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PALM II AND AFTER

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PALM II AND AFTER

The well-known case of Gary Palm v 2800 Lake Shore Drive Condominium Association¹ came to a conclusion with an unexpected ending forecasting the future of condominium governance.

In 1999 Gary Palm an owner at 2800 LSD *requested certain documentation from his board and was denied access*. In 2000 he filed suit for injunctive and declaratory relief and to dissolve the association. The suit alleged, *among other things*, that the board in violation of the Act and the association's operating documents:

- 1) wrongly limited access to records;
- 2) conducted business in closed session;
- 3) failed to confirm votes taken at a closed session at an open meeting, and failed to vote even at the open meetings;
- 4) conducted business by email and fax;
- 5) commingled operating and reserve funds, failed to credit owners with budget surpluses and for having deposited funds that are not FDIC insured; and
- 6) failed to give proper notice of board meetings.

Defendant association raised multiple defenses to Palm's claims including:

- 1) their declaration's exculpatory clause;
- 2) reliance on advice of counsel and;
- 3) the business judgment rule.

Despite the association's multiple defenses, the trial court ruled for Palm on most counts. The association requested a rehearing which was denied. As an outgrowth of Palm a rash of legislation was passed and is now incorporated into the ACT and other statutes providing a new roadmap for board governance and operations and court have followed the dictates of Palm that boards are strictly follow the law of the declaration.

In another case, Alliance Property Management Ltd. v. Forest Villa of Countryside Condominium Association,² the lower court followed Palm and opined that a board must strictly comply with the authority of the Act and the association's governing documents. The appellate court agreed.

ANALYSIS

THE MAIN POINTS ARE:

- 1. Informal meetings or executive session 'workshops' held by the board are no longer permitted.**

¹ Gary Palm V 2800 Lake Shore Drive Condominium Association, an Illinois Not-for-Profit Corporation; Board of Directors of The 2800 Lake Shore Drive Condominium Association; And Kay Grossman, Individually and as President of the Board, 2014 IL App (1st) 111290.

² Alliance Property Management Ltd. v. Forest Villa of Countryside Condominium Association, 2015 IL App (1st) 150169

According to Palm II, “*All board discussion, investigating by reason or argument, talking about, presenting in detail for examination and consideration of association matters as well as voting thereon must be conducted in a meeting open to all unit owners.*”

- Although boards have traditionally held informal, closed or executive session meetings to deal with the day to day business of their associations, this is no longer an option, except under the circumstances described below.
- The court looked to §2(w)³ of the Act and determined that it defined ‘*meeting of the board*’ as ‘*any gathering of a quorum*⁴ of the members of the board....held for the purpose of conducting business’.
- The court further pronounced *conducting business* to include any board discussion or consideration of association matters requiring an open meeting if a quorum of the board is present, which includes electronic communications. Such as:
 - Letting others know how you will vote/ Convincing others how to vote
 - Reviewing options/bids or projects and discussing them
 - General communication discussing minor repair needs
 - Emails may still be used carefully, to relay ministerial matters such as meeting date and time, other information to be considered at an upcoming meeting, bids, all of which would be discussed and resolved at an open meeting.
 - Managers should have a point contact to direct administrative questions.
 - No email whether to a board member or manager should include a ‘reply to all’; rather it should include in large bold print, ‘DO NOT REPLY’.
 - No email whether to a board member or manager should include discussion comments.
 - Email is a form of communication and can/may serve as evidence.
- The court reading §2(w) in conjunction with § 18(b) (9)⁵ further determined that meetings of the board, as described above shall be open to any unit owner with 3 exceptions ⁶ and ‘any vote on these matters shall be taken at a meeting or portion thereof open to any unit owner’ with notice having been given.
- Amended ICPA Section 18(a) (9) (A), states that a closed session must be part of a properly called open board meeting. Only then may the board move into a closed session and only for the purpose of discussing or considering information relating to (i) litigation involving the association; (ii) employment, (iii) rule violations, and (iv) unpaid assessments and now “to discuss or consider information relating to” all of those subjects”. Amended Section 18(a) (9) (A) further clarifies that board action on a matter considered in closed session must be the subject of a vote during the open portion of a board meeting.
 - Meetings with the association’s attorney falling under the closed meeting exception will still need to be reviewed and an overview of counsel’s general advice given at an open meeting.

³ 765 ILCS 605§ 2 (w)

⁴ Defined in each association’s declaration.

⁵ 765 ILCS 605§18 (b)(9)

⁶ (i) to discuss litigation pending or that is probable or imminent; (ii) to consider appointment, employment or dismissal of an employee; or (iii) to discuss violations of rules and regulations or unit owners unpaid share of the common expenses.

- General business matter discussions with the association attorney are to be discussed at an open meeting of the board.
2. **No More Discussion or Voting by Email , Canvassing or on any device .**
Now new electronic communication rules are in place and offer other methods to conduct business. The new rules must be followed exactly and new forms and procedures will need to be drafted to add them to the rules and incorporate their use.
 3. **A board’s authority to delegate to a manager must be found in the declaration.**
Delegating authority beyond the mandates of the declaration is a breach of the board’s fiduciary duty. Every action delegated to a manager must find its foundation in the operating documents. As with board members, a manager may only have discussion with less than a quorum of the board. When delegating authority, the manager may either be given selected functions with absolute authority, i.e. the right to approve contracts without approval under a certain dollar amount, or the discussion or vote on the issue must be had at an open meeting of the board.
 4. **Exculpation clauses may no longer protect a board or its individual members from liability.**
The failure of a board to follow its Governing Documents (Declaration, Bylaws, Amendments, Article of Incorporation and the Plat), will now be found to be a breach of a board’s fiduciary duty as mentioned in Alliance Property above.
 - Board’s shall use due diligence acting on behalf of the Association
 - The court stated that a board can be subject to liability if their actions are “grossly negligent in that they intentionally failed to act in the face of a known duty, demonstrating a conscious disregard for their duties.” i.e.
 - Failing to hold open meetings
 - Failing to provide proper notice of meetings
 - Failed to vote or confirm vote at an open meeting
 - Failing to itemize reserves
 - Commingling operations and reserve funds
 - Failing to credit owners with surplus
 - Failing to disclose conflicts of interest
 - Failing to vote to defend or initiate litigation
 - A board may be found to have properly exercised its business judgment when securing the advice of counsel before taking action

FIRST ACTION ITEMS:

1. **Review your declaration** to understand how you are to actually operate.
2. **Review your meeting and notice protocols.**
3. **Review and revise policies and procedures** where necessary to comply with Palm II, the Act and your association documents.
 - a. **Review your finance practices** to ensure they are compliant with your declaration, the Act and Palm.

- i. If you are an association in Chicago do not limit access to books and records that are of a financial nature and be prepared to have them available 10 days from date of request.
 - ii. Review for correct application of reserves and the return of surplus if provided for in your declaration
 - iii. Itemize reserve, members are entitled to this information.
- b. **Review your record production procedures** to ensure they are compliant with your declaration, the Act and Palm.
- 4. **Review the contract between you and the property manager.** Review and update your procedures and policies regarding a manager.

THOUGHTS AND SOLUTIONS

1. Enact self-enacting policies.
2. Think about committees. A meeting of a committee consisting of owner members, manager, if any, and less than a quorum of the board or a committee of less than a quorum of the board will not be considered conducting business and is not subject to the open meetings rule. It is a good way to get some of the larger tasks handled before they return to an open meeting for a discussion and vote.
3. Unfortunately, if you are a board of three, many solutions will not be available unless assignments are given to only one board member and then discussion and vote at an open meeting. Even if you're small formalities must be met.
4. Delegating contractual authority to a manager is all or nothing. If you require the manager discuss and or look to you for consent, the vote must be taken at an open meeting or you can give total authority without any oversight, unless you vote in advance as noted below in 6.
5. When unsure about an issue seek advice of counsel and have the attorney confirm the advice in writing. Even if the advice is later found to be incorrect the board members will generally remain protected by the business judgment rule. Remember, if about general business, the discussion must occur at an open board meeting, if about possible litigation at a closed meeting, reviewed at an open meeting.
6. Vote with Contingencies when you know there are items that will need to be approved before the next scheduled meeting. Vote at an open board meeting and set a limit or parameters for what is being agreed to.
7. When necessary consider a Teleconference Meeting, if proper protocols are in place. When a decision is not an emergency but needs to be made before the next scheduled meeting the board may meet by telephone or other technological means as long as protocols are in place for electronic communications. Same rules 48hrs notice and location of the meeting.
8. When there's an emergency consider taking informal action. All board members must consent in writing to the action to be taken. It also can't appear like a board meeting. Rules are needed to set out how an informal action is to work. The record of the action taken is to be kept with the association's official records.

