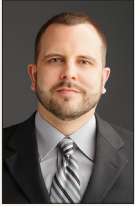


## Lender Scrutiny of SB326 Inspections Reports



By Tyler Kerns, Esq.

As part of the sales process for a condominium unit that will be financed with a mortgage, the prospective purchaser's lender will typically require an association representative to complete a condominium questionnaire. The lender may use a standard Fannie Mae/Freddie Mac questionnaire form, or the lender may have their own custom questionnaire. The questionnaire helps the lender determine if the property and the association meet its lending eligibility guidelines. After the 2021 condominium building collapse in Surfside, Florida, the lender questionnaires started including questions about building safety. The Fannie Mae/Freddie Mac questionnaire form, which is used by many lenders or serves as the model for most custom lender questionnaires, includes a series of questions about the association's most recent building inspection. Specifically, that questionnaire asks:

1. *When was the last building inspection by a licensed architect, licensed engineer, or any other building inspector?*
2. *Did the last inspection have any findings related to the safety, soundness, structural integrity, or habitability of the project's building(s)?*
- 2a. *If Yes, have recommended repairs/replacements been completed?*
- If the repairs/replacements have not been completed:*
- 2b. *What repairs/replacements remain to be completed?*
- 2c. *When will the repairs/replacements be completed?*

*Provide a copy of the inspection and HOA board meeting minutes to document findings and action plan.*

Civil Code §5551, the statute that took effect as of 1/1/2020 as a result of Senate Bill 326, requires condominium associations with buildings containing three or more units to have "exterior elevated elements" for which the association has maintenance or repair responsibility inspected by a licensed structural or civil engineer or architect every nine years with the first inspection to have

been completed by 1/1/2025. Therefore, condominium associations that have had a Civil Code §5551/SB326 inspection completed would, in most cases, reference that inspection in response to the above questions on a lender questionnaire.

The SB326 inspection reports are required to include the inspector's recommendations for any necessary repairs or replacement of exterior elevated elements. If any of the exterior elevated elements pose an immediate threat to safety, the inspector is required to notify the local code enforcement agency, and the association is required to take measures to prevent access to those exterior elevated elements until repairs have been completed and the local enforcement agency has inspected and approved the repairs. In many instances, however, the inspector will not find any of the exterior elevated elements to be an immediate threat to safety but will still include in the inspection report recommendations for repairs that do not pose an immediate threat to safety. Importantly, when the lender questionnaire asks about "recommended repairs/replacements," the question is not limited to items that the inspector may have considered to be an immediate threat to safety. The lender questionnaire wants to know whether even these nonemergency repairs have been completed and, if not, when they will be completed and what the association's "action plan" is for completing the repairs.

Many lenders refer to the Fannie Mae Selling Guide to determine lending eligibility.



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Under the Fannie Mae Selling Guide, condominium projects in need of "critical repairs" are ineligible. The guidelines relating to critical repairs are not specifically tied to SB326 inspections and are not necessarily limited to items that pose an immediate threat to safety. The Fannie Mae Selling Guide describes "Projects in Need of Critical Repairs" as "those needing repairs or replacements that significantly impact the safety, soundness, structural integrity or habitability of the project's building(s), or the financial viability or marketability of the project." It says critical repairs could include conditions such as "advanced physical deterioration," among other things, and lists "balconies" as one of several examples of items to consider. We have seen a lender make a determination that exterior elevated elements with recommendations for repair in an SB326 inspection report were "critical repairs" under the lending guidelines even though they were not identified in the report as immediate threats to safety. That lender refused to finance what had been a pending sale of a condominium.

This underscores the importance of planning for repairs recommended in an SB326 inspection report even if no immediate threats to safety are identified in the report. While Civil Code §5551/SB326 does not include any specific requirement for completing such repairs, lenders are beginning to scrutinize these inspection reports, and boards should anticipate being asked about the status of repairs recommended in an SB326 inspection report. ■

## Judicial Deference has its Limits



By Bradley Schuber, Esq.

Judicial Deference is a legal doctrine under which California courts defer to a board's authority regarding maintenance decisions made on behalf of a homeowners association. This legal doctrine was established in the case of Lamden v. La Jolla Shores Clubdominium HOA (1999) 21 Cal.4<sup>th</sup> 249. In that case, the court stated,

*"Where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise. Thus, we adopt today for California courts a rule of judicial deference to community association board decisionmaking that applies, regardless of an association's corporate status, when owners in common interest developments seek to litigate ordinary maintenance decisions entrusted to the discretion of their associations' boards of directors."*

Since the Lamden case was decided, several cases have applied this legal doctrine. While it continues to evolve, a recent unpublished case underscores that the doctrine of judicial deference does not extend to enforcement decisions inconsistent with its governing documents.

