

REPRESENTING THE CONDOMINIUM ASSOCIATION

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I. Introduction

9.1 Scope of Chapter

This chapter is intended to familiarize the practitioner with a basic “how to” guide in representing the Condominium Association. As a practical matter, it is really more a matter of advising and consulting with the Board of Directors even though the Association itself is the client. In practice, there is no difference between representing the Board of a townhome or homeowners Association, or a cooperative. The issues are generally identical even though the governing documents will differ. This chapter will deal specifically with the Condominium form of ownership.

9.2 Condominium Ownership

In 1963, a new form of property ownership was created in Illinois and modeled on Florida; the Condominium. (Initially adopted as Ill. Rev. Statutes 1991, Ch. 30, §3d et. seq., now referenced as 765 ILCS 605/1 et. seq.). This statute divides ownership into two (2) parts: the dwelling “Unit” and the Common Elements which includes everything other than the Unit. “Condominium” is an interest in real estate created by statute that gives each Owner interest in an individual Unit as well as Undivided interest in the Common Elements. 175 E.

Delaware Place HOA v. Hinojosa, 223 Ill. Dec. 222, 1997). A sub-category of “common elements” is the Limited Common Elements. Defined in detail in §4.1 of the Illinois Condominium Property Act (765 ILCS 605/4.1), it is that portion of the Common Elements that inures to the benefit of one or more Units to the exclusion of one or more Units. *Hofmeyer v. Willow Shores Condominium Assn.*, 242 Ill. Dec. 822, 1999, e.g. balconies and patios.

9.3 The Board of Directors

The duly elected Board of Directors, also referred to as the Board of Managers, is the “control group” for the Condominium Association and the Association attorney is in a professional relationship with the Association, although he takes direction from the duly-elected Board of Directors. This position is one which mandates mutual trust and confidence.

Advising the Board on administering the Association, interacting on a daily basis with the property manager, Unit Owners, various contractors and professionals is a case study in human dynamics.

9.4 The Role of the Attorney

Attorney, counselor, psychiatrist, mediator, judge, jury, executioner and grand inquisitor. The attorney advises the Board of Directors as to the risks and liabilities it faces in its daily decision-making role, often acting before a live audience of Unit Owners, usually at an open meeting held in the evening.

A myriad of problems arise in administering and maintaining the Common Elements of an Association and the attorney is the chief problem-solver and counselor to the Board in resolving them.

CAVEAT: There is an inherent conflict of interest in the attorney advising and consulting with the individual Board members or acting on behalf of or advising the individual Owners in the same Association.

The Association attorney renders advise and guidance using the operating documents of the Association (Declaration of Condominium Ownership, the By-Laws, Rules and Regulations), the Illinois Condominium Property Act (765 ILCS 605 et. seq.); the Illinois General Not-For-Profit Corporation Act, (805 ILCS 105/101/01 et. seq.) and the Forcible Entry and Detainer provisions of the Code of Civil Procedure (735 ILCS 5/9 et. seq.) and a plethora of local ordinances and case law. The attorney serves as the guidepost and sounding board for the manager and the Board members to operate within the bounds of propriety and legality.

II. Legal Basis of the Condominium Association

9.5 Creation of the Association

It all begins with the developer transferring real property from fee simple to multiple ownership. Whether it is an existing structure or new construction, the transformation of real property into a “Condominium” requires one finite action;

submitting the property to the Illinois Condominium Property Act. (765 ILCS 605/3). This entails the recording of a Declaration of Condominium Ownership and Plats of survey are prescribed by Section 5 of the Illinois Condominium Property Act (765 ILCS 605/5) (“Act”).

Once the documents are recorded, the Condominium is created and theoretically, begins to operate. The term “theoretically” is applicable because the developer may still be selling units, construction may have commenced, but a Board is usually not selected outside of the developer’s inner circle. Day-to-day decisions are made by the developer and carried out by the manager of the property, although sometimes it may be just a contractor working in the building. In most instances, proper corporate format is dispensed with until the developer sends notice for the first meeting of Owners and the Board of Directors is elected from among the Owners.

9.6 The Condominium Declaration

Section 4 of the Act prescribes the minimum particulars of a Declaration, outlining basic contents such as definitions, percentages of ownership, lawful provisions, etc. (765 ILCS 605/4).

The Declaration is a covenant running with the land which creates a contract between the Owner and the Association as to the rights and

responsibilities of Unit ownership and is binding upon the property, all Owners and their successors.

The Declaration is the underlying document from which all of the Association's authority springs. Frequently referred to as the "rules of property", they are the guidelines and restrictions as to the cooperative aspects of ownership. First, in the pecking order of priority is the Declaration of Condominium ownership which takes precedence over all other documents. However, when the rights of an Owner are at issue, the court must harmonize the provisions of the "Act" with the Association's By-Laws and Declaration, construing them as a whole. *Ulhara v. Schlade*, 177 Ill. Dec. 576, 1992.

