COMMUNITY COUNSEL

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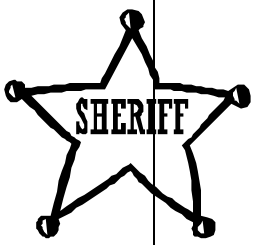
Recent Cases

- **Association held to be a party to an elevator service contract by its conduct in honoring the contract prior to terminating it.**
- **Association bound to abide by the terms of a city-issued permit requiring parking spaces assigned to a commercial unit to stay with that unit on sale.**

Self-Directed Questions in Enforcement Actions - Part 1

Recently I had occasion to contemplate how to explain the sometimes-up and sometimes-down area of rule enforcement actions. I arrived at a list of questions using a mix of the Socratic method popular in law schools to train new lawyers and self-directed questions intended to engender reflection rather than rash action. What follows is that list and some comments:



1. What is the violation? You would be surprised how often the Board or manager can't articulate what the violation is. Rather they just know that something must be a violation. If you can't state the violation take a deep breath and go home and chill out until you can articulate it.

2. What specific provision(s) of what document(s) is/are being violated? If you can't point to specific documentary provisions in your documents that create the violation, there is no violation.

Some self-directed questions to engender reflection rather than rash action.

3. If it is a rule violation, does this violation relate to a part of the property that our documents permit us to regulate? Look at the Association's rule-making authority. It may be limited to use of the common elements or common areas and may not extend to the use of the home/unit/lot.

4. If it is a rule violation, is the rule reasonable to accomplish a legitimate association purpose, and does it accomplish this purpose without being over-broad? Rules must be reasonable in purpose and scope. The perceived evil being addressed must be within the sphere of legitimate concerns of the Association, i.e. property values, aesthetics, care and upkeep of the community, and the rule must address the evil in a direct and not over-broad fashion.

5. Is there any contrary language - express or by implication - that casts doubt on the existence of a documentary violation, especially when the documents are read with an eye to allowing the freest use of private property? If there is contrary authority then look first to clarify the regulatory scheme, as only clear violations will be enforced, and unclear documents will be construed to value the freest use of property.

6. If it is a rule violation, is the rule completely consistent with the superior documents? Contrary authority can be found not only in what is expressed in the superior documents (Declaration, Articles of Incorporation and Bylaws) but what is fairly implied from the language of those documents.

7. If it is a rule violation, was the rule properly adopted, meeting all procedural and notice requirements? A rule that is not adopted following proper mailed and posted notice, with an agenda and a copy of the proposed rule will be invalid unless and until the defect is fixed by replaying the procedure correctly and ratifying the original adoption.

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RECENT CASE SUMMARIES

In **Enclave Tower Condominium Association, Inc., vs. Thyssenkrupp Elevator Corp.**, 14 Fla. L. Weekly Supp. 314a (January 26, 2007), Elevator Company sued Association alleging a breach of an elevator maintenance agreement. In 1982, Miami Elevator Company, Elevator Company's predecessor in interest, executed an elevator maintenance agreement with Miramar Apartments to maintain its elevator in an apartment complex in exchange for a monthly fee adjusted annually. In 1998, Miramar Villas, Ltd., purchased the apartment complex and a year later transferred it to Association after converting the apartments to condominium units. Association cancelled the agreement effective January 1, 2003, after notifying and discontinuing Elevator Company's services in September of 2002. Neither Association nor Elevator Company were signatories to the agreement. After a non-jury trial, the trial court entered a final judgment finding that Association breached the agreement with Elevator Company. On appeal to the 11th Circuit Court sitting in its appellate capacity, the issue was whether a binding agreement existed and whether its terms were enforceable. Association claimed that no agreement existed and the trial court erred in finding that an implied contract at law existed because Association "knew" of the agreement. A rider provision to the agreement existed which required Miramar Apartments to notify the successor of the agreement. Further, the evidence showed that the successor, Miramar Villas, Ltd., never disclosed the existence of the agreement to the Association. However, since 1999, the Association paid the monthly service charge due under the agreement upon receiving an invoice which increased over the years without question until 2002. These monthly invoices state "service charge as per contract." As such, Association conducted itself as if a binding agreement existed by frequently requesting services from Elevator Company, giving Elevator Company its new address and listing the Elevator Company as Association's elevator service company in documents filed with the City of Miami Beach. On appeal, the appellate court noted that while no assignment language existed in the agreement, Association continued to perform under the agreement until it ceased payment in September of 2002. By the terms of the agreement, the non-payment of any sum was a material breach of the agreement. Based upon the foregoing, the appellate court affirmed that portion of the judgment awarding damages to Elevator Company for services performed under the agreement. However, the appellate court reversed that portion of the judgment awarding damages to the Elevator Company for the full five (5) year renewal term of the agreement. Specifically, the appellate court determined that Association had no knowledge of the automatic renewal provision and as such, Association would not be responsible for payment of damages for the full five (5) year term of the alleged renewal.

In **Roth vs. The Charter Club, Inc.,** 32 Fla. L. Weekly D837a (Fla. 3rd DCA, March 28, 2007), Owner appealed the dismissal, with prejudice, of his amended complaint for declaratory judgment. Owner was the owner of a commercial unit of approximately 10,000 square feet in The Charter Club. When Owner purchased the unit in 1997, he applied for, and received from the City of Miami, a Class II Special Permit, a new zoning permit which included the requirement that 48 parking spaces be designated for the use of the commercial space. Thereafter, Association allocated 48 spaces for the unit and Owner executed a document providing that the 48 spaces revert to Association if Owner were to sell the unit. Owner was in the process of selling the unit and alleged that there was a present dispute between the parties over the parking spaces as well as some portion of the unit itself. The trial court dismissed the amended complaint based on Association's argument that Owner failed to exhaust administrative remedies. On appeal however, the Third District Court of Appeal noted that there were no administrative remedies to exhaust because Owner was not contesting anything having to do with the City of Miami's decision regarding the parking spaces for the unit. Owner's action for declaratory judgment asks whether the City-awarded Class II Special Permit requires Association to continue to allocate 48 parking spaces to the unit even if it is sold to a new buyer. Owner said the answer is yes, Association said the answer is no. Therefore, the appellate court reversed the trial court and held that Owner's complaint properly stated a cause of action for declaratory judgment.

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