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# Venus

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*Association and Security Company Not Liable*

## Resident Drunk Driver Kills Passenger – Association Sued

BY LAURI CROCE, ESQ.



According to California's Fourth District Court of Appeal sitting in Riverside County, a community association and its private security company did not owe an affirmative duty to control the conduct of a drunk-driving community resident responsible for the death of his passenger.

James Hauser was a passenger in a car driven by Jack Incorvia within the community of Canyon Lake. Incorvia, who was intoxicated, drove the car off a road into a tree, killing Hauser. Hauser's child brought a premises liability action against the Canyon Lake Property Owners Association and Barton Protective Services, Inc. Both the Association and Barton were able to secure a dismissal of the claims against them, which dismissals were recently upheld in *Titus v. Canyon Lake Property Owners Association* (filed May 18, 2004).

The Canyon Lake CC&Rs empowered the Association to levy fines, set speed limits, enforce curfews on minors, make arrests, detain individuals, and limit, curtail, or prohibit conduct that violates the CC&Rs or the Association's rules and regulations. The Association hired Barton Protective Services to maintain the community in a safe and secure condition and to enforce the Association's rules and regulations upon owners, residents and visitors of the Canyon Lake community. Barton had previously ticketed Incorvia for speeding, evading arrest, and "running stops." Incorvia had also been arrested or convicted of possession, use and sale of controlled substances, public drunkenness, trespassing, and reckless and erratic driving. The Association and Barton had actual notice that Incorvia and other minors within the

community consistently violated the CC&Rs and rules and regulations, in addition to violating traffic and criminal laws outside the Canyon Lake community.

The Plaintiff contended that the Association and Barton owed a duty to protect the community against drunken drivers like Incorvia, and should have "ejected" Incorvia from the community before he could cause serious harm. The Association's motion to dismiss was based primarily upon the ground that the complaint did not allege facts showing a legal duty to Hauser or that any legal duty was breached. Barton also contended it should be dismissed because it did not own, control, or possess the property on which the incident occurred.

The Riverside Superior Court granted the defendants' motions, stating that the complaint failed to allege any facts showing that (a) Barton or the Association had any knowledge of Incorvia's intoxication on the night of the accident, (b) they had the ability to stop Incorvia from driving while drunk, or (c) they had a duty to do so. The Court of Appeal agreed with the Superior Court in its published decision.

The Court of Appeal considered the following factors in upholding the dismissals:

- There was only a remote connection between Incorvia and Hauser, on the one hand, and the Association, on the other. "At best, all that is or can be alleged is that both individuals reside in the Community. There is no contractual relationship between them and the homeowners association. No promise was made to either Incorvia or Hauser upon which they relied."

- Neither the Association nor Barton created the peril — Incorvia's drunk-driving — nor did they act

to increase the already existing risk of harm to which Hauser exposed himself.

- Neither the Association nor Barton provided Incorvia with either the car or the alcohol, and they did not cause Hauser to become a passenger in Incorvia's car.

- The CC&Rs might have created affirmative obligations to provide for security within the community, but those obligations did not, without more, create a "special relationship" requiring the Association or Barton to take specific actions to protect community residents from a drunken Incorvia.

- Incorvia's conduct prior to the accident did not present a "high degree of foreseeability" of harm to community residents. "[W]hile it was foreseeable that Incorvia could become intoxicated, drive a car, and cause an accident, 'almost any result was foreseeable with the benefit of hindsight.'" The court went on to explain that although Incorvia's previous drug and alcohol use and reckless driving satisfied a low threshold for legal foreseeability in its analysis of duty, the risk of harm was significantly less certain than a clear foreseeability of harm, as in a case involving months of verbal and physical assaults, threats, and intimidation against the plaintiff by the defendant's tenant in *Madhani v. Cooper* (2003) 106 Cal.App.4th 412. There were no allegations here that Incorvia had previously harmed, assaulted, or threatened anyone.