In Lipton v. Fairbanks Ranch Association No. D082967, Cal. Ct. App. 4th Jan. 21, 2025, Seymour and Jo Lotsoff (the "Lotsoffs") owned a home in Fairbanks Ranch, a residential common interest development managed by the Fairbanks Ranch Association (the "Association"). In March 2017, the Lotsoffs discovered that the retaining wall supporting a tennis court on their property needed repair. The repair required trimming the tall bamboo hedge located in front of the retaining wall down to its roots. The repair work occurred in July 2017.

After the repair was completed, neighbors Stuart and Elisabeth Lipton (the "Liptons") contacted the Lotsoffs to discuss the bamboo. Before it was cut down, the bamboo provided a natural screen for the tennis court. Without the bamboo, the lights from the tennis court disturbed the Liptons when they tried to sleep at night.

Unable to resolve the issue with the Lotsoffs, the Liptons contacted the Association's Environmental Control Committee (the "ECC") in March of 2018 to complain that the tennis court was not adequately screened in accordance with the Association's architectural guidelines, which provide, in part, "Tennis courts should not impede views and should be screened with natural plant materials. Night lighting of tennis courts will be prohibited in most instances."

In May 2018, the ECC investigated this complaint, which led to the ECC requesting that the Lotsoffs install a green tennis court screen on the chain-link fence facing the Liptons' property and replace the bamboo. During the summer of 2018, the Lotsoffs planted additional bamboo of a different variety that does not grow as tall as the original species of bamboo.

A year later, in August 2019, a member of the Association's board of directors met with the Liptons to discuss their ongoing complaints. In October 2019, the board considered sending the Lotsoffs a letter requesting they replace the new bamboo

with the original species. However, the board concluded that the letter was unnecessary since the planted bamboo would soon adequately screen the tennis court.

In November 2019, the Liptons filed a lawsuit against the Association and the Lotsoffs. During the case, the Liptons argued that the Association had violated its governing documents by allowing the Lotsoffs to remove the bamboo without submitting an application to the ECC for approval and by permitting the tennis courts' lights to affect them adversely. The Association argued that it deserved deference from the court for its decisions. Ultimately, the court held that the board was "entitled to judicial deference where it acts in a manner consistent with its governing authority and exercises its discretion within that authority. However, where a board acts in a manner inconsistent with those governing documents, i.e., where the governing documents do not extend such discretion, the actions are not entitled to judicial deference." On appeal, the appellate court upheld the trial court's decision.

This case, while an unpublished opinion, serves as a good reminder that the legal doctrine of judicial deference does not apply to all board decisions. If a board receives a complaint about a potential violation, it should investigate it and take enforcement steps as outlined in its governing documents. Associations should not plan to rely on the doctrine of judicial deference regarding enforcement decisions that are inconsistent with its governing documents. ■



## Kruger Serves Up Grand Slam Against Nonresident Owner's Use of Common Area Tennis Courts



By Steven Banks, Esq.

In keeping with this month's "tennis" newsletter theme [Editor's note: Attorney Schubert's article is also about a case involving a tennis court], it's worth looking back at an appellate court decision that, 30 (love) years later, remains in play on the issue of nonresident owners' use of common area facilities.

Three decades ago, a plucky young lawyer named Joel Kruger defended the Point Loma Tennis Club Community Corporation, a San Diego condo association, against a lawsuit lobbed by Kenneth Liebler, a nonresident unit owner and tennis player. The owner started the volley by seeking a temporary restraining order and injunctive relief against the association's enforcing its rule prohibiting nonresident owners from using common area recreational facilities. After the association aced him in the trial court, the owner appealed to the refs (the Court of Appeal, Fourth District, Division 1), resulting in the published decision in *Liebler v.*



*Point Loma Tennis Club* (1995) 40 Cal. App.4th 1600.

For years before Mr. Liebler bought his unit, the association's rules had specifically excluded nonresident owners from using the common area recreational facilities. The association's CC&Rs prohibited owners from severing or separately conveying their interest in their units from their undivided interest in the common area. The owner received the CC&Rs and rules and regulations when he purchased his unit. The owner never lived in the unit; instead, he leased it to his daughter and a succession of tenants. But that didn't stop him from using the tennis courts and other common area recreational facilities. He amended his lease agreement to include a clause claiming that he and the tenant shared the premises as "cotenants."

