the land".** Therefore, there was no reason to consider later deeds of conveyance to determine the meaning of the prior declaration of covenants, and the architectural covenants were binding on the property and the current owner.

Denial May Not Be Arbitrary

With regard to the Board refusal to approve the proposed garage, the Court of Special Appeals acknowledged in its unpublished decision that the Maryland appellate courts have articulated different judicial approaches to architectural review decisions. In some instances, the business judgment rule has been applied to preclude any judicial review of decisions to **approve an architectural change** where there is no allegation of "fraud or bad faith" or that the decision is "arbitrary".

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(Cont'd from Page 3, Over-Sized Garage)

Other decisions allow for courts to review decisions to **deny an architectural change** to determine if it is based on the standards in the covenant and is a "reasonable determination made in good faith and not high-handed, whimsical or captious in manner".

To the extent the Maryland courts have established different standards for approval and denials of architectural change decisions, the appeals court concluded that the Board denial of the request to build a 2-story, 3-car garage met both standards.

The conclusion that the Board action was reasonable and not arbitrary was based on the evidence presented at a 2-day trial which showed that the Board spent months reviewing the homeowners' various garage proposals and communicated with the owners about the Board's concerns that the proposed garage was too wide compared to neighboring properties and that there were no other 2-story, 3-car garages behind row houses in the community.

The court also observed that the Board had met to consider the application and documented its meetings with detailed minutes.

THOMAS SCHILD LAW GROUP, LLC represents condominiums, cooperatives, and homeowner associations in Maryland and Washington, D.C. The firm advises community associations on all aspects of association operations including covenant enforcement, assessment collection, developer warranties, maintenance and management contracts, and association document interpretation. Thomas Schild Law Group also represents community associations in court litigation and administrative hearings.
