

***Treo @ Kettner HOA v. Intergulf Construction Corp, Cal. App., Div. 4, D052402 (2008).***

See relevant documents below. Emphasis added.

**THE FACTUAL HISTORY**

[As a result of construction defects]. A provision of Association's CC&R's required that all disputes between it and Intergulf be decided by a general judicial reference pursuant to Code of Civil Procedure section 638.1 [Essentially a judgment by a court appointed referee, which precludes a trial by jury. See excerpt from Court records, below.] Intergulf moved for an order submitting the case to a judicial referee. Association opposed the order, arguing that **the provision of its CC&R's cited by Intergulf was not a contract as required by section 638** and that if it was, it was unconscionable and unenforceable. [This is the HOA arguing against a contractual interpretation].

The Enforcement sections [of the CC&Rs] describe various nonjudicial procedures for the resolution of disputes. Section 17.4.5 states that if those procedures are unsuccessful, the dispute shall be resolved by general judicial reference pursuant to section 638.

The trial court rejected Association's arguments and granted Intergulf's motion for Order of General Reference.

**THE APPEALS COURT BACKGROUND**

In *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361 our Supreme Court noted the popularity and advantages of common interest developments and traced the evolution of the legal concepts that make them possible. It noted that the viability of such shared ownership communities rests on the existence of extensive reciprocal equitable servitudes. (Id. at pp. 370-375.)

[Recall my repeated arguments that HOAs are based on equitable servitudes, going back to *The Homes Association Handbook*, and that the 2000 rewrite was geared to support HOAs, and not for the equitable treatment of homeowners].

The inclusion of such restrictions in the recorded declaration is sufficient notice to permit their enforcement as equitable servitudes. (*Nahrstedt v. Lakeside Village Condominium Assn.*). [CONSTRUCTIVE NOTICE PROCEDURE IS USED, IN MY OPINION, TO BYPASS THE CONSTITUTION].

In *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944

Our Supreme Court discussed the constitutional, statutory and policy considerations relevant to the waiver of trial by jury in civil cases. *Grafton* does not deal, as does this case, with jury waivers resulting from prelitigation contracts agreeing to general judicial references pursuant to 9 section 638.

**The court began by noting that article I, section 16 of the California Constitution states that trial by jury is " 'an inviolate right' " that in civil cases may be " 'waived by the consent of the parties expressed as prescribed by statute.' "** When a party, based on a

contract, asserts that a dispute be decided by some entity other than a jury, **they must identify a statutory basis allowing such waiver** and the consent of the opposing party to so proceed.

In *Grafton* the court held that the rules under which the parties to a lawsuit may waive jury trial **must be prescribed by the Legislature** and that the power to do so may not be delegated to the courts. (36 Cal.4th at pp. 952-955.)

## **COURT DISCUSSION**

The court noted that "even those jurisdictions permitting predispute waiver of the right to jury trial **do not uncritically endorse unregulated freedom of contract**; rather, they seek to protect the constitutional right to jury trial with a number of safeguards not typical of commercial law, including . . . restrictions on the type of contracts that may contain jury waivers, presumptions against a finding of voluntariness, inquires regarding the parties' representation by counsel as well as relative bargaining power and sophistication, and consideration of font size and placement of waiver clause within the contract."

It is at least arguable that there is some meeting of the minds between the developer and the party to whom the first conveyance is made. The problem, however, is that later purchasers and their successors, who will make up almost all association members, **effectively have no choice but to accept the CC&R's prepared by the developer**, including in this case the waiver of the right to trial by jury.

Treating CC&R's as a contract such that they are sufficient to waive the right to trial by jury does not comport with the importance of the right waived. CC&R's are notoriously lengthy, are adhesive in nature, are written by developers perhaps years before many owners buy, and often, as here with regard to the waiver of trial by jury, cannot be modified by the association. Further, the document is not signed by the parties.

Treating CC&R's as equitable servitudes makes possible the existence of common interest communities because they allow the continued governance of the community when multiple parties own the property and when such ownership changes over time. Because of this conclusion, it is unnecessary we reach Association's claim the jury waiver provision is unconscionable.

## **COURT OPINION**

**When the Legislature stated in section 638 that the right could be waived by written contract, did it mean the term contract to include equitable servitudes created by the CC&R's of common interest communities? We do not believe that it did.**

## **THE RELEVANT DOCUMENTS**

Treo HOA v. Intergulf opinion: [Jury trial](#).

### **CC&Rs**

Section 17.4.6 of article 17 is set out in capital letters and is entitled, "AGREEMENT TO DISPUTE RESOLUTION; WAIVER OF JURY TRIAL." [ A procedure providing sufficient notice, which I have argued must be used for all other important covenants, including those absent constitutional protections]. In doing so, the section states Intergulf, Association and owners

**acknowledge they give up their rights** to have the dispute tried before a jury. **The section states that the dispute resolution system described may not be amended without Intergulf's written consent.**

**1. Section 638 of CA civil procedure** Section 638 in relevant part states: "A referee may be appointed upon the agreement of the parties filed with the clerk, or judge, or entered in the minutes, or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties." (Italics added.) In a judicial reference, a pending court action is sent to a referee for hearing, determination and a report back to the court. A general reference directs the referee to try all issues in the action. The hearing is conducted under the rules of evidence applicable to judicial proceedings. In a general reference, the referee prepares a statement of decision that stands as the decision of the court and is reviewable as if the court had rendered it. The primary effect of such a reference is to require trial by a referee and not by a court or jury. (Trend Homes, Inc. v. Superior Court (2005) 131 Cal.App.4th 950, 955-956.)

**3. Equitable Servitudes [Note that the 2000 revision to the *Restatement Third, Property: Servitudes* dropped the very important word "equitable"].**

Civil Code section 1354, subdivision (a), states that CC&R's "shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development." The section declares that unless the CC&R's state otherwise, the servitudes may be enforced "by any owner of a separate interest or by the association, or by both."