9.7 The By-Laws

A. Just as in the case of any corporation, the By-Laws are the "handbook" which empowers the Board of Directors with express authority to administer and maintain the property, elect a Board, run its meetings, adopt the budget and maintain records. Not to be confused with the Declaration, the By-Laws are addressed in greater detail by the Act.

Section 18 of the Act sets forth the minimum requirements for Condominium Association By-Laws.

Some of the more essential items include:

- (1) Annual elections of the Board §(a)(1)

- (2) Budgets §(a)(6) & (80)
- (3) Year-end reports §(a)(7)
- (4) Open meetings §(a)(9)
- (5) Filling Board vacancies §(a)(13)
- (6) Conflict of interest restrictions §(a)(16)
- (7) Election procedures §(a)(17), (18), (b)(1), (3), (6), (7), (8), (9), (10)
- (8) Directors and Officers' insurance §(g)
- (9) Leasing (§11)

In all instances, the aforesaid requirements as well as the remainder of Section 18, supercedes any provisions of the Association's By-Laws. However, most Condominium By-Laws are more comprehensive and include considerably more detailed power and authority than the minimum listed in the statute. The By-Laws are the roadmap for the Board of Directors on how to operate the Association.

B. The following provisions of Section 18 of the Act mirrored by most By-Laws generally require the most interpretation”:

1. Electing the Board

(a) Every year the Association should hold an Owners meeting and conduct an election for the Board of Directors (Board of Managers). "...The terms of at least one-third (1/3) of the members of the Board shall expire annually". (§18(a)(1)). This provides for staggered terms so there is continuity yet no one is elected for a life term. Only one Owner per Unit may serve on the Board, which precludes a husband and wife serving together, unless they own more than one (1) Unit and terms are limited to two (2) years. (§18(a)(11)), but directors and officers can succeed themselves. (EXHIBIT 1).

2. The Budget

The proposed budget for the coming year must be sent out to the Owners at least thirty (30) days prior to adoption by the Board at an open Board meeting. (Remember, it is the Board of Directors, not the Owners that approve the budget.)

However, the Owners are entitled to a separate notice of the budget meeting when the budget will be adopted by the Board. (Notice shall not be more than thirty (30) nor less than ten (10) days in advance. (§18(b)(6)).

In the event the budget or any special assessment exceeds the prior year's total sum of regular and special assessments by 15% or more, only then do the Owners have a right to call for a referendum to vote on the budget. Twenty percent (20%) of the Owners can petition the Board within fourteen (14)

days after the Board action to call a special meeting to vote on the budget or special assessment and a majority of all Owners is required to overturn the proposed changes (§18)(a)(8).

Although if the additional or non-recurring expenditures come within the definition of an “emergency” or are “mandated” by law, then there is no 15% cap. (§18(a)(8)(iv). (An emergency is defined as “an immediate danger to the structural integrity of the Common Elements or to the health, safety or the property of the Unit Owners.”)

Some Declarations and By-Laws have caps on capital expenditures, however, if they come within the definition of repairs, replacement or restoration of existing portions of the Common Elements, then the cap would not be applicable. (§18.4(a)).

If replacement of existing Common Elements results in an improvement, which exceeds 5% of the annual budget, it, too, can be subject to an Owner referendum after 20% of the Owners have petitioned the Board within fourteen (14) days of adoption, as is the case with §18(a)(8).

As you can see, the budget and assessment procedures can be confusing because you must look at the separate statutory references to see if the situation qualifies.

3. Open Meetings

The rule is, that all meetings of the Board are open to all Owners and require no less than 48 hours advance written notice (§18(1)(9)), to be mailed or delivered to each Owner and posted in a common hallway.

The exceptions to the open meetings requirements are meetings held to (1) discuss litigation, (2) hiring and firing employees or contractors, or (3) to discuss violations and delinquencies. Any vote on these matters shall be taken at a meeting open to the Owners. (§18(a)(9)).

This begs the question: Can the Board meet as a committee of the whole without conducting business, i.e., not voting. Section 2(w) of the Act defines a meeting of the Board as any gathering of a quorum of the members of the Board, “held for the purpose of conducting Board business.”

Most of the experts agree that so long as no voting is conducted at a closed session, no business is being conducted and these opportunities can be availed on a limited basis, so long as voting on all matters is held at the open meeting and noted in the minutes. It does explode the old myth about three (3) Board members getting on an elevator....., etc.

The Board must meet openly at least 4 times annually (§18(a)(10)), although many Boards use planning sessions or workshops to prepare for the open meetings.