After other owners asked the association's board of directors to investigate nonresidents' use of the tennis courts, the association wrote to the nonresident owners to remind them that the rules required them to assign to their tenants the use of the facilities. The letter advised nonresident owners that they would be asked to leave or fined if they continued to use the facilities. All nonresident owners complied except for Mr. Liebler, who continued using the tennis courts at will, claiming he was entitled to the privileges of a tenant and owner as a "registered resident" of his unit by the terms of his lease (which he refused to produce). The association sent him violation letters and



imposed fines. The owner didn't pay the penalties and instead sued the association.

The owner argued he had an easement of enjoyment in the common area, which he could use until he sold his unit. He claimed the association could not abridge this by a rule. He also claimed the restriction was unreasonable and had been unfairly applied.

The Court of Appeal found the owner had served a double fault. It distinguished the cases he cited and ruled that a conveyance of the unit to a tenant necessarily suspended the owner's access to the common area during the tenancy because the CC&Rs prohibited severing access to the common area from the unit. It also found the restriction was reasonable and reasonably applied.

The *Liebler* case remains good law and continues to stand for the proposition that nonresident owners give up their right to use common area facilities while leasing their units to tenants. ■

## New FDCPA Case Exempts Collection of HOA Fines



By Garrett Wait, Esq.

In a case out of the Central District of California titled *Nabatmama v. Ross Morgan & Co.*, a federal judge determined that the imposition and collection of fines for CC&R violations was not subject to the Fair Debt Collections Practices Act ("FDCPA"). In that case, a resident of the Shenandoah Villas Homeowners Association ("Association") named Jeffrey Nabatmama was subject to fines totaling \$106,000 for alleged violations of the Association's CC&Rs.

The Association's management company, Ross Morgan Co. ("Morgan"), began typical enforcement efforts following the levy of the fine. In response, Nabatmama alleged that Morgan was acting as a debt collector for

the Association and wrongfully billed Nabatmama for the fines. He alleged that this act was a violation of the FDCPA and that he should be entitled to recover his actual damages, damages related to emotional distress, and statutory damages.

Morgan filed a motion to dismiss Nabatmama's claims. In a brief opinion, the Court found that the fines did not qualify as a consumer debt and therefore were not subject to the FDCPA, dismissing Nabatmama's FDCPA claim with prejudice. The Court reasoned that while it and the Ninth Circuit have recognized that "an ongoing obligation to pay assessments to a homeowners' association is a consumer 'debt' under the FDCPA," fines are nonconsensual and not a consumer debt.

There is a distinction between a party's affirmative obligation to pay regular assessments arising from the initial purchase of the

property and fines that arise from a later violation of Association rules. The promise to pay regular assessments occurs when the homeowner purchases the property and therefore "arises" out of the consumer real estate transaction. A fine is not transactional because it is nonconsensual. The Association expressly did not consent to a member or resident breaching its governing documents.

Of note, Nabatmama was not an owner of a property and not a member of the Association. The Court did not rule on whether the Association properly levied the fines against a non-member, and it is not clear from the facts of the case that the CC&Rs grant the Association the authority to levy fines in such a significant amount. Since the case remains ongoing, it may be possible that Nabatmama will win on other grounds, but critically, the Court dismissed his FDCPA claim. ■

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*What's happening at*



**Farewell to Niki Tran**

It is with both pride and sadness that we bid farewell to Attorney Niki Tran, a remarkable colleague who has been instrumental in shaping the marketing and transactional success of Kriger & Schubert. Niki has decided to begin a new chapter in Canada, where she will be closer to her family.

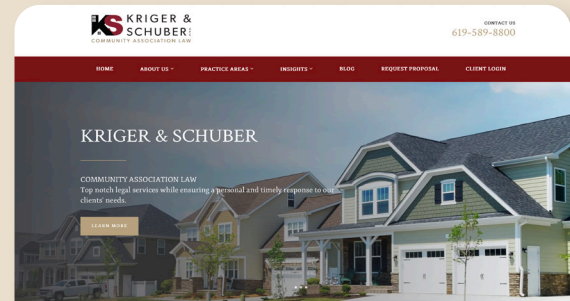


Niki's contributions to the firm have been nothing short of extraordinary. Her sharp legal acumen in transactional work and innovative marketing strategies have left an indelible mark on our team and clients. As an integral part of the firm, she brought dedication, creativity, and professionalism that elevated everyone around her.

While we are incredibly sad to see her go, we are excited for the opportunities and adventures that await her in this next phase of her life. Niki, we wish you nothing but happiness, success, and fulfillment as you embark on this journey. Your presence will be deeply missed, but your legacy will continue to inspire us.

Best wishes, Niki!

You will always have a place in the Kriger & Schubert family.



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