POLICIES/RESOLUTIONS	HAVE	UPDATE	WANT	ISSUE
Electronic Communication Policy (ECP)				must have to use email
•Generally				
•Any board action requiring vote, consent, approval, signature				
•Email				
•Notice generally				
•Teleconference Meetings and Hearings				
•Voting/Elections				?
•EC Record Retention				MUST HAVE
•Waivers				MUST HAVE
•Unanimous Consent Form				MUST HAVE
Policies in General				
•Informal Acts of Board				
•Collection				
•Violation				
•Meeting				
•Communication				
•Voting/Elections				
•Architectural Modification				
•Insurance				
•Key				
•Pet				
•Move in-Move out				
•Bicycle				
•Misc: Smoking/Noise/Heat				
•Safety, Smoke, Carbon Monoxide Detectors/Fire Extinguisher				
•Satellite				
Homeowner Association Code of Conduct Directors				
Homeowner Association Code of Conduct Members				
Delegation Resolution (specific acts) e.g. blanket resolution				
send delinquent account to attorney				
approve contracts under a specific amount				
approve architectural request				
send notices/warnings under violation policy/ specific policies				
organize and host teleconference meetings				
Owner Complaint Resolution Policy** REQUIRED				MUST HAVE

CONDOMINIUM ASSOCIATION
COMMUNICATION AUTHORIZATION: E-MAIL

I _____, [owner] acknowledge receipt of this e-mail communication authorization form and give the _____ Condominium Association and its hired management company, if any, authorization to notify me regarding condominium business by e-mail communication as set out in the Communication Policy.

I waive any right I may have to receive notice by mail or other means except where stated in the policy. I understand that by waiving this right I assume the risks involved with electronic communications and release the association from any liability.

If I decline I understand all communication from and to the condominium association or its hired management and/or owners WILL ONLY be delivered by:

1. Written communication delivered by mail. or
2. Written communication delivered in person.

☐ I ACCEPT

☐ I DECLINE *

* I understand mailed or in person communication deliveries may delay communications although I acknowledge that notices of meetings will be posted 48 hours prior to each meeting date in each front tier entryway.

* I understand the selection of email notification is revocable at any time upon written notice to the Management Office or _____.

DATE: _____, 2015

Signature

Address & Unit #

Email address: # 1
DO NOT include email address if you decline

Email address: # 1
DO NOT include email address if you decline

Sign and return this Resolution by _____ TO THE ASSOCIATION OR
MANAGEMENT as acknowledgement of receipt and understanding of the Policy at
_____.

Failure to return a signed acknowledgement within seven (14) days of approval shall result in a violation of the regulation and be subject to fine pursuant to the Violation policy.

Date: _____

Owner

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Action by Unanimous Written Consent

_____ Condominium Association _____, 2016

Pursuant to the provisions of the IL General Not for Profit Business Corporation Act and consistent with the bylaws of the Association, we, the undersigned directors of _____ Condominium Association, Inc. adopt the following resolution in this action by written consent without a meeting:

Be it resolved that the Association through the Board

This action by written consent may be executed in counterparts and each such counterpart shall be considered an original and all counterparts together shall be considered one document. The effective date of the above resolution, _____ 20 , irrespective of the date of signing shall be the latest date on which this consent shall have been executed by any director.

[Signature of Director]
[Name of Director]
Dated: _____

[Signature of Director]
[Name of Director]
Dated: _____

[Signature of Director]
[Name of Director]
Dated: _____

[Signature of Director]
[Name of Director]
Dated: _____

[Signature of Director]
[Name of Director]
Dated: _____

[Signature of Director]
[Name of Director]
Dated: _____

¹ Unanimous written consent may have retroactive effective dates—i.e., prior to the date by which all directors have signed. Such consents therefore operate similar to ratifications of prior actions.

Matters that are Forever Changing and Hot Topics

A healthy board is an educated board. Nothing ever stays the same and an educated board is better able to handle the endless changes. Keeping up with changing times and trends is crucial. Whether you do in house programs or go elsewhere, Education is the order of the day. It's one of the best tools to help boards be prudent in every aspect of association administration. Trouble can be very costly.

To stay on top of life at your association:

- Create ways to address the varying needs of the association's size
- Understand and create ways to handle the changing demographics
- Understand the need for reserve studies and design ways to meet the demand for reserves
- Tackle ongoing technology needs
- Modernize your volunteer structure, since Palm committees and volunteers are more important than ever
- Recognize Key Trends and address them head on

Hot Topics:

- Cyber security- double encrypted code is not enough, need other protocols in place to protect hacking of info.
- Unauthorized Practice of Law- many manager's and other service providers, unwittingly practice law. In these instances, and unfortunately for the association, when they think they are saving money by not initially retaining counsel in the end they may need to retain an attorney anyway and the issue/problem, whatever, costs 3x's as much.
- Zombie Foreclosures- when a lender is in possession is controlled by court order not by when the deed is recorded. When the lender doesn't pay assessments and the property is left in limbo file a claim the Illinois Department of Professional Regulation. The courts are also now awarding all unpaid assessments under certain circumstances.
- Medical Marijuana- anyone legally permitted to smoke can do so in their units only. The board may enact other rules or policy regarding its use and nuisance rules. You can require the user produce their registry identification and retrograde units, if need be, to keep smoke from seeping into the common areas. It is no different than cigarette smoke.
- Service animals- You cannot restrict type or size but there are rules to qualify as a service dog. The disabled are a protected class although the service animal must be tied to assisting one of the disabilities. You can request a physician letter to determine what disability is being assisted. The board to enforce these requirements must enact a rule or policy regarding the ownership of a service animal.
- Guns- considering the dangerous state of Chicago the conceal and carry law allows you to put up a sign that bans guns. It must be 4x6 no more, no less and clearly visible in the front of the building.
- Live streaming- now with technology live streaming is as legal as any other form of distribution. A rule or policy may be enacted to regulate how and when such medium may be used. You may regulate that you need notice if you are concerned about last minute use.

OVERVIEW OF 2016 AMENDMENTS

In 2014 and again in 2015, the legislature responded to the aftermath of *Palm II* by passing multiple amendments to the Illinois Condominium Property Act (“ICPA”). A number of this year’s amendments affect key provisions regarding open meetings, notice of meetings and amendments to condominium instruments. Among the changes adopted by the legislature are a new requirement for electronic notice of board meetings to owners, and authorization for boards to deal with emergency situations without first holding an open board meeting.

1. Email Notice of Board Meetings to Unit Owners

With the increased use of email to distribute official notices, amended Section 18(a) (9) (E) imposes a new notice obligation for official notices delivered by email. This electronic notice requirement is in addition to the obligation to post notice of board meetings in the building at least 48 hours in advance. Notice can now be given by e-mail to each owner who has provided the association with written authorization to conduct business by “Acceptable technological means” (defined as electronic transmission over the Internet or similar network, telecopier or e-mail) and for owners who “opt out” of e-mail notification pursuant to Section 18.8(f), by regular mail or personal delivery of hardcopy.

Amended Section 18(a)(9)(E) affects every condominium association that distributes official notices by email, as this change to the ICPA overrides any contrary provisions in an association’s declaration or bylaws.

2. Notice of Board Meetings to Board Members

Each board member must receive at least 48 hours’ prior notice of a board meeting unless notice is waived pursuant to Section 18.8(a); however, no waiver procedure or requirements is set out in the section. Therefore, it is suggested the board obtain written waivers or have the waiver stated in the meeting minutes.

3. Board Member Participation in Board Meetings.

Board members may participate in and act at any board meeting (a) in person (b) by telephonic means or (c) by use of any acceptable technological means whereby all persons participating in the meeting can communicate with each other (such as skype, e-mail, chat rooms).

