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Condo Unit Owners Have Right of Action Against Council of Unit Owners for Failing to File Timely Suit Against Developer for Defects in Common Elements

By: [Raymond Daniel Burke](#)

The Maryland Court of Special Appeals has recognized a cause of action by individual condominium unit owners where the council of unit owners has failed to take timely legal action against the project's developer to address evidence of construction defects in the common elements. I was retained to take an appeal on behalf of a group of individual unit owners at the Avalon Court Six Condominium in Pikesville. In a reported opinion filed on September 29, 2011, the Court of Special Appeals held that individual unit owners have a right of action for negligence against the council of unit owners, acting through the board of directors, in failing to address defects in the common elements by bringing a timely claim against the developer. *Greenstein et al. v. Council of Unit Owners of Avalon Court Six Condominium, Inc.*, No. 0485, September Term, 2009.

Under the governing documents for Avalon Court Six, in addition to the fact that the council of unit owners had the duty to maintain the common elements, its board of directors had the exclusive right to bring a suit relating to the common elements. Suit was filed against the developer in August 2006. However, it was held that the claim was not filed within the applicable statute of limitations. The Circuit Court for Baltimore County found that the council's board of directors was on notice of the existence of defects in the common elements, at the latest, in June 2002 when it received responses to a memorandum sent to all owners by its property manager requesting information concerning water leaks. As a result, the Circuit Court held that the general three-year period of limitations expired in June 2005. It was found,

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in fact, that the board did not retain an engineering firm to undertake a proper investigation of leakage until September 2005. The report of that investigation was received in December 2005.

Unable to recover from the developer or its insurer, in order to effectuate the necessary repairs, increased assessments and special assessments totaling more than \$1 million were imposed on the unit owners. These assessments were in excess of \$35,000 per unit. In January 2008, a group of individual unit owners filed suit against the council for the board's failure to maintain the common elements by pursuing a timely claim against the developer. The unit owners claimed damages in the form of the increased and special assessments. The condominium's insurer provided a defense to this action through the board of director's liability policy.

The Circuit Court for Baltimore County entered summary judgment in favor of the council, finding that the individual owners had no right of action against the council, and/or that suit was filed too late, since the owner knew of the defects in 2002. I was then retained to pursue an appeal from this ruling, and was assisted by our construction practice group associate, [Ian Friedman](#). The Court of Special Appeals reversed, expressly holding that the individual unit owners have a right of action against the council of unit owners for the board's failure to properly execute its duty to pursue a timely claim against the developer for defects in the common elements. It also found that their action had been timely filed.

This is the first Maryland appellate decision recognizing the right of individual condominium unit owners to file suit where the board of director's suit against the developer was found to have been filed after expiration of the statute of limitations