

COMMUNITY COUNSEL

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RECENT CASES

- ♦ **Extension of covenants constitutes a modification of them.**
- ♦ **Recovery of attorney's fees is permissible where owner purchased after 1988 change to S. 57.105, F.S.**
- ♦ **Riparian rights include the right to build a dock on a waterway.**

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Mold and Mildew Issues

One cause of action that finds its way to the courts with increasing frequency is a claim for personal injury and/or property damage based on the presence of mold and mildew in a living or work environment. As a sure sign that there is a potential for a great many more such actions personal injury law firms now frequently sponsor mold and mildew seminars.

Community Associations need to consider this trend and its possible impact on them. While it is true that the Association is not a successor to the developer and does not share liability for original design and construction defects, once it becomes aware of a condition permitting trapped moisture the Association must take appropriate action to correct existing conditions in each instance where it bears a maintenance obligation of any relevance. This can involve opening walls and ceilings to correct water leaks, installing moisture barriers, and even instituting design changes to better handle flowing water. The problem may be manifest not only in residential buildings but in clubhouses as well. Many so-called sick buildings are now recognized as having severe mold and mildew problems.

In reaction to the trend, many property and liability insurers have revised their pollution exclusions to cover damages in any way related to "... solid, liquid, gaseous or thermal smoke vapors, soot, fumes, acids, alkalis,

toxic chemicals, waste materials, or other irritants, contaminants or pollutants." In addition, typical directors and officers policies exclude coverage for personal injury or property damage, meaning that available errors and omissions policies will provide only limited coverage for such claims.



Thus, many communities may have to face claims without the backup of insurance policies. Associations interested in avoiding claims may do well to do some preventative checking around their premises. Moisture detection equipment is readily available and can be highly accurate at determining the amount of moisture hidden by walls with minimal destructive testing. Additionally, the local Board of health and many private experts are available to test air quality for the presence of dangerous spores. By monitoring complaints and water intrusion or spillage incidents, Associations can perform inexpensive tests post-clean up to determine whether any residual problems may be festering.

ASSOCIATIONS THAT MAY BE WITHOUT INSURANCE COVERAGE SHOULD DO PREVENTATIVE CHECKS FOR MOISTURE

Also, Associations should be careful to monitor clean-ups performed by owners and their contractors, resulting from broken or leaking pipe incidents, to be certain that all trapped moisture has been removed. Failure to check on the work may lead to a claim down the road, when the original source of the moisture is difficult to prove.

RECENT CASE SUMMARIES

In **Venetian Isles Homeowners Association, Inc., vs. Albrecht**, 27 Fla. L. Weekly D1575 (Fla. 2nd DCA July 10, 2002), Association appealed an adverse final judgment which held that Association lacked the ability to enforce the restrictive covenants contained in the declaration. In 1997 Property Owner purchased property in the subdivision covered by the restrictive covenants. Property Owner built a wall that violated the height and location requirements of the covenants. Association brought an action to have the wall removed. The restrictive covenants contained a provision which provided that the restrictions would run with the land and be binding until January 1, 1990 unless sooner altered, modified or terminated. The trial court granted summary judgment in favor of Property Owner and held that the word "modified" did not include the ability to extend the restrictive covenants beyond January 1, 1990. The Second District Court of Appeal reversed the trial court. The appellate court ruled that the extension of the duration of the restrictive covenants is by plain meaning a modification thereof. Consequently, the appellate court held that the restrictive covenants could by proper amendment be extended beyond the initial term.

In **Holiday Square Owners Association, Inc., vs. Tsetsenis**, 27 Fla. L. Weekly D1601 (Fla. 5th DCA July 12, 2002), Unit Owner brought an action against Association and another member operating a restaurant, alleging that Association failed to enforce the governing documents in a commercial condominium. Specifically, Unit Owners alleged that Association granted special privileges to the other member, privileges Association did not also grant to the Unit Owners. Unit Owners ultimately settled the case with the other member prior to trial. However, Unit Owners proceeded with the cause of action against Association. On the eve of trial, Unit Owners' voluntarily dismissed the claim against Association. Association sought an award of prevailing party attorney's fees pursuant to the terms of the declaration. The trial court denied Association's motion for attorney fees. Association appealed the trial court's order denying Association an award of attorney fees. Unit Owners argued on appeal that the declaration provides for prevailing party attorney fees only in actions to "enforce" the declaration. Therefore, Unit Owners argued, as a defendant in the lawsuit the Association was not suing to "enforce" the declaration but that Association was acting solely in a "defensive" posture. Therefore, according to Unit Owners, Association is not entitled to attorney fees because Association is not enforcing the declaration. The Fifth District Court of Appeal reversed on several grounds. First, pursuant to Section 57.105(5), Fla. Stat., there is a reciprocity provision that allows both parties to a contract to recover attorney fees in actions to enforce the contract. The appellate court held that although this statute was not in effect at the time the declaration was recorded, Unit Owners' purchase of the unit after the effective date of the statute acted as a novation of the declaration. Secondly, the appellate court ruled that at all material times both parties were on notice that attorney fees were an issue in the lawsuit.

In **Shore Village Property Owners Association, Inc., et al., vs. The State of Florida, Department of Environmental Protection, et al.**, 27 Fla. L. Weekly D1590, (Fla. 4th DCA July 10, 2002), the appellate court was called upon to resolve an issue related to riparian rights. In Shore Village, all of the lots were burdened with a 20-foot easement and right of way for road purposes to allow access to the Indian River. In 1971 the owners in Shore Village constructed a dock in the easement area. The dock fell into disrepair and in 1998 one of the lot owners contracted to replace the dock. One of the lot owners adjacent to the Indian River (and the dock project) complained to the Department of Environmental Protection. DEP red-tagged the dock and construction came to a halt. Association brought a declaratory judgment action against the two property owners adjacent to the Indian River and also against the DEP to obtain approval for the construction of the dock. The trial court ruled that the language creating the easement included riparian rights to access the Indian River. However, the trial court ruled that these riparian rights did not include nor permit the construction of a dock. The Fourth District Court of Appeal upheld that portion of the trial court's order that found that the easement included riparian rights to access the Indian River. However, the appellate court reversed the trial court and held that the riparian rights permitted the construction of a dock. The appellate court affirmed Florida Law with respect to riparian rights and noted that these rights include the 1) general use of the water adjacent to the property; 2) the right to wharf out to navigability; 3) to have access to navigable waters; and 4) the right to accretions. In summary, the appellate court held that riparian rights include the right to build a dock to have access to navigable waters.