4. Time for Mailing Budgets.

The ICPA has long required that every association’s proposed annual budget be distributed to owners at least 30 days before the board votes on the budget. However, this requirement prevented notice of an annual meeting or other meeting of unit owners to be distributed at the same time because notice of a meeting of unit owners cannot be distributed more than 30 days in advance. To remedy this problem, effective June 1, 2016, Section 18(a)(6) has been amended to reduce the notice requirement for budgets from 30 days to 25 days.

5. Increased Authority in Closed Session Board Meetings.

Last year’s *Palm II* court decision requires that all board deliberations and decisions occur in an open board meeting, with the exception of certain topics that may be discussed in a closed session. This led to questions about how such closed sessions should be conducted. Amended ICPA Section 18(a) (9) (A), states that a closed session must be part of a properly called open board meeting. Only then may the board move into a closed session and only for the purpose of discussing or considering information relating to (i) litigation involving the association; (ii) employment, (iii) rule violations, and (iv) unpaid assessments and now “to discuss or consider information relating to” all of those subjects. Amended Section 18(a) (9) (A) further clarifies that board action on a matter considered in closed session must be the subject of a vote during the open portion of a board meeting.

6. Remote Participation in Board Meetings.

Section 107.05(d) of the Illinois General Not for Profit Corporation Act allows board members to participate in board meetings by telephone or other electronic means, but not everyone recognized that this authority applied to condominium associations. ICPA Section 18(a)(9)(B) now expressly includes that same authority in the ICPA, and confirms that a board member participating in a meeting by telephone or other electronic means is also deemed to be present at the meeting for purposes of establishing a quorum.

7. Notifying Board Members of Board Meetings.

ICPA Section 18(a) (9) (D) previously required that notice of board meetings be “mailed or delivered” to all board members. New ICPA Section 18(a) (9) (D) replaces the words “mailed or delivered” with the words “given to every board member,” opening the door for board meeting notices to be “given” to board members by telephone, email, text message, door drop or other means.

8. Ratification of Emergency Actions.

For boards facing emergency situations requiring immediate attention, the *Palm II* court’s proscription on board action without an open board meeting created a difficult situation for board’s to act. The intent of the new legislation is to “empower and support boards to act in emergencies,” and new ICPA Section 18(a) (21) creates a special exception to the requirements of *Palm II* available to all Condominium Associations, regardless of whether it is stated in their declarations. Boards may take immediate action (without calling a board meeting on 48 hours’ notice) to respond to an emergency, provided that such action is later ratified and confirmed at a subsequent open board meeting. Within 7 days of the event, boards must provide owners with notice of the emergency event and a general description of the actions taken.

9. No Notice to Lenders Required for Certain Declaration Amendments.

ICPA Section 27 provides that a condominium board may amend an association’s declaration, without a unit owner vote, to correct an omission, error, or inconsistency, or to bring the declaration into conformance with changes to the ICPA or other laws. However, the declarations of some associations require unit owner approval, notice to mortgagees or even approval of mortgagees for declaration changes. Effective June 1, 2016, revised ICPA Section 27 expressly provides that corrective amendments do not need unit owner approval, notice to mortgagees or approval of mortgagees, notwithstanding requirements to the contrary in an association’s declaration.

10. Ombudsperson Act.

In 2014, the legislature approved a law, newly added Section 35, to create the “Office of the Condominium and Common Interest Community Ombudsperson” effective July 1, 2016. The Ombudsperson would, among other things, provide assistance in resolving disputes between unit owners and their associations, and provide training, educational materials and courses for unit owners and board members. Currently there is no funding for implementation of that law, so the Ombudsperson system will likely not be in place as quickly as was contemplated.

To be in compliance with the Ombudsperson Act, Associations must develop and adopt a written complaint/grievance resolution policy for unit owner complaints. Further an amendment offered to the Act sets 180 days as the time period by which a board must submit a final resolution to an owner’s complaint.

Unit Owner Complaint Resolution Policy

The Act further mandates that within 180 days of the effective date of the Act (that is, December 27, 2016), each association (other than those common interest community associations that are exempt from the Common Interest Community Association Act) is required to adopt a written policy for resolving complaints made by unit owners, which policy shall be made available to all unit owners upon request. Such policy must include: a sample complaint form, a description of the process by which complaints shall be delivered to the association, the association’s timeline and manner of

making final determinations in response to unit owner complaints and a requirement that the final determination made by the association in response to a unit owner complaint be in writing, made within 180 days after the complaint was made and marked clearly and conspicuously as “final.” New associations that are created after the effective date of the Act, must establish and adopt the above described written policy as soon as possible.

Cases

In State Place Condominium Association v. Magpayo, a recent decision by the Illinois Appellate Court ruled that a condominium unit owner must pay post-judgment attorneys’ fees (in addition to post-judgment common expenses) before he or she can vacate the judgment and regain possession of his or her unit. Since the unit owner in *Magpayo* had not paid in full the amount, including post-judgment attorneys’ fees, necessary to vacate the judgment, the Appellate Court affirmed the trial court’s denial of the unit owner’s motion to vacate.

In Weiner v. Prairie Park Condominium Association Inc. the District Court for the Northern District of Illinois allowed Fair Housing Act claims against an association for not providing handicap parking to a handicapped owner where all handicap spaces were assigned to other owners. The U.S. Fair Housing Act Requires Condominium to Accommodate Handicapped Parkers.

In Cambridge Apartments Condominium Association v. Williams, an Illinois appeals court affirmed a ruling that an association was entitled to judgment against a former unit owner for unpaid assessments that became due after the unit’s transfer because the association had no notice of the change in ownership.

In 1010 Lake Shore Ass’n v. Deutsche Bank National Trust Company, the Illinois Supreme Court ruled that there are two steps to follow before a lien for past due assessments is extinguished. Not only must the association be named as a party in the foreclosure, a first assessment payment must be made on the first of the month following the month that title transfers.

In Henderson Square Condominium Association et al. v. Lab Townhomes, LLC, et al. involved an association that sued its developer 15 years after construction was completed. Claims for defective construction have a 10 years’ limitation to sue after construction is completed. Here the Supreme Court ruled that claims for fraudulent misrepresentations may be pursued even after 10 years in certain circumstances. This ruling is important because associations often do not become aware of construction problems for many years.

In Studiager v. Honeytree Townhouse Improvement Association, an Illinois appeals court followed the ruling in *Stobe v. 842-848 West Bradley Place Condominium Association* and affirmed the lower court’s ruling that an amendment to the association’s restrictive covenants that prohibited leasing units was unreasonable, invalid and unenforceable.

In Neufairfield Homeowners Association v. Wagner et al., the court found in favor of two home-based daycares despite a provision in the declaration prohibiting commercial activities. The declaration contained the familiar exception for the operation of personal businesses so long as they met certain criteria however the declaration also barred activities resulting in frequent commercial traffic. The Appellate Court allowed the daycares to continue on the basis that an additional four to six cars entering and leaving the property twice a day was not “frequent commercial traffic” in violation of the declaration. Many declarations contain contrary provisions which is why it is important to consult the association counsel on issues involving interpretation of an Association’s operating documents.

(765 ILCS 605/12) (From Ch. 30, par. 312)

Sec. 12. Insurance.

(a) Required coverage. No policy of insurance shall be issued or delivered to a condominium association, and no policy of insurance issued to a condominium association shall be renewed, unless the insurance coverage under the policy includes the following:

(1) Property insurance. Property insurance (iii) providing coverage, at the time the insurance is purchased and at each renewal date, in a total amount of not less than the full insurable replacement cost of the insured property, less deductibles, but including coverage sufficient to rebuild the insured property in compliance with building code requirements subsequent to an insured loss, including: Coverage B, demolition costs; and Coverage C, increased cost of construction coverage. The combined total of Coverage B and Coverage C shall be no less than 10% of each insured building value, or \$500,000, whichever is less.

(3) Fidelity bond; directors' and officers' coverage.

