

Planned Community/ Condominium Responsibilities

By Carl N. Weiner

Purchasing a home in a planned community or condominium carries with it certain rights and responsibilities. Membership in an association involves a careful balancing of private rights of the community against the private rights of individual residents. Under the United States Constitution

and the Pennsylvania Constitution, certain rights, such as free speech, are protected from interference by government. The question is whether an association is entitled to limit rights such as free speech. In Pennsylvania, the clear answer is yes. In New Jersey, the answer is "yes, but . . ."

In Pennsylvania, it is clear that the balancing of the private rights of individuals against the rules established by an association have been resolved in favor of associations. Courts in Pennsylvania have supported the enforcement of restrictive covenants against challenges asserting violation of free speech rights. The law in Pennsylvania dealing with association issues has only recently been developed.

The first significant appellate court decision determining rights of the association as opposed to rights of private individuals was decided as recently as 1996. In the case of **Midlake on Big Boulder Lake Condo Association v. Cappuccio**, the Pennsylvania Superior Court upheld the restriction in a condominium declaration which prohibited erecting any signs on or in a unit or in common elements, which are visible from the outdoors. The Pennsylvania Superior Court made it clear that the association was a private organization, not a governmental organization and stated that the association was entitled to enforce private restrictions as a private organization without violating the free speech rights granted to its residents under the First Amendment of the United States Constitution.

The following year, another Pennsylvania appellate court also weighed in on the issue. In **Anelli v. Arrowhead Lakes Community Association**, the association declaration also prohibited signs. Homeowners who were having difficulty selling their house attempted to post a real estate "For Sale" sign in front of their house. The association prohibited such signs and the homeowners filed suit to stop enforcement of that restrictive covenant. The Commonwealth Court found that the association is not a governmental agency, and therefore, had the right to restrict free speech in the nature of signs.

continued on page 3

REAL ESTATE AGENTS BEWARE:

YOUR COMMISSION MUST BE IN WRITING

By Mark F. Himsworth

When you work hard for a commission, you expect to be paid, and in today's competitive market where inventory is moving slowly, that commission can be precious. Don't blow the opportunity by not having your agency agreement in writing and signed by your client. Without it, you won't recover your commission. This point was driven home in the recent case of *Coldwell Banker Commercial Diamond Realtors v. Dreslin* (Memorandum Opinion, Pa. Super., October 24, 2006).

In this case, Coldwell Banker alleged that the sellers orally agreed to pay Coldwell Banker a 6% commission on the sale of their property in the event that Coldwell Banker found a buyer. Within two months, Coldwell Banker found a purchaser who was willing to pay \$2.1 Million for the property. The parties agreed that the sellers would finalize the



negotiations. Subsequently, the sellers closed on the agreement of sale for \$2.5 Million without paying Coldwell Banker the \$150,000 commission. Coldwell Banker filed

continued on page 2

DO YOU
KNOW



Merle Ochrach



Merle Ochrach. . . Do you know that gardening is a passion? Do you know about her heavy involvement in the Juvenile Diabetes Research Foundation? Do you know that she has been a Partner with Hamburg, Rubin, Mullin, Maxwell and Lupin since 1995? Do you know that she participates in many of her children's activities, and do you know that she still finds time to attend numerous night meetings for her clients?

Merle represents a wide variety of clients, from developers through brokers of commercial, industrial and residential properties and has developed a niche in the representation of municipalities and water and sewer authorities. She has extensive experience in negotiating and drafting commercial leases and has developed an expertise in addressing lease issues for retail, commercial and industrial centers.

In addition, Merle is a member of the Pennsylvania Bar Association and is active with the Montgomery Bar Association. She has served on the Board of Directors, has been a member and Chairperson of the Real Estate/Land Use Committee, has served a three-year term on the Law Reporter Committee and has been a member and Chairperson of the Municipal Law Committee of the Montgomery Bar Association. She is also a member of the Board of Directors of the Montgomery County Development Corporation, and was the co-recipient of the first Committee of the Year Award for her efforts as Co-Chair of the Montgomery Bar's Continuing Legal Education Committee. Merle also served as a delegate to the Pennsylvania House of Delegates for the Montgomery Bar Association and is past Chairperson of the Montgomery Women's Network.

Merle is an active speaker and has made presentations to numerous organizations including the Pennsylvania Association of Realtors, Montgomery Bar Association, Philadelphia Bar Institute, rotary groups and the Business Focus group.

