

New Case Law: Akil Affan v. Portofino Cove Homeowners Association

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On October 29, 2010, a new case was published called Akil Affan v. Portofino Cove Homeowners Association. The case involved an owner suing his homeowners association for its alleged failure to properly clean drain lines, resulting in damage to the owner's unit. At trial, the court used what is called the "rule of judicial deference" to grant judgment to the Association. That rule was first announced in a case entitled Lamden v. La Jolla Shores Clubdominium Homeowners Association. It states that a court will defer to (i.e. assume to be correct) the decisions of a board of directors when choosing between alternative maintenance and repair options, provided certain criteria are met (e.g. proper investigation, act in good faith, etc.).

In the Affan case, the Court of Appeals concluded the judicial deference rule did not apply, not because the board chose the erroneous method of repair, but because it chose to perform no maintenance or repair. The court stated that under such circumstances, the decision not to perform any maintenance and repair cannot be justified under the judicial deference rule.

But, the court went onto mention a situation which could conceivably arise where the decision not to perform any maintenance or repair would be justified. What the court said is the following:

"There may be some rare situations in which an association's decision to do *nothing* to address a common area maintenance issue deserves judicial deference. For example, we can envision a scenario in which an association faces two extreme choices: doing nothing or adopting a prohibitively expensive course of action. A court may decide to extend judicial deference to an association's choice of inaction in that narrow context, if the choice stemmed from deliberations that carefully weight the alternatives and gave

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primacy to the best interests of the association and its members.”

What the Court of Appeals said, is it can envision cases, although quite rare, where the only real choices facing the board of directors are (1) do nothing, or (2) spend an exorbitant amount of money, and that under the right circumstance, choice number 1 could be justified.

In order to maximize the possibility for judicial deference, a board of directors should remain mindful that their decision regarding how and when to maintain the project is only entitled to protection by the court if the association can show, by proper evidence that the Board: (1) acted in good faith; (2) acted in the best interest of the community; (3) acted within the scope of its authority under the governing documents; and (4) selected among the means available for discharging common area maintenance and repair obligations. Remember, the Affan court foresees only “rare situations” where a decision not to act will be defensible, so use this potential defense with caution and with circumspection. The burden of convincing a court that a decision to do nothing was correct may be substantial.