(D) The board of directors must obtain directors and officer's liability coverage at a level deemed reasonable by the board, if not otherwise established by the declaration or bylaws. Directors and officer's liability coverage must extend to all contracts and other actions taken by the board in their official capacity as directors and officers, but this coverage shall exclude actions for which the directors are not entitled to indemnification under the General Not for Profit Corporation Act of 1986 or the declaration and bylaws of the association. The coverage required by this subparagraph (D) shall include, but not be limited to, coverage of: defense of non-monetary actions; defense of breach of contract; and defense of decisions related to the placement or adequacy of insurance. The coverage required by this subparagraph (D) shall include as an insured: past, present, and future board members while acting in their capacity as members of the board of directors; the managing agent; and employees of the board of directors and the managing agent.

(b) Contiguous units; improvements and betterments. The insurance maintained under subdivision (a)(1) must include the units, the limited common elements except as otherwise determined by the board of managers, and the common elements. The insurance need not cover improvements and betterments to the units installed by unit owners, but if improvements and betterments are covered, any increased cost may be assessed by the association against the units affected.

Common elements include fixtures located within the unfinished interior surfaces of the perimeter walls, floors, and ceilings of the individual units initially installed by the developer. Common elements exclude floor, wall, and ceiling coverings. "Improvements and betterments" means all decorating, fixtures, and furnishings installed or added to and located within the boundaries of the unit, including electrical fixtures, appliances, air conditioning and heating equipment, water heaters, built-in cabinets installed by unit owners, or any other additions, alterations, or upgrades installed or purchased by any unit owner.

(h) Mandatory unit owner coverage. The board of directors may, under the declaration and bylaws or by rule, require condominium unit owners to obtain insurance covering their personal liability and compensatory (but not consequential) damages to another unit caused by the negligence of the owner or his or her guests, residents, or invitees, or regardless of any negligence originating from the unit. The personal liability of a unit owner or association member must include the deductible of the owner whose unit was damaged, any damage not covered by insurance required by this subsection, as well as the decorating, painting, wall and floor coverings, trim, appliances, equipment, and other furnishings.

(I) The changes to this Section made by this amendatory Act of the 98th General Assembly apply only to insurance policies issued or renewed on or after June 1, 2015. (Source: P.A. 98-762, eff. 6-1-15.)

(Text of Section after amendment by P.A. 99-472)

Sec. 18. Contents of bylaws. The bylaws shall provide for at least the following:

(a) (6) that each unit owner shall receive, at least 25 days prior to the adoption thereof by the board of managers, a copy of the proposed annual budget together with an indication of which portions are intended for reserves, capital expenditures or repairs or payment of real estate taxes;

(B) (9)(A) that every meeting of the board of managers shall be open to any unit owner, except for the portion of any meeting held to discuss or consider information relating to: (i) litigation when an action against or on behalf of the particular association has been filed and is pending in a court or administrative tribunal, or when the board of managers finds that such an action is probable or imminent, (ii) appointment, employment or dismissal of an employee, (iii) violations of rules and regulations of the association, or (iv) a unit owner's unpaid share of common expenses; that any vote on these matters discussed or considered in closed session shall take place at a meeting of the board of managers or portion thereof open to any unit owner;

(C) that board members may participate in and act at any meeting of the board of managers in person, by telephonic means, or by use of any acceptable technological means whereby all persons participating in the meeting can communicate with each other; that participation constitutes attendance and presence in person at the meeting;

(D) that any unit owner may record the proceedings at meetings of the board of managers or portions thereof required to be open by this Act by tape, film or other means, and that the board may prescribe reasonable rules and regulations to govern the right to make such recordings;

(E) that notice of every meeting of the board of managers shall be given to every board member at least 48 hours prior thereto, unless the board member waives notice of the meeting pursuant to subsection (a) of Section 18.8; and

(F) that notice of every meeting of the board of managers shall be posted in entranceways, elevators, or other conspicuous places in the condominium at least 48 hours prior to the meeting of the board of managers except where there is no common entranceway for 7 or more units, the board of managers may designate one or more locations in the proximity of these units where the notices of meetings shall be posted; that notice of every meeting of the board of managers shall also be given at least 48 hours prior to the meeting, or such longer notice as this Act may separately require, to: (i) each unit owner who has provided the association with written authorization to conduct business by acceptable technological means, and (ii) to the extent that the condominium instruments of an association require, to each other unit owner, as required by subsection (f) of Section 18.8, by mail or delivery, and that no other notice of a meeting of the board of managers need be given to any unit owner;

(21) that the board may ratify and confirm actions of the members of the board taken in response to an emergency, as that term is defined in subdivision (a)(8)(iv) of this Section; that the board shall give 2 notice to the unit owners of: (i) the occurrence of the emergency event within 7 business days after the emergency event, and (ii) the general description of the actions taken to address the event within 7 days after the emergency event. The intent of the provisions of this amendatory Act of the 99th General Assembly adding this paragraph (21) is to empower and support boards to act in emergencies.

(b) (6) that written notice of any membership meeting shall be mailed or delivered giving members no less than 10 and no more than 30 days' notice of the time, place and purpose of such meeting except that notice may be sent, to the extent the condominium instruments or rules adopted thereunder expressly so provide, by electronic transmission consented to by the unit owner to whom the notice is given, provided the director and officer or his agent certifies in writing to the delivery by electronic transmission;

(9)(A) except as provided in subparagraph (B) of this paragraph (9) in connection with board elections, that a unit owner may vote by proxy executed in writing by the unit owner or by his duly authorized attorney in fact; that the proxy must bear the date of execution and, unless the condominium instruments or the written proxy itself provide otherwise, is invalid after 11 months from the date of its execution; to the extent the condominium instruments or rules adopted thereunder expressly so provide, a vote or proxy may be submitted by electronic transmission, provided that any such electronic

transmission shall either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the unit owner or the unit owner's proxy;

(B) that if a rule adopted at least 120 days before a board election or the declaration or bylaws provide for balloting as set forth in this subsection, unit owners may not vote by proxy in board elections, but may vote only (i) by submitting an association-issued ballot in person at the election meeting or (ii) by submitting an association-issued ballot to the association or its designated agent by mail or other means of delivery specified in the declaration, bylaws, or rule; that the ballots shall be mailed or otherwise distributed to unit owners not less than 10 and not more than 30 days before the election meeting, and the board shall give unit owners not less than 21 days' prior written notice of the deadline for inclusion of a candidate's name on the ballots; that the deadline shall be no more than 7 days before the ballots are mailed or otherwise distributed to unit owners; that every such ballot must include the names of all candidates who have given the board or its authorized agent timely written notice of their candidacy and must give the person casting the ballot the opportunity to cast votes for candidates whose names do not appear on the ballot; that a ballot received by the association or its designated agent after the close of voting shall not be counted; that a unit owner who submits a ballot by mail or other means of delivery specified in the declaration, bylaws, or rule may request and cast a ballot in person at the election meeting, and thereby void any ballot previously submitted by that unit owner;

(B-5) that if a rule adopted at least 120 days before a board election or the declaration or bylaws provide for balloting as set forth in this subparagraph, unit owners may not vote by proxy in board elections, but may vote only (i) by submitting an association-issued ballot in person at the election meeting; or (ii) by any acceptable technological means as defined in Section 2 of this Act; instructions regarding the use of electronic means for voting shall be distributed to all unit owners not less than 10 and not more than 30 days before the election meeting, and the board shall give unit owners not less than 21 days' prior written notice of the deadline for inclusion of a candidate's name on the ballots; the deadline shall be no more than 7 days before the instructions for voting using electronic or acceptable technological means is distributed to unit owners; every instruction notice must include the names of all candidates who have given the board or its authorized agent timely written notice of their candidacy and must give the person voting through electronic or acceptable technological means the opportunity to cast votes for candidates whose names do not appear on the ballot; a unit owner who submits a vote using electronic or acceptable technological means may request and cast a ballot in person at the election meeting, thereby voiding any vote previously submitted by that unit owner;

(D) that votes cast by ballot under subparagraph (B) or electronic or acceptable technological means under subparagraph (B-5) of this paragraph (9) are valid for the purpose of establishing a quorum;

(765 ILCS 605/18.4) (from Ch. 30, par. 318.4)

Sec. 18.4. Powers and duties of board of managers. The board of managers shall exercise for the association all powers, duties and authority vested in the association by law or the condominium instruments except for such powers, duties and authority reserved by law to the members of the association. The powers and duties of the board of managers shall include, but shall not be limited to, the following:

(s) To adopt and amend rules and regulations (1) authorizing electronic delivery of notices and other communications required or contemplated by this Act to each unit owner who provides the association with written authorization for electronic delivery and an electronic address to which such communications are to be electronically transmitted; and (2) authorizing each unit owner to designate an electronic address or a U.S. Postal Service address, or both, as the unit owner's address on any list of members or unit owners which an association is required to provide upon request pursuant to any provision of this Act or any condominium instrument.

