COMMUNITY MATTERS

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News and Trends in Community Association Law

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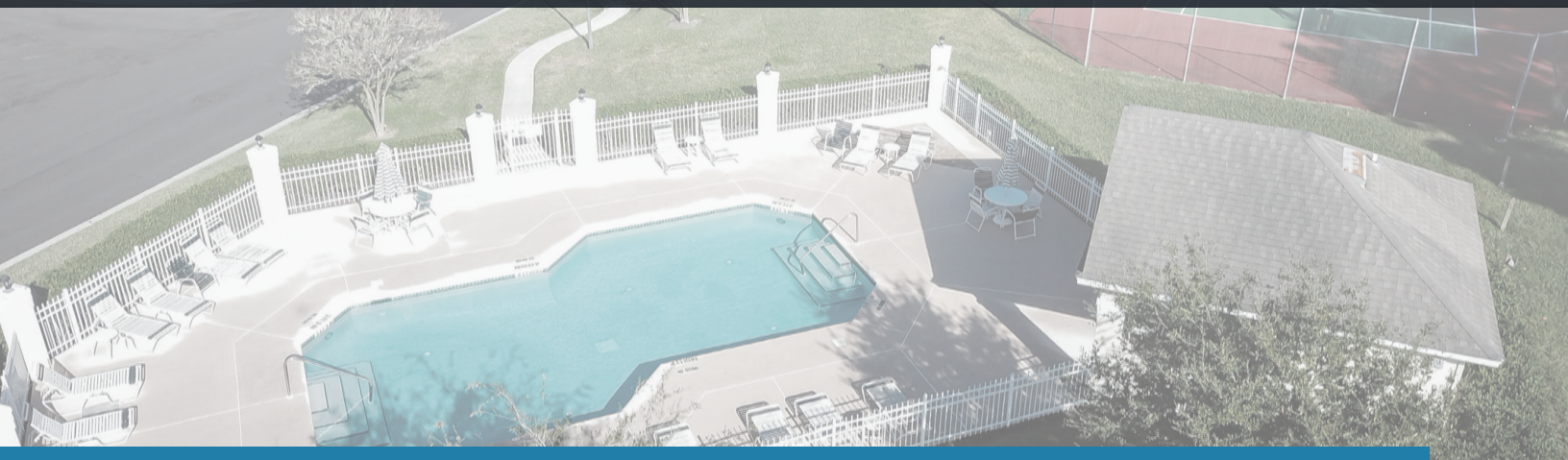

www.luederlaw.com | **Spring 2024 edition**

Published by the law firm of Lueder, Larkin & Hunter, LLC

Covenant Enforcement Against Owners in Bankruptcy

by **Daniel E. Melchi, Esq.**

Spring is here, and in the community association industry, that usually also means an increase in associations' attention to covenant enforcement. Perhaps that is because, with the warm weather, comes the inevitable: the growing of grass (that needs to be cut), the appearance of weeds (that need to be pulled or eradicated), and the heating and subsequent fading and disintegration of pine straw and mulch (that needs to be refreshed). Also, warmer weather tends to bring people outdoors more, and that means Board members, property managers, and other members of associations are more likely to see homes that could use a little sprucing up with exterior painting, replacement of broken or rotted fences, and other maintenance issues. An association's enforcement of maintenance requirements can range from gentle reminders to owners of their responsibilities to maintain their properties, to the imposition of fines if they refuse to do so, to self-help or abatement by the associations themselves to fix the issue and then billing that cost to the owner, or litigation in the courts to require owners to maintain their properties.

All of the enforcement remedies available to associations under their governing documents remain available even if an owner is in an active bankruptcy; however, the ability and timing of actually employing such options is a trickier situation. When an owner is in an active bankruptcy, there is a Bankruptcy Code provision called the "automatic bankruptcy stay" (shortened to usually just being called the "stay") that goes into effect as soon as the bankruptcy case is filed. The stay prevents any entity from doing certain things with respect to the bankrupt owner or the owner's property while the stay remains in place. The stay usually remains in place the entire time the bankruptcy case is open unless the Bankruptcy Court affirmatively lifts or modifies the stay to allow certain actions. Violation of any part of the Bankruptcy Code's stay statute subjects the violating party or entity to heavy fines or even imprisonment (for extreme, wanton, and likely continued violations, especially after a Bankruptcy Judge has ordered that such person or entity stop doing the stay-violating act).

Usually, we think of collecting debts by sending demand letters, continuing garnishments to collect a judgment, or filing liens for unpaid assessments as things that the stay undoubtedly prohibits an association from doing while it is in place. What many associations' Boards or property managers may not be aware of is that the stay also prohibits any entity from "exercising control over property of the estate." When an owner files for bankruptcy, all of his or her property becomes "property of the bankruptcy estate," and that property is technically being administered by the bankruptcy trustee while the bankruptcy case remains active. A bankruptcy case can last anywhere from about six months (in a typical Chapter 7 case without the sale of any property) to up to five years (in a typical Chapter 13 case where the owner is in a long-term repayment plan). That is a long time for the stay to remain in place, and it is a long time during which Associations may not "exercise control over property of the estate."