She is a graduate of the University of Pennsylvania and has a double major in Economics and American History. She received her J.D. from Rutgers University School of Law – Camden, and, yes, she still manages to work out faithfully at the gym!



HAMBURG, RUBIN, MULLIN, MAXWELL & LUPIN

375 Morris Road | PO Box 1479 | Lansdale, PA 19446-0773
Telephone: 215-661-0400 | Fax: 215-661-0315 | www.hrmmml.com

Joan Wean, Editor

If you would like copies of the newsletter sent to someone you know, please contact Sandie at 215-661-0400.

Hamburg, Rubin, Mullin, Maxwell & Lupin's IN BRIEF is intended to provide information on recent legal developments. The information contained in this newsletter is not offered as legal advice or legal opinion on specific facts.

© 2008 Hamburg, Rubin, Mullin, Maxwell & Lupin

Real Estate Agents...

continued from page 1

suit, based upon the oral agreement. The trial court dismissed the Complaint since, according to the Real Estate Licensing and Registration Act ("RELRA"), it does not permit the recovery of a commission and fees in the absence of a written agreement signed by the consumer. On appeal, the Superior Court affirmed. The Court reasoned as follows:

The RELRA "establishes specific standards of conduct in licensing which pertain to all persons engaged in the sale or transfer of real property within this Commonwealth." *Meyers V. Gwynedd Development Group*, 756 A.2d 67, 69 (Pa. Super. 2000); See also 63 P.S. §455.301. The principal purpose of the Act is to protect buyers and sellers of real estate, the most expensive item many persons ever buy or sell, from abuse by persons engaged in the real estate business. *Id.* at 69.

Section 455.606a(b)(1) of RELRA provides that a licensee is not entitled to recover a fee, commission or other valuable consideration for services in the absence of a written agreement. Specifically, this section provides as follows:

A licensee may not perform a service for a consumer of real estate services for a fee, commission or other valuable consideration paid by or on behalf of the consumer unless the nature of the service and the fee to be charged are set forth in a written agreement between the broker and the consumer that is signed by the consumer. This paragraph shall not prohibit a licensee from performing services before such an agreement is signed, but the licensee is not entitled to recover a fee, commission or other valuable consideration in the absence of such a signed agreement.

63 P.S. §455.606a(b)(1).

So before you pound the pavements, and before you mine the fields for prospects, make sure that your agency agreement (buyer or seller) is in writing and signed. The PAR form conforms with the statute and better be in your briefcase.

If you have any questions, please don't hesitate to call.

Planned Community... continued from page 2

Recently, the question of whether a condominium association or a homeowners association is truly a private organization has come under closer scrutiny. Democratic government, as we know it, is an entity created by consensus of citizens, under the guidelines created in a Constitution, which is charged with the responsibility of protecting the health, safety and welfare of the people. Government issues regulations and laws for that purpose. An association is an entity which enforces rules and regulations under the consensus of residents who have voluntarily purchased into a community which is subject to recorded covenants and restrictions. The association is charged with the responsibility of protecting the health, safety and welfare of residents within the community. Associations have taken on some of the responsibilities which previously were the sole responsibility of government. Does that mean that associations should be restricted, just as government is, from limiting rights of free speech?

New Jersey courts have taken a hard look at this issue. The balance which has been established by Pennsylvania courts has recently been under active review by New Jersey appellate courts. In the case of Committee for a Better Twin Rivers vs. Twin Rivers Homeowners' Association, the New Jersey appellate courts considered an election dispute arising in a large association comprising 10,000 residents. Twin Rivers consists of mixed dwelling types and commercial buildings. There is a school, county library and a firehouse located within the boundaries of the community. The association, like many, oversees parks, swimming pools and playgrounds. It provides lawn maintenance, trash collection and snow removal. Twin Rivers is a large-scale community in which the association maintains 34 private roads.

In a recent election, a group of individuals challenging the board incumbents alleged that they did not have fair access to be able to communicate with the community's residents. This group asserted that the association improperly interfered with their right to have political signs on lawns and on common elements. This group also challenged the right to control the content of the association newsletter; since the

president of the association had a column on the first page, the protesting group wanted a right of equal access to express its points of view.

While Pennsylvania appellate courts have specifically held that associations are not governmental agencies, the New Jersey Superior Court found that there were substantial similarities between a homeowners' association and a governmental body. The protesting residents argued that the association, in maintaining roads, maintaining community facilities, collecting assessments and enforcing rules, performs the same functions as a municipal government, and therefore, should be subject to the constitutional boundaries of government.