(765 ILCS 605/18.8)

Sec. 18.8. Use of technology.

(a) Any notice required to be sent or received or signature, vote, consent, or approval required to be obtained under any condominium instrument or any provision of this Act may be accomplished using the technology generally available at that time. This Section shall govern the use of technology in implementing the provisions of any condominium instrument or any provision of this Act concerning notices, signatures, votes, consents, or approvals.

(b) The association, unit owners, and other persons entitled to occupy a unit may perform any obligation or exercise any right under any condominium instrument or any provision of this Act by use of any technological means that provides sufficient security, reliability, identification, and verifiability.

(c) A verifiable electronic signature satisfies any requirement for a signature under any condominium instrument or any provision of this Act.

(d) Voting on, consent to, and approval of any matter under any condominium instrument or any provision of this Act may be accomplished by electronic transmission or other equivalent technological means, provided that a record is created as evidence thereof and maintained as long as the record would be required to be maintained in non-electronic form.

(e) Subject to other provisions of law, no action required or permitted by any condominium instrument or any provision of this Act need be acknowledged before a notary public if the identity and signature of the person can otherwise be authenticated to the satisfaction of the board of directors or board of managers.

(f) If any person does not provide written authorization to conduct business using electronic transmission or other equivalent technological means, the association shall, at its expense, conduct business with the person without the use of electronic transmission or other equivalent technological means.

(g) This Section does not apply to any notices required under Article IX of the Code of Civil Procedure related to: (i) an action by the association to collect a common expense; or (ii) foreclosure proceedings in enforcement of any lien rights under this Act. (Source: P.A. 98-1042, eff. 1-1-15; 99-78, eff. 7-20-15.)

Sec. 27. Amendments. (Text of Section after amendment by P.A. 99-472)

(a) If there is any unit owner other than the developer, and unless otherwise provided in this Act, the condominium instruments shall be amended only as follows:

(i) upon the affirmative vote of 2/3 of those voting or upon the majority specified by the condominium instruments, provided that in no event shall the condominium instruments require more than a three-quarters vote of all unit owners; and

(ii) with the approval of, or notice to, any mortgagees or other lienholders of record, if required under the provisions of the condominium instruments.

(b)(1) If there is an omission, error, or inconsistency in a condominium instrument, such that a provision of a condominium instrument does not conform to this Act or to another applicable statute, the association may correct the omission, error, or inconsistency to conform the condominium instrument to this Act or to another applicable statute by an amendment adopted by vote of two-thirds of the Board of Managers, without a unit owner vote. A provision in a condominium instrument requiring or allowing unit owners, mortgagees, or other lienholders of record to vote to approve an amendment to a condominium instrument, or for the mortgagees or other lienholders of record to be given notice of an amendment to a condominium instrument, is not applicable to an amendment to the extent that the amendment corrects an omission, error, or inconsistency to conform the condominium instrument to this Act or to another applicable statute.

(2) If through a scrivener's error, a unit has not been designated as owning an appropriate undivided share of the common elements or does not bear an appropriate share of the common expenses or that all the common expenses or all of the common elements in the condominium have not been

distributed in the declaration, so that the sum total of the shares of common elements which have been distributed or the sum total of the shares of the common expenses fail to equal 100%, or if it appears that more than 100% of the common elements or common expenses have been distributed, the error may be corrected by operation of law by filing an amendment to the declaration approved by vote of two-thirds of the members of the Board of Managers or a majority vote of the unit owners at a meeting called for this purpose which proportionately adjusts all percentage interests so that the total is equal to 100% unless the condominium instruments specifically provide for a different procedure or different percentage vote by the owners of the units and the owners of mortgages thereon affected by modification being made in the undivided interest in the common elements, the number of votes in the unit owners association or the liability for common expenses appertaining to the unit.

(3) If an omission or error or a scrivener's error in the declaration, bylaws or other condominium instrument is corrected by vote of two-thirds of the members of the Board of Managers pursuant to the authority established in subsections (b)(1) or (b)(2) of Section 27 of this Act, the Board upon written petition by unit owners with 20 percent of the votes of the association filed within 30 days of the Board action shall call a meeting of the unit owners within 30 days of the filing of the petition to consider the Board action. Unless a majority of the votes of the unit owners of the association are cast at the meeting to reject the action, it is ratified whether or not a quorum is present.

(4) The procedures for amendments set forth in this subsection (b) cannot be used if such an amendment would materially or adversely affect property rights of the unit owners unless the affected unit owners consent in writing. This Section does not restrict the powers of the association to otherwise amend the declaration, bylaws, or other condominium instruments, but authorizes a simple process of amendment requiring a lesser vote for the purpose of correcting defects, errors, or omissions when the property rights of the unit owners are not materially or adversely affected.

(5) If there is an omission or error in the declaration, bylaws, or other condominium instruments, which may not be corrected by an amendment procedure set forth in paragraphs (1) and (2) of subsection (b) of Section 27 in the declaration then the Circuit Court in the County in which the condominium is located shall have jurisdiction to hear a petition of one or more of the unit owners thereon or of the association, to correct the error or omission, and the action may be a class action. The court may require that one or more methods of correcting the error or omission be submitted to the unit owners to determine the most acceptable correction. All unit owners in the association must be joined as parties to the action. Service of process on owners may be by publication, but the plaintiff shall furnish all unit owners not personally served with process with copies of the petition and final judgment of the court by certified mail return receipt requested, at their last known address.

(6) Nothing contained in this Section shall be construed to invalidate any provision of a condominium instrument authorizing the developer to amend a condominium instrument prior to the latest date on which the initial membership meeting of the unit owners must be held, whether or not it has actually been held, to bring the instrument into compliance with the legal requirements of the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Administration, the United States Veterans Administration or their respective successors and assigns. (Source: P.A. 98-282, eff. 1-1-14; 99-472, eff. 6-1-16.)

(765 ILCS 605/35) (This Section may contain text from a Public Act with a delayed effective date)

Sec. 35. Compliance with the Condominium and Common Interest Community Ombudsperson Act. Every unit owners' association must comply with the Condominium and Common Interest Community Ombudsperson Act and is subject to all provisions of the Condominium and Common Interest Community Ombudsperson Act. This Section is repealed July 1, 2021. (Source: P.A. 98-1135, eff. 7-1-16.)

LEGISLATIVE UPDATE

STATE

HB4490 (Rep. Drury) ATTORNEY'S FEES IN THE EVENT OF AN OWNER DEFAULT. This bill amends Section 9.2 (b) of the Illinois Condominium Property Act. Currently Section 9.2 provides that attorney's fees incurred by an association arising out of default by a unit owner, tenant guest or invitee of the governing documents or the Act can be added to the unit owner's share of the common expense or unit owner's account. The bill amends the section to prohibit an association from adding attorney's fees to an owner's account without a finding by a court. The bills require a court to award attorney's fees, in every default, before attorney's fees can be added to the unit owners' account, thereby requiring a judicial finding on any default.

4/8/2016	House	Rule 19(a) / Re-referred to Rules Committee
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HB4491 (Rep. Drury) EXPANSION OF UNIT OWNER DEFENSES IN COLLECTION CASES UNDER THE FORCIBLE ACT. This bill amended Sections 9-106 and 9-111 of the Illinois Forcible Entry and Detainer Act. Effectively this bill seeks to overturn the Illinois Supreme Court's decision in *Spanish Court Two Condominium Ass'n v. Carlson*, 2014 IL 115342 (2104). In *Spanish Court Two* the Supreme Court held that the obligation to pay assessments was an independent covenant and a unit owner's attempt to raise as a defense a breach of duty by an association was not "germane" to the collection case and thereby not permitted. This bill seeks to amend the Forcible Act to reverse the holding of the Supreme Court and permit an owner to raise, in any delinquent assessment collection case, a "material breach of any duty" in the condominium instruments, rules or statutes, or an "improper motive" by the association in bringing the action. Further, the bill amends the Forcible Act to **bar** an association in a collection case from recovering any attorney's fees and costs if the court finds that the association breached an obligation under the governing documents or a fiduciary duty to the unit owner, regardless of non-payment of assessments.

