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UNDERSTANDING COMMUNITY ASSOCIATION

Due Process

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"Whatever disagreement there may be as to the scope of the phrase 'due process of law' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard." [i]

-Oliver Wendell Holmes, Jr.

What is due process? And why should community associations care about providing a "fair hearing" or an "opportunity to be heard?"

Actually, "due process" in the context of community associations is a bit of a misnomer. The Fourteenth Amendment to the U.S. Constitution prevents a *state* from depriving "any person of life, liberty, or property, without due process of law[.]" So if community associations are not a "state," there is no requirement that associations provide due process, right?

Well, that's where things get tricky…

In 1946, the U.S. Supreme Court decided Marsh v. State.[ii] In Marsh, the Court held that a person's free speech rights were violated by a town that was *entirely* owned and operated by a private, for-profit company. The Court found that because the "public function" of the town had been transferred from the municipality to the company, it was sufficient to require the company to comply with certain constitutional safeguards.

In recent decades, planned communities and condominiums have gradually taken over many functions that were previously the exclusive domain of the state and local government. Most associations are responsible for the same or similar functions as governments (rule enforcement, trash removal, street lighting, snow removal, etc.). Larger communities often function *as* small towns, complete with private roads, security, parks, pools, golf courses, and multi-million dollar operating budgets. As could be predicted, it was not a giant leap for some courts across the country to analogize these community associations to the company in Marsh in determining whether associations were capable of performing "state action."

What Constitutes State Action?

Whether "state action" will exist in a community association context may not always be cut and dry. As a general rule, courts have been reluctant to find that an association has actually engaged in state action such as to find constitutional safeguards applicable, yet the courts have used the "state action" rational to sustain claims against associations based on fair housing and discrimination. [iii]

In Pennsylvania, the courts have held that no state action exists in litigation challenging the actions of community associations. In Midlake on Big Boulder Lake v. Cappuccio, the condominium association sought to compel an owner to comply with a document provision prohibiting posting signs on his property.[iv] The court acknowledged that if the association was a governmental organization rather than a private entity, the restrictions would clearly be unconstitutional. Since the court did not consider the association to be engaging in "state action," it did not find the enforcement of the sign restriction to be an impermissible infringement of free speech in violation of the Constitution.[v]

In Mazdabrook Commons Homeowner's Association, Inc. v. Khan, however, the New Jersey Supreme Court considered a similar question of whether a homeowners' association can prohibit residents from posting political signs in the windows of their own homes, reaching a different result.[vi] There, the Court determined that such a restriction was unconstitutional, even when contained in the association's governing documents, holding that "[b]alancing the minimal interference with Mazdabrook's private property interest against Khan's free speech right to post political signs on his own property, we conclude that the sign policy in question violates the free speech clause of the State Constitution."[vii]

So why did these cases come out differently? For one reason, New Jersey is unique in that an individual's affirmative right to speak freely is protected not only from abridgement by government, but also, in certain situations, from unreasonably restrictive and oppressive conduct by private entities due in part to New Jersey's more encompassing State Constitution.[viii]

So What Does This Mean for My Association?

Putting aside whether an association is engaging in state action or not, the reality is that every community association should have in place some

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form of "due process," whether you call it mediation, conciliation, alternative dispute resolution ("ADR") or "an opportunity to be heard." Why? Because the law and your association's governing documents (most likely) require it.

By way of example, section 3302(a)(11) of the Pennsylvania Uniform Condominium Act guarantees due process rights before fines for violations of the regulations may be imposed on unit owners.[ix] Similarly, the New Jersey Condominium Act prohibits the imposition of fines unless the unit owner is given notice and an opportunity to participate in a dispute resolution procedure.[x] In addition, both New Jersey's Condominium Act and Planned Real Estate Development Full Disclosure Act ("PREDFDA") provide that every association shall provide a fair and efficient procedure for the resolution of disputes between individual unit owners and the association as an alternative to litigation.[xi]

So, how do we go about ensuring due process in community associations? Again, most association governing documents with provide for the creation of either a hearing, covenants or ADR committee and a basic outline of how the grievance process should work. If that is not the case, your association should, in consultation with counsel, consider adopting a resolution that would provide for such a committee and lay out certain ground rules and operating procedures for how the hearing process should work.

Such procedures should include, but are not limited to:

> Establishment of a hearing/covenants ADR committee, either as stated in the documents or created by resolution, and clearly defined the membership requirements, Organizational structure, jurisdictional, quorum and meeting procedures, and confidentiality requirements;
>
> Procedures to resolve disputes, which may range from informal actions to investigations to written complaints.
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> Written complaints should state in clear and concise language the specific allegations with the pertinent details (times, dates, persons involved);
>
> Processes for amending and/or supplementing written complaints, including discovery, if necessary;
>
> Procedures for the actual hearing, including the rules and conduct of the hearing and the right to make statements and/or hear testimony; and
>
> The issuance of decisions, penalties and appeals of such decisions, whether to the association's board or some other governing body.

Again, unless these issues are sufficiently detailed in your governing documents, it is recommended that you consult with the association's counsel before adopting a due process resolution or conducting any hearings.

While ensuring that your association has adequate "due process" procedures can seem like a daunting task, the efforts taken by an association's board now, before a dispute becomes a larger problem, are imperative. The goal of the association should be to provide each unit owner with a clear and defined process to resolve disputes and an opportunity to be heard. Compliance with procedures already existent in your governing documents and/or adopting new, comprehensive procedures will go a long way toward preventing unnecessary and costly litigation in the future. It should also prevent your association from worrying about "state action" and having to question whether the association is actually providing due process.