- Even assuming the Association could "eject" a resident from the community or bar him from using its streets, such a remedy would be substantially more burdensome than evicting a tenant from an apartment building. There is no such thing as an unlawful detainer for

Providing Affordable Housing

## Homestart — Conversion Team Pays Back the City of El Cajon



BY PATEE BARTA, EDITOR

On May 11, 2004 at 3:00 p.m. in El Cajon City Council Chambers, Homestart LLC member's John Kalas, Joel Kriger, Tom Wright, Jon Wayne, and Kyle Clark lined up at the podium to present Councilmember Bob McClellan a hefty check for \$1.766 Million. This was repayment of \$1.2 Million, with interest, of the El Cajon City loan for the condo conversion known as Emerald Estates.

The Homestart Team received a commendation, after the oversized check handoff, for the conversion of Emerald Estates from apartments to affordable condominiums. This was the first group to successfully convert with city redevelopment agency assistance, and it represented more than two years of hard work.

According to Developer Tom Wright, "This was the brainchild of City Councilman Bob McClellan who was trying to get someone to convert dilapidated apartment complexes with city help into affordable housing."

Imagine a young couple in today's excessively priced housing market trying to purchase a small home. With a shortage of affordable housing in San Diego and apartment rents topping out, help from parents, grandparents and friends is often necessary. Without assistance, prospective first-time home buyers could find themselves in perpetual renters' hell.

Enter the Condo Conversion Team, Homestart LLC, a group of businessmen with the forethought to partner with the City of El Cajon to spearhead the conversion of 22 apartments into condominiums in an undesirable area.

According to the City of El Cajon, "This is the first condominium conversion project the City has partnered on and all units will be sold to low and moderate-income families earning 120% or less of the Area Median Income."

### Build It Affordable and They Will Come

Bob McClellan had a recurring idea to try a condo conversion and continually mentioned it to John Kalas at weekly luncheons. "I thought it was

crazy with liability issues and the costs to do the project... but two-and-a-half years ago he convinced me to take on the project," Kalas said.

Kalas consulted attorney Joel Kriger on the legal aspects of such a project, then thoughtfully built the conversion team below:



Headstart LLC members line up behind John Kalas as he presents Councilman Bob McClellan a check for \$1.2 Million plus interest, in repayment of funds loaned to condo convert Emerald Estates. (Left to Right: Jon Wayne, building contractor; Tom Wright, developer; David English (Sold units-not a partner); Jenna Canwaiter (not a partner), Sterling Capital; Joel Kriger, attorney; Kyle Clark, John Burnham real estate broker; John Kalas, Castle Breckenridge Management owner/partner.

### Homestart LLC

**John Kalas** - Owner and Partner in a local management company specializing in common interest developments

**Joel Kriger** - Attorney and expert in condominium law

**Tom Wright** - A local developer

**Jon Wayne** - A local expert building contractor who specializes in condominium refurbishment

**Kyle Clark** - A local real estate broker with John Burnham and Co. - Site Acquisition

Although a talented pool of professionals, well-versed in the business of real estate, building, condominiums and law, there were delays and some red tape to wade through. Many steps, some baby and some grand, were taken.

The first step was to make an application to the City of El Cajon for a community block grant (CBG Funds). The City granted Homestart \$1.2 million to purchase a property in El Cajon. A 22-unit apartment complex on Emerald Ave. was acquired with Kyle Clark's assistance, however, the location was considered one of the two worst streets

for health and safety violations in the city. Optimistically, the team forged ahead.

Next, a refinement of the City's building code for condo conversions went through a very arduous review process with the city building department and

as a result the following changes were adopted:

- (1) a new ordinance for parking for condo conversion projects
- (2) a new ordinance for sub-metering for older condo conversions
- (3) installation of dual pane windows on condo conversion projects is now a requirement.

