

# COMMUNITY COUNSEL

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## Recent Cases

- ♦ **Owner could not enjoin the filing of a foreclosure action, as the right to defend the suit gives a remedy at law preventing irreparable harm.**
- ♦ **Reservation of easement on Plat to access water did not allow easement holders to do any thing but pass without undue delay.**

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## Care to Smoke? In Colorado Take it Outside.

A trial court-level decision issued by a court sitting in Golden, Colorado has found that the smell of smoke seeping from one residential condominium unit into another is a nuisance, and that a Declaration of Condominium can be amended by the members to prohibit smoking within any unit.

The condominium in question was an older four unit condominium conversion. Despite numerous attempts by the smokers to stop the infiltration of the odor into the adjacent unit, and despite expert testimony that the heating and ventilation systems were separate, the court nevertheless determined that the odor met the definition of a legal nuisance and determined that an amendment was a reasonable means of addressing the problem. The court summarized its task as follows:

*The court then must consider whether seepage of second hand smoke or its smell constitutes a nuisance which is a source of annoyance or interferes with the peaceful possession of the property. If so, the court must additionally consider whether the remedy of banning all smoking on the Property was done reasonably and in good faith, and was not otherwise violative of any legal rights.*

In finding for the defendant Association, the court refused to distinguish between the actual smoke and its odor, relying on the dictionary definition of a nuisance, i.e. :



*... activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that law will presume resulting damage.*

It found substantial evidence that the smell was a long standing problem for multiple residents and had caused some to move or threaten to do so.

The court also found that despite a raucous and volatile membership meeting to consider the issue, the adoption of the amendment prohibiting smoking inside any unit was an act done in good faith for the purpose of ridding the community of a problem, and not for any vindictive reason. The court analogized the problem to that of regulating loud noise. It also determined that there was no authority to support the argument that smoking is a fundamental right protected by the United States constitution.

## Is smoking in one's home an unlawful activity?

Of course, this case is binding only on the local jurisdiction in Colorado. On one level, however, the decision represents a new extreme in the protection of public health – determining that the “normal” activity of smoking within a private home is an unwarranted and unlawful use of the home. On another level it represents a further limitation of the autonomous use of private property when persons live in common with others. This is the “burning” question of our time: in a community association, how does one properly balance the property rights of the individual against the rights of the other residents?

## RECENT CASE SUMMARIES

In **The Reserve at Wedgefield Homeowners Association, Inc., vs. Dixon**, 32 Fla. L. Weekly D214b (Fla. 5th DCA 1/12/2007), Owner filed suit against Association seeking relief from Association's imposition of assessments on her property. Owner purchased two lots in Association, but only one house is located on both lots. Owner received notifications from Association that she owed assessments on both lots. However, Owner alleged that she received notification from the vice president and secretary of Association indicating that Owner only owed assessments on one lot (because only one home is located on both lots). Owner alleged that Association continued to assess dues on each of Owner's lots and that Association filed a claim of lien against Owner's property because she failed to pay the assessments. Along with her complaint, Owner filed a verified motion for emergency injunctive relief. In her motion, Owner alleged the same facts as were alleged in her complaint with the additional allegation that Association had forwarded correspondence to her indicating that Association would institute foreclosure proceedings against Owner if she failed to pay the dues which were owed. The trial court conducted a hearing on the emergency motion for injunction. After the hearing, the trial court entered a written order granting Owner's motion for temporary injunction and enjoining Association from initiating any proceeding to effect the foreclosure or execution of its lien on Owner's property. The trial court's order simply states that "because each parcel of real estate is unique unto itself, the foreclosure of plaintiff's property would amount to irreparable harm" and "under the circumstances of this case, the plaintiff has no adequate remedy at law and has substantial likelihood of success on the merits of this action." The trial court also waived the bond requirement. Association appealed the granting of the injunction on the basis that the order failed to comply with the technical requirements of the law. The Fifth District Court of Appeal noted that a preliminary injunction is an extraordinary remedy which should be granted only if the party seeking the injunction establishes the following criteria: (1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) consideration of the public interest. In this case, the trial court's injunction order failed to order Owner to post a bond and fails to set forth a factual basis to support each of the elements of a temporary injunction. As such, the appellate court ruled as a matter of law that the injunction order must be reversed. The appellate court further noted that even if the technical deficiencies of the instant injunction order were not dispositive, the entry of temporary injunctive relief in this matter would have been improper because the alleged facts are insufficient to support a conclusion that Owner would suffer irreparable harm if the injunctive relief were not granted or that Owner did not have an adequate remedy at law. Owner alleged as irreparable harm the threat that Association will institute foreclosure proceedings against her property and that Owner may lose her property in the foreclosure. However, no such loss would occur merely by the institution of the foreclosure proceedings. Instead, such loss could only occur upon successful prosecution of the foreclosure proceedings, during which time Owner could raise all of the issues raised in her motion. As such, Owner had an adequate remedy at law in her ability to defend the foreclosure proceedings.

In **Brannon vs. Boldt, et al.**, 32 Fla. L. Weekly D288b (Fla. 2nd DCA 1/24/2007), several interior lot owners of in a subdivision brought suit against a waterfront owner to enforce an easement for ingress and egress to the waterfront. In reviewing the case *en banc*, the Second District Court of Appeal reviewed a very narrow, but significant issue, i.e., "*What rights do the residents in a neighborhood receive, as dominant estate holders under an implied easement created by denotation on a plat map of an 'easement for ingress and egress' to a body of water, when the servient estate is part of a residential lot on which there exists an occupied family dwelling?*" The subdivision was platted in 1953 and included twenty-two lots along the entrance road and four lots near the water's edge. Two of the waterfront lots were sold to a single owner, who constructed only one residence on the two lots. A 22' wide easement was created over these two waterfront lots for "ingress and egress" to the mean high water line. Thus, the purchasers of the interior lots knew that although they would not own waterfront property, they were purchasing the right to reach the water in a convenient manner. The appellate court noted that this was not a case involving an express easement where the rights are explained in detail in a recorded document. Instead, it is a case where the easement is implied from the recorded plat. The appellate court concluded that in the absence of a more elaborate written easement, the purpose of this implied easement is merely to give the interior lot owners access to the water and to the public riparian rights possessed by all people below the high-water mark. As such, the interior lot owners had the right to build a dock at the water's edge of this easement if otherwise permitted by law. The interior owners also had the right to cross the property without undue delay to reach any area below the mean high-water mark where public riparian rights exist. Also, the interior owners could cross the property to launch any small boat, canoe, or floatation device that reasonably can be launched from the existing seawall. However, these interior lot owners did not have the right to remain within the easement for extended periods to view the water, fireworks, or the sunset.