No minutes are taken of the closed session as they are essentially confidential. However, minutes would be discoverable in litigation, as they would not constitute “work product” and be subject to any exceptions. *Wilstein vs. San Tropai Master Assoc.*, 89 F.R.D. 371 (N.D. Ill. 1999).

4. Removal of Directors

This highly sensitive area is generally governed by express provisions of the By-Laws and the Illinois General Not-For-Profit Corporation Act. (805 ILCS 105 et. seq.).

Where the By-Laws are silent regarding the removal of directors, Section 108.35 of the Not-For-Profit Corporation Act governs (805 ILCS 105/108.35).

One or more directors may be removed with or without cause. A director may be removed by the affirmative vote of two-thirds (2/3) of the votes present in person or by proxy at a meeting, after notice is sent to all members. The notice must state the purpose of the meeting, and only the named directors may be removed at the meeting. A quorum must be present, in person or by proxy.

If cumulative voting is permitted, the formula becomes complicated because the statute states that “if less than the entire board is to be removed, with or without cause, if the votes cast against his or her removal would be sufficient to elect him or her if then cumulatively voted at an election of the entire Board of Directors.” (805 ILCS 105/108.35(c) (3)).

Directors can also be removed by court order and a court can bar the director from running for re-election.

There is a key point to remember; directors are elected by the Members and in almost all instances, the By-Laws (and the Not-For-Profit Corporation Act) empower only the Owners to effect a recall.

Officers, however, are the officers of the Board, not the Association. They are elected by a majority of the Directors and as such, can be removed by a majority of Directors, although such an individual would still remain as a Director, unless removed by the Owners, as aforesaid.

5. Resignation

Clearly, Board members can resign at any time and must do so when they are no longer Owners, because only Owners may serve on the Board. (765 ILCS 605/§18(a)(1)). However, what if a Board member consistently fails to attend meetings without cause. It could be viewed as a “constructive resignation” and the Board should have a policy that upon certified notice, and no opportunity to plead their case before the Board, failure to show cause why the Director failed to attend any number of consecutive meetings and failed to notify anyone, that Director will have deemed to “constructively resign” from the Board and the vacancy will be filled. If this individual fails to respond, it could be viewed that it was their intention to resign and the Board can, in theory, make this presumption.

Boards of Directors are most efficient and effective when they have a full complement of Directors available to put in time and attend meetings.

6. Reserves

If you look at some of the difficulties plaguing Associations, it stems from not having enough money, or having inadequate reserves to fund capital expenditures. Early Boards that failed to consult with professionals while trying to deal with the transition of a new Association from developer to Owner control must often raise assessments significantly because the developers often misjudge the cost of operations or subsidize the property to keep assessments low in order to make sales more attractive.

Later Boards may make some effort to start accumulating reserves, but unless they hire a qualified consultant, they generally do not have the vision or expertise to anticipate leaking roofs, rotten siding and the overall useful life of the property down the road.

Finally, years later, the Board members may be sitting with a million dollars worth of repairs for 15 year old buildings and are woefully unprepared. They must now face having to levy a special assessment, obtain a bank loan or both. Section 9 (c) of the Illinois Condominium Property Act (765 ILCS 605/9 (c) et. seq., requires that all budgets adopted after July 1, 1990, include a provision for reasonable reserves for capital expenditures and deferred maintenance for

repairs and replacement of the Common Elements. A valuable tool in establishing a basis for reserves would be Reserve Study Guidelines for Community Associations, Planned Developments and Condominiums, Richard Wyndhamsmith, Windamhouse, Inc. 1989.

The term “reasonable” is defined by determining the useful life of all components, amenities and systems, return on investment using a professional to create a reserve study and most important, the financial impact on the Unit Owners and market value of the property and lastly, the ability of the Association to obtain financing. (765 ILCS 605/§9(c)(2)(i) through (v)).

These criteria do not establish a fixed percentage or an amount, but the conscientious professional must give guidance to the Board of Directors on fulfilling their fiduciary duty to the members of the Association to make a good faith calculation. The Board of Directors should retain the services of an experienced consultant to perform a useful life study and reserve analysis so the Board can set money aside using actual data.

III. The Role of the Board of Directors

A. The Duties and Responsibilities of the Board

In advising a Board of Directors as to their risks and liabilities for exposure while serving on the Board, the attorney must define the limits of power.

(Absolute power, corrupts absolutely!)

A veritable job description must be pulled together from various Sections of the Condominium Act (primarily, §18 and §18.4, but elsewhere) the Declaration, By-Laws and common law. The powers and duties of the Board established in the Act include in part::

1. Prepare and adopt the budget and establish reasonable reserves (see §9.5B2 infra).
2. Collect delinquent assessments

The Act in its earliest form anticipated that recording liens and foreclosing liens would be the standard method of collecting delinquent assessments.