The Superior Court agreed. The Court considered comparisons between Twin Rivers, as a large scale association, and company-owned towns in which private



companies own a significant portion of the housing and commercial buildings. Decades ago, the United States Supreme Court determined that the rights of free speech trump private contractual rights to restrict signs and other forms of communication in company-owned towns. The Superior Court held that the protesting groups' right to engage in free expression took precedent over the private interest of enforcing restrictive covenants. The Superior Court found that the association was not entitled to restrict signage related to election campaigns or other expressive exercises, even as a matter of contractual right. The Court found that the association is functionally equivalent to a governmental body, and therefore, any regulation restricting this fundamental right violates the public interest.

The New Jersey Supreme Court, in reviewing the decision of the Superior Court, took another point of view. The New Jersey Supreme Court affirmed that associations as private residential communities have the right to enforce private covenants. The New Jersey Supreme Court ultimately found that

the primary use of the Twin Rivers property was residential, and the primary purpose of the association was to maintain association property for private purposes. The Court determined that the association had not invited the public to use its property even though a public school and library were located within the community. The Supreme Court also decided that the protesting group was not unreasonably restricted by the limitation on signs and by having the community newsletter controlled by the association board. The Court found that the group had other means of communicating with residents within the association and that the restrictions on the group's activities were not unreasonable or oppressive.

The Supreme Court held the association was not acting as a municipality. However, the New Jersey Supreme Court found that under New Jersey law, unlike most states, governmental action is not required to prove a violation of constitutional rights. In New Jersey, a private entity can violate constitutional rights. Accordingly, it was not enough to simply find that the association was a private entity. The New Jersey Supreme Court stated that under certain circumstances, constitutional rights are protected from interference by the owner of private property.

Significantly, the Supreme Court cautioned that its holding that an association is not a governmental entity "does not suggest, however, that the residents of a homeowners' association may never successfully seek constitutional redress against a governing association that unreasonably infringes their free speech rights." The Court left the door open to a possible claim against an association for violation of free speech rights if the restrictive covenants unreasonably restrict speech and stated that in such cases, the right to limit signs or otherwise restrict speech may be declared unenforceable as a matter of public policy.

The Twin Rivers case has broad implications for all communities, including those in Pennsylvania. The question as to whether associations are functionally equivalent to governmental bodies is now subject to closer review. This implies that associations may be held more accountable for its actions in enforcing covenants.



Steven A. Hann, was a featured speaker at the Pennsylvania Municipal Authorities Association's 65th Annual Conference in State College, Pennsylvania in September. He provided an update to seminar attendees on topics such as TMDLs, Pennsylvania's Chesapeake Bay Tributary Strategy, Nutrient Criteria Development, Nanotechnology and Stormwater Authorities. Hamburg, Rubin, Mullin, Maxwell & Lupin is the Pennsylvania Municipal Authorities Association's Eastern Regional Solicitor.

John Iannozzi raised funds for the Muscular Dystrophy Association Lock Up in November 2007.

Bernadette Kearney has been appointed as Co-Chair of the Municipal Committee of the Montgomery Bar Association for 2008.

Christine Madden is engaged to Hugh J. Ferry. A September wedding is planned.

Susan Mirarchi, Litigation Paralegal, has been invited to become an appointed member of Ordinance Review Committee of Richland Township by the Township Manager Steven Sechrist.

Ed Mullin's daughter, **Liz Mullin**, who is a junior at Gwynedd Mercy Academy High School, is Co-President of the school's Mock Trial Teams and **Ethan O'Shea** is acting as coach for one of the two Gwynedd Mercy teams. In addition, **Kate Mullin** received all A's at Muhlenberg and is on the Dean's List.

William G. Roark wrote an article that was published in the Legal Intelligencer entitled "Understanding the Value of Plain English: Confessions of a First-Year Associate."

Dr. Emily Caren Stein was married on Saturday evening, February 23, 2008, to **Benjamin Scott Lupin**, son of **Linda** and **Steven Lupin**. The bride is a dentist at Brickworks Dental in Mays Landing, NJ. Ben is an associate, practicing employee-benefits law at Drinker Biddle & Reath in Philadelphia.

Helen Strohecker, Legal Assistant, was unanimously elected Treasurer and Assistant Secretary of the Horsham Industrial and Commercial Development Authority.

Joan Wean, our firm's Legal Administrator, has been appointed to a two-year term on the International Association of Legal Administrator's *Vendor Relations Committee*, effective at the May 2008 Annual Conference.