4/8/2016	House	Rule 19(a) / Re-referred to Rules Committee
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HB4658 (Rep. Nekritz) AMENDMENT TO OMBUDSPERSON ACT. This bill amends Section 35 of the Condominium and Common Interest Community Ombudsperson Act. Section 35 entitled "Written Policy for Resolving Complaints" requires associations to adopt a formula written policy for resolving complaints by owners. This bill removes references to requiring associations to register with the Department of Financial and Professional Regulations. The bill repeals Section 55 of the Act thereby providing that associations will no longer be required to register with the Department.

5/31/2016	House	Passed Both Houses
6/27/2016	House	Sent to the Governor
8/12/2016	House	Governor Approved
8/12/2016	House	Effective Date August 12, 2016
8/12/2016	House	Public Act 99-0776

HB5812 (Rep. Breen) MORE AMENDMENTS TO OMBUDSPERSON ACT. This bill amends multiple sections of the Condominium and Common Interest Community Ombudsperson Act. The bill makes some minor technical changes to the Act and the terms. Additionally, the bill amends Section 15 of the Act to revise the definition of "Condominium Association" to mirror the definition within the Condominium Property Act. The bill includes a new term in Section 20 to provide that the Ombudsperson has no authority to consider matters which would constitute charges under the Illinois Human Rights Act. The bill amends Section 30 to provide that the Office of Ombudsperson make available a toll free number to provide information and resources. The bill provides that the Ombudsperson would be named (rather than employed) by the Department and the office would also be situated under the Division of Real Estate instead of the Division of Professional Regulation.

The bill retains the existing requirement that, on or before December 27, 2016, associations must establish and adopt written policies for resolving complaints made by unit owners.

The bill amends Section 35 by requiring an association to make a final determination on a unit owner's complaint within 90 days (versus a reasonable time). The bill removes a provision enabling the unit owner to notify the Department of the association's lack of, or the inadequacy of, a written policy, which could lead to an association losing its legal rights to bring civil actions for the collection of delinquent assessments. The bill repeals Section 55 of the Act thereby providing that associations will no longer be required to register with the Department.

Significantly, the bill mandates associations amend their governing documents to adopt dispute resolution mechanism.

The bill provides that no later than July 1, 2019, Associations will be required to adopt a bylaw or declaration amendment to provide for mandatory mediation or arbitration with respect to the vast majority of disputes between associations and unit owners. The parties could choose whether alternative dispute resolution would be binding or non-binding. The bill removes all provisions relating to the Ombudsperson providing "request for assistance."

Finally, the bill amends Section 50 of the Act to require the Department to submit an annual report to the General Assembly regarding education and training requests received instead of dispute resolution assistance requests and outcomes.

4/8/2016	House	Rule 19(a) / Re-referred to Rules Committee
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HB5927 (Rep. Fine) CODIFIES A COMMON INTEREST COMMUNITY'S ABILITY TO ENACT RULES. This bill amends Section 1-30 of the Common Interest Community Association Act to explicitly provide that a board of a Common Interest Community has the statutory authority to adopt rules and regulations. The bill prohibits a board from adopting rules which impair First Amendment rights or conflict with the declaration or bylaws.

4/8/2016	House	Rule 19(a) / Re-referred to Rules Committee
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HB5696 (Rep. Cassidy) AMENDMENT TO DEFINITION OF ACCEPTABLE TECHNOLOGY.

The bill amends the definition of "acceptable technological means" in both the Condominium Property Act and the Common Interest Community Association Act to expand its meaning to include "any generally available technology that, by rule of the association, is deemed to provide reasonable, reliability, identification and verifiability." Additionally, the bill makes technical changes to the Act to create a consistent use of the term "acceptable technological means."

5/25/2016	House	Passed Both Houses
6/23/2016	House	Sent to the Governor
7/22/2016	House	Governor Approved
7/22/2016	House	Effective Date January 1, 2017
7/22/2016	House	Public Act 99-0612

HB6243 (Rep. Jesiel) CREATES SHORT-TERM RESIDENTIAL RENTAL PROPERTY ACT.

The bill creates the Short-Term Residential Rental Property Act. It provided that a short-term residential rental property listed on internet-enabled platforms (such as airbnb) shall not be regulated by a unit of local government in a manner more restrictive than bed and breakfast establishments are regulated under the Bed and Breakfast Act. Further provides that a short-term residential rental property, platform administrator, rental property host, or guest shall not be taxed by a unit of local government in an amount greater than a hotel, a hotel operator, or hotel guest.

2/11/2016	House	Referred to Rules Committee
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SB2354 (Sen. Haine) EXECUTIVE SESSION/CLOSED PORTION OF MEETINGS. This bill

amends Section 1-40 of the Common Interest Community Association Act and Section 18 (a) (9) of the Illinois Condominium Property Act. The bill changes both Acts to clarify what items may be discussed by the Board of Directors during the closed portion of a meeting or executive session meetings. The bill details that Board's may discuss engagement, interviewing and dismissal of employees and third party contractors. Additionally, the bill specifies that Board members can meet separately only for the specific enumerated matters. Finally, the bill makes it clear the Board members can meet with legal counsel outside to the presence of an open meeting.

5/18/2016	Senate	Passed Both Houses
6/16/2016	Senate	Sent to the Governor
7/15/2016	Senate	Governor Approved
7/15/2016	Senate	Effective Date January 1, 2017
7/15/2016	Senate	Public Act 99-0567

SB2359 (Sen. Mulroe) BOARD'S ABILITY TO APPROVE A LOAN. The bill changes the Act to clarify the inconsistency in within Section 18.4 of the Illinois Condominium Property Act. The bill would allow elected Boards of Directors, by majority vote, to execute various bank documents to secure a loan on behalf of the Association. Currently the language has a qualifier relating to the "condominium instruments" and there is a concern that some old condominium declarations and by-laws may require up to two-thirds of the owners to vote when incurring "expenses" in excess of a certain capped dollar amount This bill makes it clear that the limits in the "condominium instruments" do not apply to loans approve by majority vote of the Board of Directors to perform such necessary maintenance, replacement and repairs to the Common Elements.

5/31/2016	Senate	Passed Both Houses
6/29/2016	Senate	Sent to the Governor
8/19/2016	Senate	Governor Approved
8/19/2016	Senate	Effective Date January 1, 2017
8/19/2016	Senate	Public Act 99-0849

SB2837 (Sen. Silverstein) AMENDMENT TO SMOKE DETECTORS ACT. This bill amends the Smoke Detector Act. It provides that if a smoke detector is battery powered, then the battery must be non-replaceable, non-removable, and capable of powering the detector for a minimum of 10 years. An amendment was filed in the Senate further defining the requirements and providing that it shall apply to smoke detectors which more than 10 years old, fail to respond to testing or are newly installed. Additionally, the amendment provides that the requirements will not apply to centrally monitored systems, low frequency/Wi-Fi devices or those designated by State Fire Marshall. Finally, the bill creates an exemption for dwelling units and hotels within municipalities with a population over 1,000,000 inhabitants.

4/22/2016	House	Referred to Rules Committee
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SB2863 (Sen. Connelly) AMENDMENT TO SECTION 15 OF THE CONDO ACT. This bill amends Section 15 of the Condominium Property Act "Sale of Property." Section 15 provides a mechanism where the entire condominium property can be sold to a third party. The bill was amended on March 15, 2016. The bill amends a subsection (a) to Section 15 of the Act to provide that if a unit owner has filed a written objection to the sale within 20 days after approval the unit owner shall be entitled to receive reimbursement for relocation costs. This bill will not apply to any pending approved sales.