Section 9(g) of the Act accounts for the recording of a lien, however, this raises several problems:

(a) A lien is a cloud on the title and in, and of itself, it does not collect the money.

(b) There is no statutory mechanism for an assessment lien foreclosure (a make-shift procedure is cobbled together from mortgage and mechanics lien foreclosure law).

(c) Lien Foreclosure proceedings in Illinois are costly, time-consuming and cumbersome. As a result, an Association may choose to record a lien to secure its rights and establish priorities, but the most effective method of

collection is set forth in §9.2(a) of the Act coupled with 735 ILCS 5/9 et. seq., the Forcible Entry and Detainer provisions of the Illinois Code of Civil Procedure. Eviction is the preferred method of collecting delinquencies used by Associations in Illinois, and, it is the Board's obligation to monitor and enforce a strict collection policy.

3. Obtain adequate insurance coverage.

Section 12 of the Act outlines the various kinds of insurance required for Condominiums (a)(1) property damage (full insurable replacement cost, less deductibles), (2) general liability, (3) officers and directors liability including fidelity bonds for handling funds, and while it is not mandatory, but should be is, (4) workers' compensation.

Also, it is implicit not only for all Board of Directors to make sure their own insurance coverage is adequate, but also that of their property managers and any contractor providing goods and/or services to the Association, as well.

4. Discretionary Powers

It is within the sound discretion of the Board of Directors to initiate certain actions if it feels it is in the best interests of the Association, although, in some instances, Unit Owner approval is also required:

Section 4.2 and §18.4(n) - dedication of streets and/or utilities to a Unit of local government.

Section 14.3 and §18.4(o) - grant an easement for laying cable tv.

Section 14 - grant an easement to local government to protect against groundwater damage and erosion.

Section 18(b)(13) - the merger or consolidation of the Association, sell and dispose of property assets (subject to approval of two-thirds (2/3) of the Owners present in person or by proxy at a special meeting).

Section 18.4(p) - seek a reduction of real estate taxes assessed on all Units.

5. Additional mandatory duties

(a) Provide the Owners an annual accounting of all receipts and expenditures. (§18(a)(7))

(b) The Board of Directors must meet at least four (4) times per year. (§18(b)(3)).

(c) The Association must hold an annual meeting of Owners for the purpose of electing the Board. (§18(b)(3)).

6. Administer and maintain the Common Elements (§18.4(A)). Implicit in administering the Common Elements, aside from maintenance responsibility is architectural control, or maintaining the architectural and aesthetic appearance of the community. It is probably the most broad-based authority that the Board of

Directors retains and is also the subject of more litigation than any other single matter. The main consideration is to look to the covenants for guidance as they probably contain the parameters.

A Board of Directors should establish procedures for requesting permission including description, materials, time frame, contractor's credentials, insurance, etc. The rules should provide for fair and objective standards, clear specifications and a summary and expeditious response.

Among the hundreds of architectural control decisions, here is a typical example; the appellate court upheld the trial courts issuance of an injunction requiring an Owner to remove a room air conditioner that she installed in an exterior wall of her Unit without prior approval from the Association. *Cabrini Villas HOA v. Hoghverdian*, 111 Cal. App. 4th 683 4 Cal. Repr. 3d 192, 2003. Whether it is solar panels, swingsets, flower boxes, fences, or swimming pools, the Board must have the procedures in place and move impartially, make it known to all current and future purchasers that they exist.

7. Adopt and amend the Rules and Regulations covering details of operation (765 ILCS 605/§18.4 (h)) upon notice to Owners with a copy of the proposed text, not more than thirty (30) days nor less than ten (10) days in advanced of an Owner's meeting, when the proposed rules are discussed before they are adopted by the Board.

8. To reasonably accommodate the needs of the handicapped and disabled (§18.4(9)). This provision of the Act seems simple enough, however, it can have enormous ramifications for an Association. The Board of Directors must be sensitive to the needs of handicapped people to the extent it should anticipate basic needs before a request is even made. The Americans with Disabilities Act, 42 USC, §12/02, in most cases is not applicable, but a Board needs to have a working understanding of the parameters of the Fair Housing Amendments of 1988, (Title VIII Civil Rights Act 42 USC 3601-3619), the Illinois Accessibility Code as well as local and county ordinances. The Board of Managers of a Condominium has the authority to adopt and amend rules covering details of operation and use of property and to reasonably accommodate needs of handicapped Unit Owners as required by the Human Rights Act (ch. 681-101 et. seq.) in exercise of its powers with respect to use of Common Elements. *Robinson, et al. v. LuCasa Grande Condo Assn.*, 150 Ill. Dec. 148, 1990.

