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CONDOMINIUM DEVELOPER CANNOT ENFORCE CC&R'S AFTER SELLING ALL UNITS

Promenade at Playa Vista Homeowners Association v. Western Pacific Housing, No. B225086 (2nd Dist. November 8, 2011)

November 14, 2011 by Alex Merritt and Michael Wilmar

This month the Second District Court of Appeal concluded that the developer of a condominium complex lacked standing to enforce the declaration of covenants, conditions, and restrictions (CC&R's) after it had sold all the units in the complex.

Western Pacific Housing and Playa Capital Company (the "Developers") constructed and sold a 90-unit condominium complex in Playa Vista, California. The homeowners association ("HOA") for the complex later filed suit against the Developers, alleging construction defects. The Developers sought to enforce a binding arbitration provision in the CC&R's.

The Second District Court of Appeal upheld the trial court's rejection of a motion to compel arbitration. It reasoned that the Developers could have enforced an arbitration provision in a *contract*. However, CC&R's are not contracts, but rather *equitable servitudes*, which may only be enforced by a property owner or an HOA.

The court relied on California Civil Code section 1354, which states that CC&R's "shall be enforceable equitable servitudes" and may be enforced "by any owner of a separate interest or by the association, or by both." Relying on the plain meaning of section 1354, the court decided that "the Developers cannot enforce the CC&R's once they have completed the project and sold all the units" because "they no longer have any ownership interest in the property."

The court also decided that the Federal Arbitration Act, which makes a written arbitration provision in a *contract* valid and enforceable, did not apply because CC&R's are not contracts.

The court distinguished *B.C.E. Development, Inc. v. Smith*, 215 Cal.App.3d 1142 (1989), which allowed a developer to enforce CC&R's where it had continuing authority to do so through an architectural review committee. In contrast, the Playa Vista Developers had not retained any authority or control to enforce CC&R's . Moreover, given the plain language of section 1354, the court suggested that *B.C.E. Development* was wrongly decided.

The California Supreme Court is set to consider this same issue in *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, 187 Cal.App.4th 24 (2010), review granted November 10, 2010, S186149. If it agrees with the Second District Court of Appeal, developers may begin retaining an interest in the properties they develop to preserve their right to enforce CC&R's.