

# COMMUNITY COUNSEL

April, 2007

A Publication of Wean & Malchow, P.A.

Volume 11, Issue 4

## Recent Cases

- ♦ **Condo Association had standing to sue Master HOA on behalf of its members and did not have to mediate first.**
- ♦ **Suit by owners for latent defects and tolling of the statute of limitations was improperly dismissed by the trial court. these are fact questions to be resolved at trial.**

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.

## Self-Directed Questions in Enforcement Actions - Part 2

We continue with our list of self-directed questions intended to engender reflection when determining whether to commence or pursue a covenant enforcement action. The first seven were published last month and can be seen at our website.

**8. Have we given the proper person(s) notice of the nature of the violation, including the text of all of the provisions that are being violated?** The Association bears the burden of proving not only the violation of specific restrictions, but that the members has received "due process," i.e. notice and an opportunity to cure.



**9. Have we given the proper person(s) a reasonable opportunity to cure the violation?** This is the second prong of due process, and it means that an action can't be started too quickly; not until the member has had a reasonable chance to address the violation, with the time needed being dependent on the nature of the violation.

**10. Have we had any response from the persons to whom we gave notice and are they willing to be cooperative?** The receipt of a substantive response presents opportunities to communicate – to solve the problem without need of formal legal action.

**11. Have we documented the response and all discussion in writing?** Be sure that the case can't degenerate into a he-said, she-said dispute. Be sure to wear the white hat and that the record of written discussion shows that the Association has gone the extra step to avoid formal action.

**12. Is there something about the violation that should cause us to re-examine our documents and maybe change them?** If the violation indicates a problem with the documents, consider curing the violation (and future ones of the same nature) by fixing the documents.

**13. Did the Association have any role whatsoever in causing, approving or permitting the continuance of the violation?**

Failure to enforce in a uniform and timely manner or tacit or negligent permission, form the bases for the defenses of selective enforcement, waiver, estoppel and laches.

**14. Have we taken some prompt enforcement action against all similar violations that we know about?** The failure to do can doom your case, as selective enforcement is the most commonly asserted defense.

**15. Are we motivated by any improper purposes, or will the impact have any improper results?** Take steps to keep personalities out of the mix. Consider keeping Board members living near a violation out of the enforcement process, to avoid the appearance of improper motivations.

**16. How would I feel about receiving a notice of this violation?** This is the most telling question. If your honest answer isn't clear, then revisit all the reasons why.

**17. What substantial harm is being done and to whom?** A lot of courts are loath to enforce clear violations that are technical only. Be sure you can show some harm to the community.

**18. Do we understand the enforcement process and the time and costs involved and are we willing to go all the way?** Depending on how the other party handles the case, these cases can be expensive. Is the community willing to go the distance?

**19. Will we have trouble with other residents if we don't take enforcement action?** Will the Association be sued by an owner who is aggrieved by the failure to enforce?

Some more self-directed questions to engender reflection and proper action.

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## RECENT CASE SUMMARIES

In **The Circle Villas Condominium Association, Inc., vs. The Circle Property Owners Association, Inc.**, 32 FLW D1015a (Fla. 4<sup>th</sup> DCA 4/18/07) Condominium Association (“CA”) brought an action against Master Homeowners Association (“MHA”) for the alleged failure of the MHA to maintain the common areas of the community. CA brought the action in its name on behalf of its individual unit owners and members as permitted by Rule 1.221, Florida Rules of Civil Procedure. MHA moved to dismiss the complaint on the grounds that CA lacked standing to bring the action. Specifically, MHA alleged CA was not a “member” of MHA. Additionally, MHA argued that CA was required to submit the claim to mandatory mediation pursuant to Section 720.311, Florida Statutes. The trial court granted the motion to dismiss on the finding that CA lacked standing to bring the action in its own name. On appeal, CA argued that it had standing pursuant to Rule 1.221 to pursue matters of common interest to its members and unit owners. On appeal to the Fourth District Court of Appeal, MHA argued that the allegations of the complaint were contrary to the provisions of membership set forth in the declaration. MHA argued that the declaration specifically limits its membership to those persons owning a unit within the premises subject to the declaration. The appellate court dismissed this argument on the grounds that while the declaration defines who is a member of the MHA, it does not negate CA’s standing to bring the action as a matter of common interest on behalf of its unit owners. MHA further argued that CA was required to submit the claim to mandatory mediation pursuant to Section 720.311, Fla. Stat. In reviewing this claim, the appellate court specifically noted that Section 720.302(4), Florida Statutes, expressly states that Chapter 720 does not apply to any association that is subject to chapter 718. Therefore, the CA was not subject to the mediation provisions of Section 720.311, Fla. Stat. Based upon the foregoing, the Fourth District Court of Appeal reversed the trial court and remanded the case for further proceedings.

In **Chodorow vs. Bella Vista Mid-Rise Condominium Association, Inc., et al.**, 32 FLW D1074a (Fla. 3<sup>rd</sup> DCA 4/25/07), Owners brought a claim against Association, Developer, and others alleging construction defects existed in their condominium unit. Owners were the owners of the penthouse unit. Owners sued when they discovered water leaks, which caused damage to the unit and its contents. Owners alleged that throughout their ownership of the unit, they experienced multiple incursions of water. Owners claim that these incursions occurred at different times, in different places, and for completely different and unrelated reasons, each of which manifested itself differently from the others. Owners alleged that the cause of each defect was latent and hidden and therefore could not have been discovered upon reasonable inspection. Owners alleged that the first noticed a water incursion a month after they moved into the unit, and that the remaining leaks surfaced thereafter. The trial court dismissed Owners’ fifth amended complaint with prejudice, on their claim against all of the parties, in part because Owner’s suit was untimely and that they knew or should have known that they had a cause of action for the defect. Ultimately, the trial court dismissed all claims against all of the defendants except for the architect and Association, which remained pending at the time of the appeal. On appeal to the Third District Court of Appeal, the court held that the trial court went outside the four corners of the complaint when it dismissed Owners’ suit. The appellate court noted that whether or not the Owners knew or should have known of the defects did not affirmatively appear on the face of the complaint. It is thus a question of fact that should be raised by affirmative defense and decided by a jury. Additionally, whether or not there was an act or omission that served to toll the statute of limitations period was another issue of fact that did not affirmatively appear on the face of the complaint. Based upon the foregoing, the appellate court reversed and remanded the case for further proceedings.