9. Records

(a) Not only is the Association the keeper of the records, but it must also be prepared to produce and disclose records within statutory guidelines for sales, re-sales, refinancing, Unit Owner curiosity or even political purposes.

Section 19 of the Act identifies items such as Association documents, minutes, contracts and financial records to be available for inspection and copying. However, in addition, “a current listing of the names, addresses and weighted votes of all members entitled to vote” (§19(a)(7)), and ballots and proxies from the last election, (§19(a)(8)) must also be made available. Provided, however, that the Owner making the request must make a written request, stating with particularity that they are seeking. The Board’s failure to reply and properly respond can result in sanctions including the payment of the Owner’s attorney’s fees if litigation is filed to seek the cooperation of the Board. (§18(b)).

Underlying the Owner’s rights, however, is the obligation to state a “proper purpose”.

What is excluded from this Board disclosure requirement are records and documents pertaining to (1) hiring and firing of employees, (2) pending or threatened litigation or administrative proceedings, and (3) individual Owner files in checking delinquencies, leases (§19(g)).

The Board must also make documents and disclosure of certain facts available to any Owner upon request for purposes of selling or financing their Unit (§22.1). (EXHIBIT 4). This includes Association documents, lien and assessment status, current and future capital expenditures, a financial statement,

pending litigation status, and insurance information, etc. In *Miller v. St. Charles Condo*, 96 Ill. Dec. 311, 1986, the court found that a condominium attorney's intentional and malicious interference with the issuance of a closing letter could be deemed to be tortious interference unless the attorney shows that he is accorded a conditional privilege when advising his client and no "actual malice" is intended.

In all instances, when document and record requests are made to the Board, however, they can charge reasonable copying costs and expenses to the person making the request. Failure to timely respond to a request can be very costly and Associations should have a set policy on responding to requests. (§9(f)). In *Tagher vs. Wesley*, 278 Ill. Dec. 659, 2003, the Illinois Appellate Court held that the members of a Board were in contempt of court and were sanctioned for refusing to produce records. The records were budgetary files of the finance committee and the court further found that the Owner had stated a proper purpose. Overall, there must be a very good documented reason, within statutory parameters, for a Board to produce certain records or refusal to issue a letter.

10. The Board, as Fiduciaries

“In the performance of their duties, the officers and members of the Board, whether appointed by the developer or elected by the Unit Owners, shall exercise the care required of a fiduciary of the Unit Owners.” (§18.4(9)).

Since the Condominium Association officers and Board members owe a fiduciary duty to the members of the Association, they must act in a manner reasonably related to the exercise of that duty not only to the Association, but also for the individuals themselves. *Board of Managers of Weathersfield Condo Assoc. v. Schaumburg, Ltd. Partnership*, 240 Ill. Dec. 336 1999. Failure of Condominium Board members to act in a manner reasonably related to their fiduciary duties results in liability for the Board and its individual members. *LaSalle N. at Bank vs. the Board of Directors of 1100 Lake Shore Dr. Condo Assoc.*, 222 Ill. Dec. 579, 1997. However, when the Board properly exercises its business judgment in interpreting its own Declaration, the Board’s interpretation, even if incorrect, is not a “breach of fiduciary duty.” *Id.* See *Carney v. Donley*, 199 Ill. Dec. 219, 1994 (also see, *Wolinsky vs. Kadison*, 70 Ill. Dec. 277, 1983, *Kelley v. Astor Investors, Inc.*, 88 Ill. Dec. 620, 1985.

IV. Dealing with Developers

Although the Illinois Condominium Property Act is not explicit in outlining the rights and obligations of a Unit Owner elected Board in dealing with the developer, there are implicit requirements:

A. Initially, when the Declaration of Condominium Ownership is recorded, the existence of the Board of Managers (or Directors) “springs forth” as if it popped out of Zeus’s head, like Athena.

The developer generally operates the Association in a very casual manner (no meetings, no minutes, few records are kept) and makes informal decisions that sometimes come back to haunt the Association (allowing pools, decks, fences, etc., where none would otherwise be permitted).

The penalty, however, for failure to make an effort at corporate accountability, is potential personal liability for the developer. §18.4(r) provides that, “officers and members of the Board, whether appointed by the developer or elected by the Unit Owners, shall exercise the care required of a fiduciary of the Unit Owners.” Individual Board members appointed by the developer can be held liable for breach of fiduciary duty if the developer failed to establish and maintain adequate reserves for future repair of Common Areas prior to turnover. *Board of Mgrs., Weathersfield Condo Assn. v. Schaumburg Ltd. Partnership*, 240 Ill. Dec. 336, 1999.