Even though changes were required, Jon Wayne kept an anticipative view, saying, "I have to admit the most rewarding part of my job [on Emerald] and any reconstruction project is to take a dilapidated building and turn it into a vibrant useful product. I enjoy being able to look through the years of neglect and envision what it will become."

After compliance with city council requirements, Homestart, "after many discussions among the partners, reached a consensus whereas it was agreed the interiors of the units needed to be gutted and fully refurbished," said Wayne.

According to Wayne, "We worked as a team to create the correct mix of products, textures, finishes and fixtures



owner-occupied and not used for rental property.

### Law and Negotiations

Attorney Joel Kriger's role in the project was multi-fold. After the City of El Cajon lent Homestart the \$1.2 million, the terms and conditions of the loan were converted into an affordable housing agreement, which was different and unique than typically done.

"This involved extensive negotiations with not only the City staff but also Morgan Foley the El Cajon City Attorney. This was the first time affordable housing funds were being used for the purpose of converting an apartment building into condominiums and

### It's a Wrap for Homestart's Emerald Estates — Annual Meeting for New Homeowners

In June all the units were sold and the first annual meeting of the association was scheduled to select its new board of directors. Dinner was provided for all the members and their families. John Kalas and other representatives from Castle-Breckenridge Management were in attendance.

Homeowner Karen Hill said, "there were about six families buying that heard about the opportunity from a friend so many of the owners were already friends. Barbeques and other get-togethers are regular happenings."



to create a pleasing interior and exterior theme. Jon Wayne Construction created the total project framework and Tom Wright and Sandy Kriger of Sandiggity Designs completed the interior design package."

"Our package was submitted to the City for approval...and once approved the work commenced. We encountered some building code challenges as the project unfolded... that once resolved, paved the way for the completion of ours as well as future projects for us and others," said Wayne proudly.

With the goal met, newly-built condos in Emerald Estates were sold to first-time homebuyers (a buyer that has not owned their own home in the last 36 months). All buyers had to qualify as not only first-time home buyers but also under affordable housing guidelines for income. Therefore, they could not make too little or too much money. The conversions were also required to be

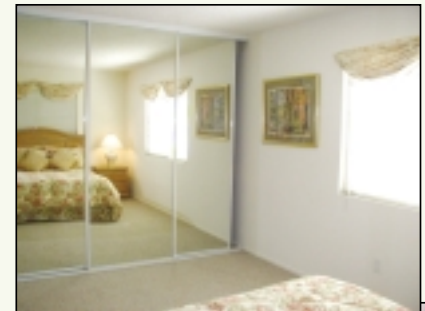
sold as affordable housing," said Attorney Kriger.

### A Win-Win Venture

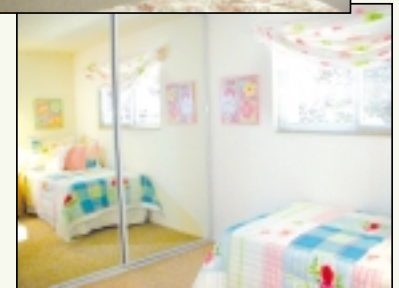
With few low income housing programs in a city with 50 percent of the population in apartments, Homestart LLC was the first venture that El Cajon gave money to in order to better the community and promote affordable homeownership. John Kalas' repayment to The City of El Cajon, with interest, and Councilman Bob McClellan's ongoing lunchtime vision and urging led to a win-win.

Sara Stiner, wife of board Secretary Shannon Stiner said, "It was tough getting moved in because of paperwork delays with the City but once in everyone was happy because of similar financial situations — it's hard to buy in San Diego. It has been a good com-

munity to live in within the complex because it is safe for my three-year-old daughter Megan and other Emerald Estates' children. I really look forward to Emerald Avenue's redevelopment to match conversion of Emerald Estates' and El Cajon's city improvements."



"The overall quality of workmanship was excellent in the conversion of Emerald Estates," according to new homeowner Sara Stiner.