7/31/2016	Senate	Pursuant to Senate Rule 3-9(b) / Referred to Assignments
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FEDERAL

HR3700 New rules for FHA recertification. Time to renew is lengthened. Owner occupancy is now 35% down from 50% unless FHA sets a different limit within 90 days of passage. (President signed 7/29/16)

HR4696 Proposed income tax deduction for HOA fees, waiting for ruling.

FHA is working on a new regulation that will deny reverse mortgages to seniors in states with priority liens. Illinois is a priority lien state.

CITY

Recycling Ordinance Amended. Effective 1/1/2017. Under the amended ordinance, property owners of multi-unit residential (more than 4), office and commercial establishments will now be mandated to provide (buy) source-separated, single stream recycling; the most commonly used collection method in the industry. Property owners will also be responsible for implementing an ongoing educational program that includes posting signage, providing adequate carts and sending written notice to tenants about the changes. The Chicago Department of Streets and Sanitation (DSS) will handle enforcement of the ordinance that includes a 30-day warning period and graduated penalties for non-compliance. For more information on recycling in Chicago, visit www.recyclebycity.com/chicago.

Short term Rental or Airbnb Ordinance Amended. Effective 1/1/2017. Buildings less than five units are allowed one unit listed online at a time. Larger buildings are capped at six units or 25 percent of the total number of units, whichever is less. People who want to exceed the limit in the smaller buildings however may apply for an exception for "an extraordinary burden" because of it. Association's may prohibit short-term rental activity through written bylaw and/or covenant restriction. Allows entire buildings to opt out of short-term rentals. The ordinance provides for creation of a list of ineligible units that will not be allowed to operate and a list of prohibited buildings. Owner's interested in listing their home/unit as a vacation rental or short-term rental must register with the City of Chicago and become a licensee. One episode of certain egregious conditions and three episodes of units that cause a disturbance will be penalized. Violators may be fined \$1,500 to \$3,000 per offense, with each day treated as a separate and distinct offense. Egregious conditions, criminal activity or public nuisance are subject to a fine of \$2,500 to \$5,000 per offense. For more information on Airbnb in Chicago, visit <https://chicago.legistar.com/View.ashx?M=F&ID=4309513&GUID=0756B50F-CF56-4C8B-9442-49037DCF0E17> <https://chicago.legistar.com/View.ashx?M=F&ID=4204250&GUID=419B023E-2956-4DD8-9D3B-A8C7DFF88B27>

OVERVIEW OF 2015 AMENDMENTS

There have been a number of changes in Illinois laws in 2015 that have impacted the management of condominium and common interest community associations. Below is a summary of the implications of these changes.

1. Expanded Board powers

Amendment to the ICPA adding Section 18.8, known as Public Act 98-1068 or HB4783. New Section voids governing document restrictions that attempt to limit or restrict rights of the Board. Regardless of the governing documents, the Board shall no longer be required to obtain the prior consent of the unit owners to take any action, including the filing of a lawsuit or demanding a trial by jury. Also, the Board is no longer required to arbitrate or mediate a dispute with the declarant or the developer or any person not then a unit owner prior to filing of a lawsuit or demanding a trial by jury. A provision otherwise voided by this Section may be enforced if approved by a vote of not less than 75% of the unit owners at any time after the election of the first unit ownerboard.

2. Electronic notices/communication

Amendment to Section 18.4 of the ICPA, known as Public Act 98-0735 or HB4784. New Sub-Section (s) to 18.4 related to the adoption and amendment of rules and regulations related to electronic delivery of notices and other communications. Such rules and regulations shall be related only to notices/ communications required or contemplated by the ICPA. Such rules shall authorize electronic delivery of notices/communications to each unit owner who provides the association with written authorization for electronic delivery and electronic address. Such rules and regulations shall authorize each unit owner to designate an electronic address or postal address (or both) on any list of members or unit owners which the association must make available pursuant to any valid records request.

3. Technology in matters requiring member voting

Amendment to Section 2 and 18 of the ICPA, and addition of 18.8, known as PA 98-1042 or HB5322. Adds the definitions of “electronic transmission” and “acceptable technological means” to section 2. Adds provision Section 18(b) (6) of the ICPA recognizing right of the Board to adopt rules and regulations relating to notice by electronic transmission. Under the new provision in 18(b)(6), if the appropriate rules and regulations exist related to electronic notice, consent must still be given by the unit owner and the director/officer must certify in writing to the delivery by electronic transmission.

Adds provision to Section 18(b)(9) of the ICPA stating that if the appropriate rules and regulations exist, a vote or proxy may be submitted by electronic transmission, provided that the electronic transmission shall either set forth or be submitted with information from which it can be determined that the vote/proxy was authorized by the unit owner. Adds provision to Section 18(b) (9) (B-5) addressing the Board’s right to adopt a rule (or if the Declaration or Bylaws state) at least 120 days before an election to eliminate the use of proxies. Under the new provision, if such a rule has been adopted related to electronic transmissions, the use of acceptable technological means may be used to vote. Under the new provision, specific notice and deadline requirements are set forth related to notice, candidacy, balloting and how that is impacted by the use of acceptable technological means. Adds provision to Section 18(b)(9)(D) of the ICPA stating that votes cast by electronic or acceptable technological means are valid for the purpose of establishing a quorum.

New Section 18.8 of the ICPA is created that specifically addresses the use of technology. Any notice required to be sent or received or signature, vote, consent or approved required to be obtained may be accomplished by using technology generally available to that time. This right to use technology extends to the association, unit owners and other persons entitled to occupy a unit. A verifiable electronic signature now satisfies any requirement for a signature under the ICPA or the governing documents.

Voting on, consent to, and approval of any matter under the ICPA or the governing documents may now be accomplished by electronic transmission, provided a record is created as evidence and maintained as long as the record would be required to be maintained in non-electronic form. Individuals must provide written authorization to conduct business using electronic transmission or other equivalent technological means. If they fail to authorize it, the association must (at its expense) conduct business with that person without the use of electronic transmission or other equivalent technological means.

4. Revisions to insurance requirements for associations

Amendment to Section 12 of the ICPA, known as Public Act 98-0762 or SB3014. Amends 12(a) (1) (iii) regarding property damage insurance and amounts of coverage. Adds a provision to 12(a) (3)(D) related to directors or officers' liability coverage requiring coverage for defense of non-monetary actions, defense of breach of contract, and defense of decisions related to the placement or adequacy of insurance. This coverage shall include past, present and future board members while acting in their capacity as members of the board, and managing agent, and employees of the board and managing agent.

Adds a provision to 12(b) that extends the definition of Improvements and betterments" to include "built-in cabinets installed by unit owners, or any other additions, alterations, or upgrades installed or purchased by any unit owner." Eliminates portion of 12(h) that allowed board to purchase insurance on behalf of an owner who fails to purchase it.

Cases

In Board of Managers of Cornell Columbian Condominium Ass'n v. Smith the court found a 3dparty purchaser at a foreclosure sale not responsible for any assessments because the association had been collecting rent granted in a forcible entry a detainer action. However, the court further found that the purchaser was responsible for the attorneys' fees and costs and the special assessment confirmed prior to purchase because a payment of the special assessment had not been made after purchase.

In Schepley v. The Condominiums of Logan Square the plaintiff stepped into a hole on defendant condominiums property. The trial court dismissed the case stating that the plaintiff and not met her burden of proof regarding board knowledge. The appellate court held the plaintiff submitted sufficient evidence of the association's constructive notice and remanded the case back to the trial court for further proceedings.

In D'Attomo v. Baumbeck the purchaser of a unit sued the condominium association for breach of contract and fraudulent concealment when it only learned about a leasing amendment after the purchase of the unit. The lower court affirmed by the appellate court held that the association only owed a duty to owners or occupants, through the owners, not a prospective purchaser.

In University Park Condominium Ass'n v. Midwest Bank and Trust Co. an Association received a judgment for assessments for two units in a land trust against a deceased individual. The defendant land trustee/beneficiary appealed the decision stating the judgment was entered improperly and failed to name a necessary party. The appellate court remanded to the circuit court to review the language of the trust to determine if the beneficiary or trustee is a necessary party.