However, many developers take this responsibility all too lightly. When the first meeting of Owners is held and the Board is elected, one of the primary responsibilities will be to review the developer's actions. In the landmark case of *Ravens Cove Townhomes, Inc. v. Knappe Development Co.*, 114 Cal. App. 3d 783, 171 Cal. Rptr. 334, 1981, the California Appellate Court held that individuals appointed by the developer could be held personally liable to Association members for breach of fiduciary duty. Developers can be held personally liable for breach of fiduciary duty for failing to set aside adequate reserves while operating the Association. *Maerker Point Villas Condo Assoc v. Gregory Szymiski*, 211 Ill. Dec. 809, 1995.

The Board is guided by the Condominium Act as well as common law.

B. Amendment & add-on authority

The developer is legally obligated to turnover control of the Association upon the sooner of the sale of 75% of the Units within three (3) years or recording the Declaration (§18.2(b)(i)). Some developers are reluctant or refuse to turn over control of the Association to the Owners. §18.2(b)(i) is very clear that the Owners can force the turnover when the developer refuses and paragraph g. provides for an award of attorney's fees if litigation is necessary to force the turnover of documents and funds. The developer is also put in the precarious position of being a multiple Unit Owner while still being in control so

it's a conflict of interest, just waiting to happen. At the time of turnover, the developer should promptly turnover the books and records of the Association to the Board. (EXHIBIT 2, List of Documents).

The Board and the developer should begin by establishing a good working relationship, rather than standing eyeball-to-eyeball.

It is worth noting that if the developer intends to build additional buildings and/or add additional Units, this right is only vested if preserved in the Declaration. (Section 6). It is also noteworthy that the developer will be required to amend and revise the proportionate percentage of ownership interests to accommodate additional Units as buildings (or floors) are completed.

The developer is obligated to pay all Common Expenses incurred prior to the first conveyance. Thereafter, all Unit Owners, including the developer are obligated to pay their proportionate share of the Common Expenses. (§9 (a)). This can be very contentious after turnover and it is essential for the diligent Board to hire an independent auditor to review (and in some instances, re-create) the books and records and in effect, follow the money.

A developer cannot exempt themselves from the payment of assessments in a Condominium, although they can in a homeowners or townhome Association. (765 ILCS 605/9).

What a developer can and most will do, is add in Units, one building or one floor at a time to minimize their exposure to pay assessments. They record an amendment to the Declaration, submitting the additional property to the Act and re-calculate the percentages of ownership. However, they are still obligated to pay the actual expenses incurred for that space until the first closing.

Technically speaking, the developer-controlled Board (which is really an oxymoron) is subject to the requirements of §§18 and 18.4 as is the case with an Owner-controlled Board, although few will resort to such formality.

Obviously, failure to pay their fair share, self-dealing and putting their own interests before the members of the Association can open the door to personal liability. The conscientious developer will pay their assessments, transfer all reserve accounts intact, and make a reasonable attempt to respond to customer service requests or they subject themselves to strict scrutiny for their actions.

C. Real Estate Taxes

Discussed in Section 10(a) of the Act, each developer is required to make an application with the local assessor to divide the tax bills amongst the respective Unit Owners. Lack of diligence on the part of the developer or the assessor in this regard can result in a single bill being issued even though all Units have been sold and closed. Prorations and credits between each Owner and the developer, notwithstanding, the bigger issue is how to divide the bill and

assist Owners in obtaining their homestead and senior citizen exemptions. The implicit language of Section 10 is that Units and Common Elements cannot be taxed separately. Real estate taxes are required to be imposed on an Owner's Unit and corresponding percentage of ownership in common elements. 400 *Condominium Assn. v. Tully*, 35 Ill. Dec. 1, 1979 and *Cambridge on the Lake HOA v. Hynes*, 72 Ill. Dec. 105, 1983.

In many instances, the Board is compelled to pay the undivided bill out of Association funds, and collect the money from the Owners or their lenders. Most experienced property managers have a standard procedure for this situation until the bills are divided.

One red flag for the Board, particularly a new turnover-Board, is to identify any and all parcels which are separately owned by the Association and not incorporated into the Common Elements.

These parcels or out-lots receive separate Permanent Index Numbers (P.I.N.S.) and generate separate tax bills.

Section 10, as aforesaid and Section 10-35 of the Illinois Property Tax Code, exempts these parcels from assessment and taxation and are to be billed at \$1.00 per year, provided that, an application for exemption is made.

In the event the developer or the Board does not make this application, which should have a permanent effect, the Association may find itself with a

large, unpaid delinquent tax bill, with penalties and interest that will have to be dealt with, years later. Also, in Cook County, sometimes the exemption is not made permanent and a piece of property will inadvertently be returned to the tax rolls. This situation needs to be monitored as well.