Resident Karen Hill agreed when neighbor Sara Stiner said that "purchasing at Emerald was positive because most of the neighbors in the complex are involved in the obvious pride in ownership of the units."



"I was present along with Bob McClellan, the El Cajon City Councilman, whose vision and support allowed this project to develop and proceed to completion. Mr. McClellan's continuing support of conversions in the City of El Cajon has fostered a lot of activity in this regard. These projects are going forward all for the betterment of the community and for first-time homebuyers who are trying to establish a foothold in an especially costly housing market," said Attorney Kriger.

From an attorney's perspective, Kriger said it was an interesting experience dealing with City staff and taking part in the development of a condominium project. All the partners were extremely pleased when the final units were sold.

What next? The parting words as the El Cajon City Council bestowed the commendation on the Homestart team were, "When are you going to start your next conversion?" Homestart LLC will keep you posted. ■

## 2004 INTERIM LEGISLATIVE UPDATE

While preliminary and subject to change, here is a brief rundown on some of the more important pending legislation as of July 2004 that will directly affect you and your community or properties:

1. **AB 2598 & SB 1682** - More than just restrictions on assessment collections
  - Expands an owners rights to place signs, posters, flags, and banners to their exclusive use common areas;
  - Provides a \$500-per-violation penalty for improper withholding of Association records;
  - Expands the types of records that must be made available to owners, including all association contracts;
  - Limits the ability to collect delinquent assessments less than \$2,500 to small claims court or recording a lien that can not be foreclosed upon;
  - Repeals the ability of owners to pay delinquent assessments under protest;
  - Restricts the available remedies to collect delinquent assessments in amounts over \$2,500;
  - Gives owners the right to demand alternative dispute resolution over assessment delinquencies and requires associations to respond within 15 days; and
  - Provides owners with the right to reclaim their foreclosed property.
2. **AB 1836** - Forced dispute resolution at no cost to owners:
  - Requires homeowner associations to provide "fair, reasonable, and expeditious" procedures for resolving disputes;
  - Owners may not be charged a fee to participate in the process;
  - Sets minimum requirements for the procedures.
3. **AB 2376** - Changes to architectural review procedures:
  - Procedures for reviewing architectural change applications must follow the statute;
  - Associations must provide "fair, reasonable, and expeditious" procedures for reviewing architectural change requests;
  - Requires decisions on architectural change requests to be in writing; and
  - Provides an appeal process for denials of change requests.
4. **AB 2718** - Changes to financial disclosures and reserve calculations:
  - Requires a new form report for financial disclosures to owners;
  - Changes the disclosure notice when associations borrow from reserves;
  - Changes the requirements for conducting reserve studies;
  - Requires a "qualified person" to provide the reserve fund calculations and defines "qualified person" as a licensed contractor for the reserve item (for example, plumbing contractors for plumbing estimates, electrical contractors for electrical estimates, elevator contractors for elevator estimates, etc.)

While the above proposals are not approved and effective as of July 2004, they do appear to be headed for approval. If you feel strongly about any of these proposals, you may wish to contact your elected representative or the governor to express your opinions.

*Ken Dillingham, Esq. is the CAI-San Diego Chapter Legislative Action Committee Chairperson and a delegate to the California Legislative Action Committee in Sacramento.*



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## Drunk Driver

▶ CONTINUED FROM PAGE 1

a resident/owner. The imposition of a duty to eject Incorvia could also have undesirable consequences for the community.

- Moreover, ejecting Incorvia, assuming it could be accomplished both legally and practically, would simply preclude him from driving within the borders of the community. There was no reason to believe that ejection from the community would prevent him from driving intoxicated or injuring people in other communities. Ejecting him from the community would appear to be particularly ineffective as to protecting his own passengers, such as Hauser, who could just as easily have been riding with Incorvia outside the community.

In conclusion, the Court of Appeal found that Canyon Lake was not legally responsible for the death of James Hauser caused by Jack Incorvia, a resident of the community who, while intoxicated, caused the fatal accident. ■



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