

# COMMUNITY COUNSEL

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## RECENT CASES

- ♦ **The statute regulating CAMs does not permit private enforcement by association members.**
- ♦ **Owner who failed to prosecute case after obtaining an injunction must pay Association's attorney's fees when trial court determines what is reasonable.**

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.

## Year-End Considerations

As 2004 winds down, community associations are faced with a series of year-end tasks and considerations that should be addressed promptly to prevent negative repercussions in 2005. Among the tasks that are presented:

1. The bylaws of both condos and HOAs typically call for a calendar year fiscal year. If so, both types of communities need to engage CPAs to timely prepare their financial statements for 2004. Chapters 718, 719 and 720 all impose deadlines for this work, and engaging the CPA earlier will help ensure that the statements will be prepared when required. HOAs need to keep in mind the new financial scrutiny requirements that came into effect on October 1, 2004, which are applicable to the 2004 budget and call for differing levels of scrutiny based on the size of the budget.

2. The budget needs to be adopted, allowing sufficient time to draft a budget, notice the meeting, adopt the budget and then give notice to the members of the 2005 assessments. If you haven't started the process, you are too late. Generally, the failure to timely adopt a budget results in the prior year's budget extending into the next fiscal year.

3. Both the budget and the financial statement in condominiums need to include reserve disclosures that establish the reserve account

balances as of the beginning of the next year.

4. Annual meetings and elections need to be scheduled, noticed and held. At these meetings a vote to roll any surplus funds over to the following year is appropriate, to prevent negative tax consequences as to any surplus funds.

5. As with personal resolutions, it is appropriate to chart a course of association goals for the coming year, representing the priorities of the Board and the community at large. It is also appropriate to reflect on the year gone by and consider what changes need to be made based on the past experiences.

6. While condominiums need to update their Q & A sheets as needed, with any new budget's change in assessments, the beginning of the new year is one of those times.

7. Be sure to calendar deadlines for the coming year, including notice dates to terminate or renew existing contracts, such as management and insurance policies.

8. Organize and close the official records for 2004 so that they are available for inspection by the members.

9. Have a happy new year!



**The Attorneys and staff of Wean & Malchow, P.A. wish each of you a healthy and safe holiday season and a happy, prosperous and interesting 2005.**

## RECENT CASE SUMMARIES

In **Gerecitano vs. Barrwood Homeowners Association, Inc.**, 29 Fla. L. Weekly D1909 (Fla. 4<sup>th</sup> DCA 8/18/2004), Owner sought review of an appellate decision rendered by the circuit court in favor of Association, an HOA under Chapter 720, Fla. Stat. Association's governing documents required owners to pay monthly assessments, due on the first day of each month, and charged a late fee for non-payment after 10 days. At the December, 1999 annual membership meeting, a \$10.00 per month increase in the monthly assessment was passed, in part, to pay salaries to Association's officers. Owner refused to pay the increased assessment and, accordingly, underpaid his monthly assessments by \$10.00 per month, from January to August, 2000. In August, Owner informed Association that he would withhold his entire assessment and he did not pay any portion of the September, 2000 assessment. In September, 2000, Association filed suit against Owner. Association's complaint sought either payment or foreclosure of its lien for the \$10.00 per month per unit assessment for eight months, the unpaid assessment and late fees for September 2000, and attorney's fees. Owner defended the action by contending the \$10.00 increased assessment was not enforceable, since it was for an improper purpose pursuant to Chapter 468, Fla. Stat., and further that Association had no right to charge a late fee for the September, 2000 assessment. After suit was filed, but prior to the final hearing, Owner paid the assessment for September, 2000, less the \$10.00 portion to which Owner objected. After a non-jury trial, the trial court entered its Final Judgment awarding Association the \$20.00 late fee for the September, 2000 assessments. The trial court also entered judgment in favor of Owner on the additional \$10.00 per month assessment, specifically holding that it was an improper assessment pursuant to Section 468.432, Fla. Stat. The trial court also denied Association's claim for attorney's fees. In reversing the trial court, the Fourth District Court of Appeal noted that the trial court specifically relied upon Section 468.432 and 468.431, Fla. Stat. These provisions relate to licensure of community association managers. Chapter 468 sets forth a statutory scheme for regulation, licensure, examination, and continuing education for community managers by the Department of Business and Professional Regulation. This chapter permits the Department to undertake disciplinary proceedings against those in violation of these statutes. However, the appellate court noted that conspicuously absent from the statutory scheme is any grant of private enforcement rights to individual unit owners or evidence of any legislative intent to allow individual association members to refuse to pay a validly passed assessment based upon a violation of the statute. The clear statutory scheme is to provide for discipline and regulation of community association management by the Department, not a method for invalidating otherwise proper assessments. While persons violating these statutes may be subject to disciplinary proceedings or criminal sanctions, there is nothing in the statute allowing a violation of the statute to be a defense to a lawful assessment. Simply, it is not a defense to an assessment that the payments were being made to unlicensed persons.

In **Baratta vs. Valley Oak Homeowners Association, Inc.**, 29 Fla. L. Weekly D2620 (Fla. 2<sup>nd</sup> DCA 11/19/2004), Association desired to have black-painted cast aluminum signposts and mailboxes lining the streets of the subdivision, suggesting that black mailboxes and matching signposts would enhance property values and promote community pride, while the existing white mailboxes showed dirt, appeared outdated, lacked "curb appeal" and were not harmonious with the landscape. Owner was perfectly satisfied with his current mailbox and objected to the proposed new mailboxes. Owner filed suit for temporary and permanent injunction to prevent Association from assessing each member \$460.00 for the new mailboxes and signposts without a vote of the owners. Owner obtained a temporary injunction against Association. Thereafter, there was no record activity for a period in excess of one year. Association moved for a dismissal of the case for failure to prosecute, for a dissolution of the temporary injunction, and for attorney's fees. The trial court dissolved the temporary injunction and dismissed the case for failure to prosecute and determined that Association was the prevailing party for purposes of an award of attorney's fees and granted fees in the amount of \$6,821.25. Owner appealed, disputing both entitlement to and the amount of fees awarded. The Second District Court of Appeal ruled in favor of Association on the issue of entitlement because Association was the prevailing party and timely claimed its right to attorney's fees. However, the appellate court reversed the amount of fees awarded due to the fact that the trial court failed to make the necessary findings as to the hourly rate, number of hours reasonably expended, and the appropriateness of reduction or enhancement factors as required by law. Specifically, the appellate court reversed the amount of fees awarded and remanded the case to the trial court to make findings explaining how \$6,821.25 in fees was reasonable for a case involving a total of thirty minutes in the courtroom and a year of no record activity.