But what exactly might be considered "exercising control over property of the estate" in the context of covenant enforcement? Here is an example: Telling an owner that he or she must replace their entire roof or repaint their home can be considered exercising such control in certain circumstances. Sending an owner a letter to remind him or her of the requirement to replace a rotting roof or refresh the paint on their home is not likely to be considered to be exercising control over the property. On the other hand, taking the next step and actually imposing fines for failure to comply or exercising self-help is much more likely to be considered exercising control over the property. This is because association-imposed fines are a punishment meant to force an owner to take action that affects the property, and self-help is obviously directly exercising control over the property by making physical changes to it.

Another example has to do with the unauthorized parking of vehicles. A vehicle, like any other property of a bankrupt owner, is "property of the bankruptcy estate." What happens if a bankrupt owner parks his or her car in an unauthorized manner within the association? Is it a violation of the stay for the association to tow the unauthorized vehicle away? That depends. For example, if the vehicle is parked on the owner's front lawn in violation of the covenants, then it is probably a violation of the stay to tow the vehicle away. But if the vehicle is parked in a visitor's parking spot located on common property or if it is otherwise parked in an unauthorized manner and not on the owner's own property, then towing away the vehicle is not likely to be considered a violation of the stay. While the vehicle is "property of the bankruptcy estate", it would likely be considered an absurd interpretation of the stay statute for a bankrupt person to park his or her vehicle on in someone else's driveway and then try to assert that the other person cannot have the trespassing vehicle towed away immediately.

What about other types of violations? Here are a couple of examples: Noise violations: Enforcing those kinds of violations would not seem to implicate the bankruptcy stay against exercising control over property. Trash cans: Telling an owner to roll their trash cans into their garage on non-trash days and then fining the owner if he or she does not comply also does not seem to implicate the bankruptcy stay against exercising control over property. Instead, these actions generally more exercise control over conduct, not property. (Also, most trash bins are actually owned by the garbage company or municipality, not individual owners.)

So what is an association to do when a homeowner is in a long-term bankruptcy case, there is a stay in place, and there are covenant violations or maintenance issues that need to be addressed? Waiting up to five years (or even months in some cases) is not really an adequate way to deal with a covenant-violating owner. Associations are not without a remedy. Bankrupt owners are not allowed to live free and clear of rules because they happen to be in a bankruptcy. Associations do, however, have to ask the Bankruptcy Court for permission prior to

"exercising control over property of the estate." This is done by having the Association's attorney file a Motion for Relief from Stay ("MFR") to allow such control to be authorized. The MFR will state the covenant's requirement, advise the Bankruptcy Court that the owner is not complying, and then ask the judge to lift or modify the stay to allow enforcement. Bankruptcy Judges are very likely to grant these motions, and far more often than not, filing an MFR in court gets the owner's attention and achieves compliance.

Associations are not without a remedy to enforce their neighborhood covenants for owners who are in bankruptcy, but it can sometimes take the extra step of seeking Bankruptcy Court permission prior to taking certain actions. Doing so can save the association from the shocking situation of being sued for enforcing its own rules and having to pay damages to the person who was breaking the rules in the first place. If Board members or property managers have questions as to whether a certain action "exercises control over property of the estate," they should consult their association's attorney for an opinion to avoid trouble down the road.

Architectural Modifications & Reasonable Accommodations: Evaluating Owners' Requests

by **Elizabeth Modzeleski, Esq.**

In most community associations, exterior improvements and changes are regulated by architectural control provisions contained in the association's governing documents.

These provisions almost always require that an owner submit a modification request to and receive approval from the association's board of directors or architectural control committee (the "Reviewing Party") prior to commencing any exterior modifications to the owner's property. The Reviewing Party will determine whether a requested modification conforms with the Association's community-wide standards and architectural requirements, and it will issue a decision to the requesting owner as required under the governing documents.

But what happens when an owner claims that an exterior modification to their property is required based on the disability of the owner or an occupant, but that modification would not normally be approved by the Reviewing Party and would not generally be in compliance with the association's governing documents? Must the association allow such a modification? Can the association require the owner to remove the modification? These questions are governed by the Fair Housing Act (the "FHA") which is a federal law, applicable across the United States.

An owner requesting permission for an exterior modification that is not in compliance with the association's governing documents based upon a disability is requesting an accommodation pursuant to the FHA. Under the FHA, the association must allow a reasonable accommodation or a modification when (1) there exists a reasonable, identifiable relationship, or nexus, between the disability and the requested accommodation or modification, and (2) the requested accommodation or modification is required to allow the disabled individual full enjoyment of the property.

The first question the association must ask is whether a person residing at the property in question has a disability recognized under the FHA. A disability is any physical or mental impairment that substantially limits at least one major life activity. According to the U.S. Department of Justice, the term "major life activity" may include seeing, hearing, walking, breathing, performing manual tasks, caring for oneself, learning, speaking, or working. Sometimes a disability is readily apparent. For example, a person who struggles with mobility issues or requires visual aids such as a walking stick or a seeing eye dog has a readily apparent disability under the FHA.

