MONDAY, APRIL 9, 2012

DAILY REPORT

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HOAs can decide rules enforcement

GWINNETT JUDGE says homeowners associations may choose not to intervene in disputes over covenants

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MORE THAN A DECADE of litigation that started over a homeowners association's landscaping rules has led to a judge ruling that associations are not obligated to force members to comply with development covenants.

The decision by Gwinnett County Superior Court Judge Michael Clark granted summary judgment to the Sugarloaf Residential Property Owners Association.

The dispute between the association and the defendants, Denise and Gary Greenwald, began in June 2001 after the association sought an injunction to compel the Greenwalds to submit and obtain approval of a plan before landscaping their lot, in accordance with the development's covenants.

The Greenwalds brought a nearly $1 million countersuit, claiming the association did not compel their neighbors to obey the same landscaping covenants; they also said the association failed to fix a drainage problem that caused storm water runoff to damage their property.

Around the same time in 2001, the Greenwalds filed a suit against their neighbors, Martin and Jill Kersh, claiming that work on the Kershes' property altered the flow of surface water and caused the Greenwalds' lot to flood. The neighbors reached a settlement in 2005 after two appearances before the state Court of Appeals.

On March 28, Clark found that Sugarloaf's declaration of covenants places the duty and responsibility to keep lots in accordance to development rules and regulations on the individual lot owners and at an owner's sole expense.

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Marvin Pastel, left, and co-counsel Thomas Cardone, with Winter Capriola Zenner, LLC.

> **"This particular case really highlighted the fact that the association is not the arbitrator of neighbors' disputes..."**

"This particular case really highlighted the fact that the association is not the arbitrator of neighbors' disputes whether it's drainage or having too many pets, and if the association makes a business decision to not get involved, that's a sound decision and the courts will uphold it," said Marvin Pastel, a partner at Winter Capriola Zenner who represented the association.

"If homeowners don't like the way an association makes business decisions, their primary recourse should be to get involved and run for the association's board of directors, not to run to the courts or

disobey the declaration," Pastel added.

But the nearly 11-year dispute may not be over. "My clients are now considering whether they will appeal," said the Greenwalds' lead attorney, Roy Banerjee, partner at Kumar, Prabhu, Patel & Banerjee.

"We are disappointed in the ruling, especially when this judge and two other judges have previously denied motions for summary judgment [filed by the association]," Banerjee explained.

After filing suit in 2001, the Duluth association obtained an injunction against the Greenwalds, which was affirmed on appeal, according to case filings.

Pastel said the case was put on hold while the courts worked through the Greenwalds' suit against their neighbors, the Kershes.

The plaintiffs then filed a second motion for summary judgment in May 2008, but the case was administratively terminated in July 2009 after the developer, Sugarloaf Properties, which was also named in the countersuit, filed a bankruptcy petition.

The case reopened in April 2010, and in June of that year, the judge denied the second motion for summary judgment. But the original judge, Judge Thomas Davis, removed himself from the case and Clark was appointed.

Pastel said Davis recused because of a conflict caused when the Greenwalds personally wrote a letter to then-Attorney General Thurbert Baker "saying what a horrible judge the trial judge was, and they copied the judge on the letter."

"The judge was put in an untenable situation even though he didn't do anything wrong," said Pastel.

The June 2010 letter, which refers to the case as a "nightmare" and the "longest running civil case in Gwinnett County," also asked the AG and then-Gov. Sonny Perdue for their assistance in moving their case forward.

In October 2010, Clark granted summary judgment to the association with regard to the Greenwalds' claims that the association acted "unfairly, arbitrarily and capriciously" in enforcing landscape covenants. But the court denied summary judgment with regard to the defendants' nuisance and attorney fees claims. The Greenwalds then amended their counterclaim to seek punitive damages.

In case filings between the Greenwalds and the association, the Greenwalds argued that the association maintained a drainage easement on which the Kershes' builders placed fill dirt, which diverted the flow of runoff storm water. They later contended that the homeowners association president acknowledged there were known covenant violations on the Greenwalds' neighbors' lot.

"Yet the association did not even so much as cite the owners [of the neighboring lot] for their violation of the covenants," the brief stated. "Clearly, the association was obligated to maintain the drainage easement by rules of the community."

The case went to trial in October 2011, but after a day and a half, the judge suspended the proceedings and recommended the parties try to settle.

"For about two and a half days we were in settlement talks with the other side, we obviously didn't settle," Pastel said.

"Ultimately, the parties disagreed with the fundamental principles of nuisance and the association's obligation to fix it," said the association's co-counsel, Thomas Cardone, who also practices for Winter Capriola Zenner.

In his March 28th order granting summary judgment, Clark wrote: "The declaration empowers the lot owners to unilaterally take action to prevent or remedy any harm resulting from a neighbor's violation of the covenants. The defendants took advantage of this provision when they filed their earlier lawsuit against the Kershes and obtained a settlement of their claims," Clark's order stated. "The court finds that the plaintiff has no affirmative duty under the declaration to correct the storm water drainage runoff between the lots at issue in this case."

Pastel said, "A lot of non-lawyer homeowners do not recognize that your covenants are equivalent to the constitution you are agreeing to live by and little nuances between covenants can make communities different."

"There is a big importance to reviewing your covenants before you move in or to at least really review them after, to know what are your obligations and your association's obligations," he said.

But Banerjee said his clients don't believe the court's decision represents the intent of a homeowners association.

"Additionally, this ruling allows a HOA to enforce covenants at its leisure and discretion," he said. "Clearly the intent of a HOA is to keep the subdivision in compliance with the covenants. However, given the court's ruling, enforcement of the covenants is not mandatory, but is now discretionary. Therefore, the decision to enforce or not enforce will be based upon whomever is the decision maker in the HOA at the time, and this will obviously lead to more litigation, not less."

The case is *Sugarloaf Residential Property Owners Association v. Greenwald*, No. 01-A-06119-4.