5 TIPS FOR RUNNING A SUCCESSFUL ASSOCIATION

1. Remind owners you're not required to have a consensus. To do this re-set expectations; create clear regulations and policies to establish uniformity of operation that works for your group, explain you're going to follow the operating documents, the law and best practices. Have an annual session for this purpose and lay it all out. If the group understands what is happening, and what is expected many issues fall away. Remind them, if they want to know more or have more input they can sign up for a committee or even run for the board.

2. Communication (limited, regular-according to your rules and the law, and strategic) is key ... no one likes to get blindsided. Members are more likely to accept changes when they are aware of them from the beginning, have an opportunity to become involved in a dialogue, and understand the basis of the decision. While transparency is a best practice, the board should not release its internal discussions or opinions. State the issue, open it for discussion, have a second discussion, if needed and then take the vote.

3. Just because the previous board did it, does not mean it is correct. When a transition occurs, the new board cannot escape its fiduciary duty by merely saying that's the way we've always done it. A transition review of the state of the corporation and its operational systems is an exercise in best practices.

4. Revise your operating documents now, before an issue arises. Many associations' operating documents are outdated and/or contain provisions unfriendly to current circumstances. It is difficult to get enough votes to amend them when no issue exists and almost impossible when a community becomes divided over an issue.

5. There's something called the Business Judgment rule, rely on it. What does it mean? Hire a professional for specialty specific work. A board is not expected to do all of the work, only oversee that the work being done is accurate. A board should have a financial expert (CPA) to consult and rely upon; with assets and liabilities that belong to everyone they shouldn't play around. You can rely on your attorney's opinion. The rule protects boards that rely on legal advice given by their counsel. Board members should take advantage of this whenever possible. A board that understands and applies the Business Judgment rule with their practices is a best practices board.

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ALL a-BOARD- YOU'RE IT!

Associations Are a Business

Condominium associations in Illinois are not-for-profit corporations. Yet, they are still corporations, even if they are not in the business of making money. Therefore, Illinois law, including the Illinois Condominium Property Act and the Illinois General Not-for-Profit Corporation Act, impose all of the powers, duties, and obligations of a corporate board of directors on condominium association directors, **which includes *fiduciary duties***. In short, **condominium association directors are fiduciaries** and must discharge their fiduciary duties on behalf of the association and its members (unit owners). Although unit owners have an ownership interest in the association, just like shareholders in a corporation, they ***SHALL NOT*** control the association's activities; that responsibility falls on its directors and officers.

Chances are that many of you reading this article were not told when purchasing your condominium that you were buying a residence and part of a business. For those that had such a discussion with their attorney or real estate agent, there are even fewer who were told that they might have to step up and participate in association governance one day.

However, participating in the governance of your association is not a bad thing. Being on a board allows a diligent director to protect his investment and ensure the marketability of his unit. After all, no one wants to buy a condominium that is part of a poorly run association. In fact, many lenders will not write loans for units that are part of financially unstable associations.

Directors as Fiduciaries

Directors and officers (who are elected from among a group of directors) of a condominium association must act as fiduciaries of that association. What does this mean? This means that **as a director you owe your association**: (1) undivided loyalty and (2) the exercise of reasonable business judgment.

Undivided Loyalty

Undivided loyalty is a fairly abstract idea but it can be explained in terms of condominium governance with some concrete examples. When acting as a director of an association board, directors cannot allow their own beliefs, perceptions, or personal needs to influence their decisions. This means that a director must fine a well liked neighbor for association rule infractions or vote to increase association assessments in spite of the increase's unpopularity or his personal inability to pay the increased amount.

The analogy of wearing two different hats goes far in illustrating how undivided loyalty works. When a director sits down with his fellow board members to handle association matters, he must take off his unit owner hat, with all its various priorities and considerations, and put on his director hat to impartially determine what can be done to that day to advance the association's interests. Not coincidentally, however, a board will find that doing what is best for the association ultimately yields the best result for unit owners, namely property value appreciation and the development of a more harmonious living environment.

Business Judgment

Being loyal, however, is only part of a director's duty. A director must also employ reasonable business judgment. This requires directors to act on an informed basis, in good faith, and in the honest belief that their actions are in the association's best interests. Note that the first requirement is that a board must be informed, which first requires a director to fully understand association business. Although every association has its own peculiarities, there are certain needs that are common to every association and that require a board's attention.

Incidentally, these needs are addressed by the types of duties imposed on association directors by Section 18.4(a) of the Illinois Condominium Property Act:

- a) To provide for the operation, care, upkeep, maintenance, and improvement of the common elements;
- b) To prepare, adopt, and distribute the annual budget;
- c) To levy and expend assessments;
- d) To collect assessments from unit owners;
- e) To provide for the employment and dismissal of personnel necessary or advisable for the maintenance and operation of the property;
- f) To obtain adequate or appropriate kinds of insurance;
- g) To own, convey, or otherwise deal with the units or lots;
- h) To adopt rules and regulations regarding the use of the property;
- i) To keep detailed accurate records of the receipts and expenditures affecting the use and operation of the property;
- j) To have access to each unit from time to time as necessary for repair and maintenance of the common elements;
- k) To pay taxes or other special assessments; and
- l) To impose charges for late payment and to levy fines or violations of the declaration, by-laws, and regulations of the association.

Note that **each one of the above functions relates to three primary objectives that every board should have** at the forefront of his mind: (1) fiscal security, (2) structural integrity, and (3) promoting health and welfare of association members. Also note that failure to perform these functions adequately or timely constitutes a breach of fiduciary duty exposing the association and individual board members to lawsuits.

Remember that the reason why a board must do things like timely collect assessments, keep detailed records of association business, or consistently enforce the rules, is to promote one of these objectives.

On a closing note, being a director on an association board can be a worthwhile and gratifying experience as long as you have the information you need to make governance manageable. The enclosed articles and forms are a sampling of what every association needs to know to discharge its fiduciary duties to the association.

WHAT ABOUT THE MEMBERS....

Of course the board should be prepared, have an agenda, know what is informational and what requires further detail, what items only need votes of affirmation and which require discussion, then vote or possibly table until the next meeting. Most articles examining the meeting process look through member eyes to correct the ills du jour; what happens when we flip the lens the other way?

Too often association members become either complacent or combative when it has to do with the business of running their association. They forget they elected a board of managers, volunteers no less, to do the work most would not, usually because of the serious responsibility and time that goes along with the position. More importantly they forget that it is these very duties and obligations they then don't want the board to perform either.

- Remember the board is undertaking a generally unwanted task and most of the time if permitted will rise to the occasion of running an effective association and effective meetings.
- Before engaging in any association matter, remember there are rules of etiquette to be followed with any interchange. Respect your leaders so they can lead.
- Become educated about rules of corporate governance. Learn that an open meeting only means anyone can be present, not that any one can speak or that it is an open agenda or town hall meeting; it is not.
- Be prepared. If you expect the board to assist you with something, undertake the steps required to bring a matter to the attention of the board the correct way. Don't try to ambush the board. Any time set aside before the formal start of a meeting or at the conclusion of the meeting is wasted if used as a gripe session. If the board takes the time to provide you an agenda and whatever you need to understand or review the topic(s) you should read everything you are provided in anticipation of the meeting, be familiar with your operating documents and constructively offer information, suggestions and support.
- Support a board motion to pay for board training in effective governance and best practices.

An educated Association is a well run association.

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Excerpts From
PUT YOUR BEST FOOT FORWARD
a book by Dimitrius and Mazzarella, 2002

Learn to listen-

- Listening makes others feel important
- Listening encourages others to listen to you
- Tips for good listening:
- Don't interrupt
- Avoid distractions
- Be an objective listener
- Be patient
- Actively participate
- Prompt others to talk
- Be direct and responsible

Decide how you want to be regardless of how you are treated-

- Don't set double standards
- Do the right thing
- Be thoughtful
- Show consideration for others
- Respect others privacy

Vocal emotion-

- Volume
- Tone and itch
- Pace
- Other qualifications:
- mumbling
- rough voices
- whining
- pretension
- breathiness

Toxic Traits

- Offensive physical acts
- Unappealing word usage
- Insensitive communication
- Aggressive behavior
- Pettiness