The second question the association must ask is whether there is a reasonable, identifiable relationship, or nexus, between the disability and the requested accommodation. In other words, does the requested accommodation actually correlate to allowing the disabled individual full use of the property? For example, a person who must use a wheelchair may require more driveway space to enter and exit vehicles, so an accommodation to the association's regulations regarding driveway size would be reasonably related to the person's disability.

When the disability and the nexus between the disability and the requested accommodation are readily apparent, the association cannot request more information regarding the condition. When the condition itself or the nexus between the disability and the requested accommodation is not readily apparent, the association may request a statement from a reliable source that the person requesting the accommodation has a disability recognized under the FHA and that there is a nexus between that disability and the requested accommodation. The source should be familiar with the disabled individual and their condition.

If there is no evidence that any person residing at the property in question has a disability recognized under the FHA or if there is no nexus between the disability and the requested accommodation, the association may proceed as it would in any other case by handling the unapproved modification as a violation of the association's governing documents. If, however, it is determined that any person residing at the property in question has a disability recognized under the FHA and that there is a nexus between the disability and the requested accommodation, then the association must accommodate its rules to allow the nonconforming exterior modification.

Please note that, under the FHA, the association may be liable for discrimination based upon a disability if it were to deny a disabled person's request for a reasonable accommodation or modification. The members of the association's board of directors could also be liable for discrimination in their individual capacities.

If you have specific questions or are dealing with a disability-related accommodation or modification request, please contact your association attorney for further guidance.

Updating Rules for Community Recreation Areas and Common Missteps

by | **Elina V. Brim, Esq.**

Springtime is a very busy time for most boards. Communities are preparing for the pool season and for the increased use of other common facilities. An important part of the re-opening process is reviewing rules and regulations governing these recreational areas to ensure that they address frequently occurring problems. However, it is important to be aware of the common pitfalls related to the adoption of new rules, such as the process to be used and the actual content of these rules.

Process for the Adoption of Rules

Each community is unique, and the governing documents vary greatly among associations. Therefore, it is important to review the governing documents for your association to ensure the correct process is utilized in adopting rules for your common property and recreation areas.

In most instances, rules and regulations may be adopted by the Board of Directors. Notice of the rules has to be given to owners and occupants sufficiently in advance to give fair notice of their content. It is also advisable to post the rules in the recreation areas to which the rules apply. This ensures that visitors are also aware of the rules.

On occasion, the governing documents require a more involved process. For instance, the covenants may require a rules committee to be established to propose rules to the board. On other occasions, owners may have to be notified of any board meeting at which rules will be presented and adopted, with owners being entitled to attend such board meetings to give their input before the Board makes its final decision. Some covenants require a specific notice period before the association can start enforcing new rules. On rare occasions, homeowner approval may be necessary to adopt recreation area rules.

Failure to follow the process outlined in the covenants and bylaws creates enforceability challenges to the rules. Therefore, following the right process is essential in exercising rule making authority.

Creation of Rules

In addition to following the correct process for adopting the rules, the rules themselves must be clearly drafted. Clear rules lead to effective enforcement. Additionally, boards should always check if there are rules already in effect which address a particular issue. Any conflicting rules must be repealed so there is no ambiguity regarding which rules are applicable.

In crafting new rules, boards should reference the covenants and bylaws to ensure that the rules supplement these documents. Rules cannot conflict with any requirements or restrictions of the covenants and bylaws, as the covenants and bylaws have precedence.

Another common mistake in the rule creation process is re-phrasing the covenants and bylaws as rules and regulations. In practice, this frequently leads to ambiguous and/or conflicting rules. In drafting rules, boards are generally better off with adopting fewer rules that address specific problematic behaviors.

Lastly, in creating rules, boards should also be aware of the requirements imposed by federal and state housing laws. The federal Fair Housing Act (the "FHA") and the Georgia Fair Housing Act make it unlawful to discriminate against any person in the provision of services or facilities in connection with ownership of property because of a person's race, religion, national origin, color, familial status, sex, or disability. Of these protected classes, familial status presents many hidden pitfalls.

A violation of the FHA can be established by showing the existence of a facially discriminatory rule which treats children, and thus, families with children, differently and less favorably than adult-only households. Some of the rules that the courts have found to be facially discriminatory are rules requiring adult supervision of any person under 18 at the pool, rules prohibiting children from using certain portions of the pool area, and rules requiring children to leave the pool so individuals over 18 can have "adult swim time." These rules plainly treat children and adults differently, and thus, are discriminatory on their face.

Boards should be aware that the FHA may punish well intentioned rules. To steer clear of legal issues and the uncertainties of legal disputes, it is important to draft rules that do not differentiate on the basis of age. Instead, rules should be narrowly drafted to address objectionable conduct.

The rule making process is a tedious but necessary task. Investing time in this undertaking will yield benefits to your community for years to come. Our firm is here to help you with this process should you require such assistance.

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