D. 1. Section 18.2 addresses specifically the developer obligations to the Owners, the Association and the new Board.

As previously discussed, the turnover of control from developer to Owners must take place within the sooner of the sale of 75% of the Units or three (3) years from the recording of the Declaration (§18.2(b)(i)).

Within sixty (60) days of the election of the Board, the developer is required to turn over all funds, books, records and documents (§18.2(d) et. seq.)

2. The Board of a new Association needs to be aware of their rights to terminate any contract made by the developer prior to the election of the Board, which extends for a period of two (2) years from the date of the election, which may be cancelled by a majority of Owners within six (6) months of the election. (§18.2(e)).

With respect to Owners and Association rights versus the developer, particularly with respect to construction defects, the statute of limitations for any actions shall not begin to run until “the Unit Owners have elected a majority of the members of the Board of Managers.” (§18.2(f)).

A developer that fails or refuses to turn over all records in accordance with paragraph (d) can be subject to court sanction and the payment of attorney's fees for failure to comply within sixty (60) days after a ten (10) day written demand. (§18.2(g)).

Claims against the developer for unpaid Common Expenses and construction defects are addressed in Ch. 11, (IICLE Handbook). REAL ESTATE LITIGATION. (2002, Supplemented 2004).

V. Owner's Meetings

Every Condominium Association is required to have at least one (1) Owner's meeting per year, which is generally the annual meeting to elect the Board of Directors. (§18(b)(3)).

Special meetings of the Owners can be called at any time during the year by the President, a majority of the Board or by 20% of the Unit Owners. (§18(b)(5)).

The meeting must be called pursuant to written notice mailed or delivered to all members not less than ten (10) nor more than thirty (30) days in advance, stating the time, place and purpose of the meeting. (§18(b)(6)).

Many people make the mistake in thinking that the notice can be merely posted, which is incorrect.

However, unless prohibited by the By-Laws, any action may be taken without a meeting of members provided there is written consent by all members, or by a minimum number of votes necessary to pass any action as if all members were present. (Ill. General Not-For-Profit Corporation Act, 805 ILCS 107.10).

At the annual meeting, the numbers of directors are elected by the Owners as prescribed in the By-Laws, but in no event shall there be less than three (3) directors. (805 ILCS, 108.10(a)).

Vacancies on the Board can be filled by a two-thirds (2/3) majority of the remaining directors until "the next annual meeting" unless twenty percent (20%) of the Owners petition for a special election (765 ILCS 605/§18(a)(13)).

Prior to the election, the Board can disseminate biographical information so long as they do not express a preference. (§18(a)(17)).

Proxies may also be used so long as the Owners can designate a preference for known candidates or write in a name. (§18(a)(18)). Although By-Laws can contain express prohibition on the use of proxies or the Board could adopt rules pertaining to mail-in elections which would make proxies superfluous. (§18(b)(9)(B)). For example, where a Condominium Association Board's procedure did not disclose to Unit Owners their right to cumulatively vote proxies it was not improper, and failure to make such disclosure did not necessarily interfere with fairness of the election process; Association complied with proxy

provisions of the Act. *Adams v. Meyers*, 190 Ill. Dec. 37, 1993. Further, courts have found that proxy forms prepared and circulated by members were invalid for failure to comply with section of the By-Laws investing the Board with authority to provide forms, and where forms were neither adopted by the Board, nor mailed by the Board with the notice of the annual meeting and there were material differences between the members proxy forms and the Board's forms. *Wymbbs v. Conashaugh Lakes Community Assoc., Inc.*, 151 Pa. Cmwlth 216, 16A 2d, 749, 1992.

A quorum for any meeting of Owners is twenty percent (20%) of the Owners. (§18(b)(7)).

No directors may be elected for a term of more than two (2) years (§18(a)(11)) and the terms of at least one-third (1/3) of the Board shall expire annually and directors are elected at large. (§18(a)(1)).

Naturally, the meeting should be chaired by the Board President in accordance with the rules of parliamentary procedure as adopted from Roberts Rules of Order, following an agenda prepared by the President, although it is not uncommon for the Association attorney to chair the meeting when there is an emotional, contested election.

Regardless of the issue; whether it is an election, a vote on an amendment or other Owner's business, volunteer election monitors and/or the

property manager should secure and count the ballots. In an election, a candidate or their representative has the right to be present during the counting of the ballots (§18(b)(10)) and proxies and ballots must be kept for a period of not less than one year (§19(a)(8)).

VI. Board Meetings

Meetings of the Board of Directors are the business meetings conducted on behalf of and open to the Unit Owners. (§18(a)(9)).

