

COMMUNITY COUNSEL

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RECENT CASES

- ♦ **WANT A DEFINITION OF A "GOOD NEIGHBOR?" TRY OUR FIRST CASE. NOT!**
- ♦ **LENDER'S ATTORNEY NOT LIABLE FOR MALPRACTICE TO BUYER OF PROPERTY WHEN ATTORNEY ASSISTED BUYER WHILE REPRESENTING THE BANK WHO FINANCED THE PURCHASE.**

THE INFORMATION GIVEN IS SUMMARY IN NATURE, FOR EDUCATIONAL PURPOSES. IT IS NOT INTENDED AS SPECIFIC OR DETAILED LEGAL ADVICE. ALWAYS SEEK INDEPENDENT LEGAL COUNSEL FOR ADVICE ON YOUR UNIQUE SITUATION.

Rough Surfing Ahead?

A recent decision of the U.S. 11th Circuit Court of Appeals in Atlanta is being pointed to by some as having ramifications for enforcement of restrictions against adult internet sites based in residential communities.

The September 21, 2001 decision arose when a Tampa-area concern operating "voyeurdorm.com," a pay-per-view site with several women living in a home surrounded with some 30 cameras, asked the City of Tampa for a ruling on whether the enterprise was an "adult entertainment facility" as defined by the Tampa City Code. The City's Zoning Administrator, the Zoning Variance Review Board and the U.S. District Court for the Middle District of Florida, all ruled that the operation was indeed an adult entertainment facility under the City Code. The 11th Circuit panel disagreed.

In doing so, the Court managed to confine its decision to the narrowest possible grounds, avoiding both wider constitutional issues and issues of direct relevance to community associations.

The court's decided, simply, that the District Court had misread the City Ordinance, which defines an adult entertain-

ment operation as a premises on which certain features are offered to the public. Because no member of the public physically attends performances at the premises, the ordinance did not apply to the activities taking place in the premises, the court ruled.

Advocates who attempt to use this case to prevent enforcement of private, contractual restrictions against operation of *any* non-residential enterprise, or occupancy of property by other than a single family, will get limited mileage out of this case, as it does not address

any of the essential differences between interpretation and enforcement of private covenants as opposed to public laws and ordinances, nor the difference between the constitutional protections against governmental actors and the fundamental right of persons to contract with their neighbors, and to compel compliance with those contracts.

The case does, however, offer a sign of things to come: local zoning ordinances will need to be redrawn in light of the realities of Internet commerce, and the differences between community association and governmental regulation of home-based businesses will again be tested in the courts.



WATCH FOR INTERNET BASED BUSINESSES IN YOUR COMMUNITY. THE AREA IS ONE FOR GROWING CONCERN

WEAN & MALCHOW, P.A.

1305 EAST ROBINSON STREET, ORLANDO, FLORIDA 32801

TEL: (407) 894-0040 FAX: (407) 894-5677

W-M@WML0.COM

RECENT CASE SUMMARIES

In **Parlato vs. Secret Oaks Owners Association, Inc., et al.**, 26 Fla. L. Weekly D2244 (Fla. 1st DCA 9/13/01) Association appealed a final administrative order denying an application to build a dock on the St. John's River. The Department of Environmental Protection denied the application on the ground that the proposed dock would violate the riparian rights of adjacent landowners. The history of the case is long and complex, but relevant to the decision. In May, 1987 the developer of the Association granted an easement to all of the property owners allowing them access to the St. John's River. At that time, a dock referred to by the parties as the "main dock" extended from Lot 10 out into the river. Additionally, there was an L-shaped auxiliary dock running parallel to the shoreline from the main dock. The easement authorized the landowners to cross over Lots 10 and 11 and to use "any dock now or hereafter located thereon." A few years after the easement was recorded, the Parlatos offered to purchase Lot 10 from the developer. While the negotiations were in progress, the Parlatos advised the other property owners in the subdivision that they would not allow the other owners to use the main dock and that the auxiliary dock would be removed. The developer disapproved of this plan by declining the offer and returning the Parlato's deposit money. The Parlatos contacted the developer a few months later and advised him that they had made a mistake and that if he would sell them Lot 10, they would be "good neighbors." As part of this sale, the easement was modified by the Parlatos and all members of the Association to provide that all lot owners would have access to the main dock, but that the Association would be responsible for the maintenance and repair of the dock as well as the cost of insurance. Soon after the purchase of Lot 10, the Parlatos had the auxiliary dock removed - at 5:00 A.M. The Association filed suit against the Parlatos seeking declaratory and injunctive relief. The Association prevailed and the court authorized the reconstruction of the auxiliary dock, provided the Association could get the necessary permits. This decision was affirmed on the first appeal to the Fifth District Court of Appeal. Nineteen months later, the Parlatos filed a complaint for supplemental relief in the first action, alleging that the Association had submitted an application to permit the construction of a new dock extending out from the easement. The Parlatos claimed that the Association was not authorized to build a new dock, because a new dock would violate the terms of the easement agreement. The trial court held that the Association was authorized by the terms of the easement to construct a new dock. This decision of the trial court was again affirmed on a second appeal to the Fifth District Court of Appeal. The Parlatos then filed an objection with the Department of Environmental Protection to the permit application to construct a new dock filed by the Association. The Parlatos argued that the Association lacked standing to apply for a dock permit because the members of the Association had only an easement and did not have an ownership interest in the land in question. The Department ruled in favor of the Parlatos on this issue and denied the permit. The decision of the Department was overturned in a third appeal to the Fifth District Court of Appeal. A current, fourth appeal to the Fifth District Court of Appeal arose out of the Parlatos next objection to the permit, which alleged that the proposed dock would interfere with the riparian rights of the adjacent landowners (*i.e.*, the Parlatos). Based upon a finding that the proposed dock would interfere with the riparian rights of the adjacent landowners, the Department rejected the Association's application to construct a new dock. In this appeal to the Fifth District Court of Appeal, the court reversed the decision of the Department and held as a matter of law that the permit for the construction of the dock should have been approved.

In **McCarty vs. Browning**, 26 Fla. L. Weekly D2194 (Fla. 3rd DCA 9/12/2001), McCarty brought a legal malpractice claim against Browning and Browning's law firm. In 1992, Browning handled a closing for the purchase of McCarty's home. Soon after the purchase, McCarty was cited by Monroe County for a code violation related to the construction of a downstairs enclosure, construction of which pre-dated McCarty's purchase of the home. In order to bring the property into compliance, McCarty removed the offending enclosure. McCarty then filed the malpractice action against Browning alleging that Browning was negligent for failing to discover and to disclose the existing code violation. Browning did not enter into an attorney-client relationship with McCarty for the purpose of examining building permits nor investigating the applicable land use regulations to ensure that the property was in code compliance. Instead, Browning represented the lender and assisted McCarty's interest at the closing only so far as preparing and reviewing loan documents, receiving and disbursing funds provided by the lender, and overseeing the actual closing. The trial court granted summary judgment in favor of Browning and dismissed McCarty's lawsuit. In affirming the trial court, the Third District Court of Appeal held that in a claim for legal malpractice, it is not sufficient merely to assert an attorney-client relationship, but to also allege that the relationship existed with respect to the acts or omissions upon which the malpractice claim is based. The court further noted that an attorney has a duty to advise the client of legal problems not within the scope of the task the attorney was retained to perform and of which the attorney becomes aware. However, the court refused to require the attorney to unilaterally expand the assigned tasks to investigate and analyze every issue conceivably related thereto simply as a method of self-protection.