

# New Jersey Law Journal

VOL. CXCI- NO.12 – INDEX 1008

MARCH 24, 2008

ESTABLISHED 1878

## Real Estate Title Insurance & Construction Law

### Homeowner's Association Standing To Assert Without Joining the Homeowners

The importance of governing documents for homeowner's associations

By Donald B. Brenner

Some builders are now trying to meld the best features of condominium living with the best features of fee simple living by creating a hybrid of a condominium and a fee simple community: town homes and single-family homes that are owned by the buyers in fee simple but have a homeowner's association with exclusive responsibility for maintenance, repair and replacement of all exterior components. As our population ages, these types of communities will likely become more prevalent. The governing documents have to be carefully drawn to avoid the problems discussed in this article.

A condominium association has exclusive standing to assert construction deficiency claims relating to common elements, because the common

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elements are owned by the association. In a fee simple community with a homeowner's association, however, the exterior components of homes/town homes are owned in fee simple by homeowners. If the Declaration of Covenants and Restrictions ("Declaration") gives a homeowner's association the exclusive obligation, power and right to maintain, repair and replace the exterior components of the single-family homes or townhomes that are owned by the unit owners in fee simple, but the bylaws do not confer upon the HOA exclusive standing to sue for construction and design deficiencies, does the homeowner's association which is not suing in a representational capacity have standing to assert those claims or must all of the homeowners be joined too?

In a case of first impression, in *Amherst Mews Homeowner's Ass. v. Hills Dev. Co.*, SOM-L-1731-03, (January 18, 2008) (unpublished opinion, on appeal). Judge Allison Accurso, on de novo review of a ruling by retired

Judge Alvin Weiss, who was serving as a Discovery Master, recently decided that the answer is that the homeowner's association has standing to bring such claims without joining the individual homeowners.

Without any statutory guidance, the court reviewed the declaration and the bylaws of the homeowner's association ("HOA"). The "common property" owned by the HOA was defined in the declaration as including all of the land and improvements other than the individual lots upon which the town homes are situated. The declaration made maintenance of the common property and all exterior components of the homes/town homes the exclusive responsibility of the HOA. This included but was not limited to, roofs, siding, decks, etc. The bylaws gave the Association the power to sue but did not address whether the homeowners had to be joined as parties.

The association disavowed any intent to sue in a representational capacity. The developer argued that it is ownership that determines the real party in interest, relying upon the following lan-

guage from *Siller v. Hartz Mtn Assocs.*, 93 N.J. 370, 382-83 : “[I]t is well established that claims for damage to individually owned property in planned residential communities may be sued only by the individual owners and that homeowner associations only have standing to pursue claims relating to common property.”

Judge Weiss had rejected this argument, reasoning that New Jersey has long taken a liberal view of standing questions. It is well established that all that is required is a sufficient stake in the subject matter of the litigation and “real adverseness.” *Crescent Park Tenants Assoc. v. Realty Equities Corp.*, 58 N.J. 98 (1971).

Judge Accurso also rejected the developer defendants’ insistence that ownership determines the real party in interest, noting that this determination “depends not on something inherent in the way property is held in planned residential developments but on the application of general precepts of the law of standing to the facts presented in the reported cases.”

Distinguishing the cases upon which the developer relied, the court recognized that the obligation of the homeowner’s association to use common expense assessments to maintain, repair and replace the exterior components of the homes owned in fee simple by unit owners did not flow from ownership at all. Rather it was rooted in the language of the declaration. In addition, the declaration required that the homeowner’s association use common expense assessments to pay to insure the roofs and exterior components of the homes and name the homeowner’s association as loss payee. Finally, under the Declaration, none of the homeowners had any right to repair their own roofs or other exterior components of their homes without permission from the homeowner’s association. Taking all of these factors into consideration, Judge Accurso held that the homeowner’s association had standing without suing in a representational capacity to sue the developer and all others responsible for what the homeown-

er’s association alleged was almost \$20 million in construction deficiency claims.

In interesting dicta, the court also dealt other arguments made by the developer in challenging the HOA’s standing. The developer argued that the homeowners were all indispensable parties because the developer would be subject to multiple 10-year warranty claims from homeowners under the New Home Warranty and Builder’s Registration Act (“HOW”), N.J.S.A. 46:3B-1 et seq. The developer also argued that the litigation by the HOA could be viewed as an election of remedies by the homeowners and they should be joined in order to avoid prejudice to them. The Court rejected these arguments because it was the Declaration drafted by the developer defendants themselves that gave the HOA the exclusive right to maintain, repair and replace the common property and the exterior components of the homes including the roofs, siding, etc.

Thus, the Court viewed it as “unlikely that a unit owner could maintain an action independent of the Association (either under HOW or otherwise) for damage to structures or that this action would result in the waiver of some right of the unit owners or subject the developer defendants to multiple suits on the same claims.”

Finally, the HOW claims were not viewed by the Court as comprising much of a threat to the developer defendants given that the first units were sold in 1997 and the last unit closed in 1999 with the only portion of the HOW warranty that was left was for major structural damage; and no homeowner had yet filed any HOW claim.

Therefore, balancing the competing interests of the parties, the court reasoned that the “risk of loss of HOW remedies is too remote to deprive the Association of standing or compel joinder of all 123 unitowners.”

Judge Accurso also agreed with Judge Weiss in rejecting the developer defendants’ argument that all of the 123 unit owners had to be brought into the

case because there were conflicts of interest between the HOA and the homeowners, and between the HOA’s counsel and the homeowners. The developer defendants based this argument on the contentions that (a) the \$20 million in damages was caused by the negligence of the HOA in failing to do maintenance and repairs, (b) the association and its counsel made misleading disclosures to the homeowners, and (c) that the homeowners never voted to institute this suit. Relying upon *Siller*, supra, the court rejected this argument because “it is the unitowners who must vindicate those rights, not the Developer Defendants.”

A developer/sponsor is in the position of controlling creation of the documents governing the operation and responsibilities of the homeowner’s association. Proper care must be taken to ensure that those documents are drafted in a manner that allows the association to operate in a sensible manner. If the developer wants to create a hybrid of the best features of a condominium and fee simple ownership, it should be encouraged because it provides people with a very attractive lifestyle.

As “baby boomers” grow older, they will increasingly look with favor upon this type of hybrid arrangement, especially in the more upscale communities where builders make the biggest profits. If the developer/sponsor is going to give the homeowner’s association the exclusive responsibility for maintenance, repair and replacement of roofs, siding and other exterior components that are owned by the homeowners, and is going to have the homeowner’s association use common expense assessments to pay for the maintenance, repair and replacement of those exterior building components, it is the responsibility of the developer/sponsor to make sure that the homeowner’s association is given the exclusive responsibility, duty and power to litigate with all responsible parties when there are claims arising from the construction and/or design of those exterior components. ■