The Board must meet at least four (4) times annually (§18 (a)(10)). Although not prescribed by statute, since Owners are allowed to be present, but not participate at an open Board meeting, most Boards schedule an open forum prior to the Board meeting itself to allow Owners to ask questions and make statements. Although the open forum may be an integral part of Association living, is not part of the meeting itself and Owners are permitted to record the proceedings subject to the rules adopted by the Board. (§18(a)(9)).

The Board meeting should also be conducted following an agenda in accordance with the rules of parliamentary procedure adopted from Roberts Rules of Order.

There is really no severe distinction between the conduct of a Board meeting of a Not-For-Profit and an Illinois business corporation. All business actions, or voting is summarized and recorded in the minutes, which is the official

record of proceedings. Minutes of a meeting of a Condominium Association should be maintained for a minimum of seven (7) years in compliance with §19(a)(4).

Special meetings of the Board can be called by the President or 25% of the members of the Board, (§18(a)(19)) pursuant to notice in accordance with §18(a)(9). Notice of all Board meetings must be delivered or mailed to all Unit Owners at least 48 hours in advance unless there is a signed waiver on file and copies of notices shall be posted in conspicuous places around the Condominium at least 48 hours in advance. (Note:** the key word here is and; posting of notices in and of itself is not adequate to comply with statutory requirements and a mailing or personal delivery is required.)

Since the language says “at least” 48 hours in advance, it is not improper for a Board of Directors to adopt and publish its schedule of meetings for the year in advance.

The Board of Directors has the authority to impose late charges and levy fines upon notice and an opportunity for a hearing (§18.4(l)). These are matters best conducted in closed session as one of the express exceptions to the open meeting requirements (§18(a)(9)), and not part of the regular open meeting agenda. (EXHIBIT 3 – Fine Proceeding Forms – Letter Notice Findings).

Section 18(c), (d), and (e) requires the election of a President, Secretary and Treasurer by the Board. It is specifically stated that the President shall preside over the Board and Owner's meetings, with no other duties listed.

Some Presidents feel they have the authority to involve themselves in all matters of the Association business, however, without the express grant of this authority by the majority of the Board, the President's job is just one of the directors and chairperson of meetings. This, of course, raises the issue as to whether the President can vote. As a general rule, the President as a duly-elected director has the legal right to vote. However, some Associations have adopted meeting procedures whereby the President does not vote except in cases of a tie. Such a rule must be in place before the President can be barred from voting.

VII. Rules and Regulations

The rules are the handbook for day-to-day living. More specific than the Declaration, written with greater clarity and more detail, rules deal with issues often just mentioned in the Declaration; swimming pools, pet conduct, parking, tenants, etc. Rules must be adopted in accordance with §18.4(h) wherein a copy of the proposed text must be sent to all Owners with notice of an Owners meeting to be held not more than thirty (30) nor less than ten (10) days from the

notice. Although no quorum is required, the Board ultimately adopts the rules it ostensibly affords Owners notice and due process.

The Board of Directors is ultimately responsible for adopting the rules after notice to the Owners. As previously discussed, to make the Board's job easier, the Board should appoint a Rules Committee to review past rules, drafts from other Associations, minutes and other Association documents to create an updated document. They would compile a draft to submit to the Board of Directors. Once the Board has reviewed the draft, it should be submitted to counsel for legal review.

Where a rule is adopted by the Board alone, such as the prohibition of leasing of Units; or it requires Board discretion, a court will scrutinize the restriction and uphold it only if it is affirmatively shown to be reasonable in purpose and application. *Apple II v. Worth State Bank*, 213 Ill. Dec. 463, 1995.

In order to adopt enforceable rules, an Association should use the following criteria:

1. A source of authority for the adoption of the rule should be established.
2. Whether the rule is necessary or whether the problem is covered in the Declaration or By-Laws should be determined.

3. The rule should be drafted as narrowly as possible and vagueness should be avoided.
4. The rule should not conflict with the Act, the Declaration, or the By-Laws.
5. The rule should be reasonably related to the purposes for which the Association has been formed.
6. The rule should be adopted by proper Board action and promulgated to all Owners and residents before its effective date. The rule may not be applied retroactively.'

Gordon H. Buck, *GAP Report #7: Drafting Association Rules* (3d ed. 1996), the Community Associations Institute.

Rules adopted by the Board must be objective, evenhanded, non-discriminatory and applied uniformly. *Board of Directors 175 E. Delaware Place HOA v. Hinojosa*, 223 Ill. Dec. 222, 1997. A Board can even adopt a “no dog” rule without amending the Declaration and By-Laws or obtaining Owner approval. The Board could include them in the By-Laws but is not required to. *Board of Directors 175 E. Delaware Place HOA v. Hinojosa*, 223 Ill. Dec. 222, 1997.

Typical rule categories deal with parking, pets, recreational activities, elections, collections, etc.

What is essential to include is (1) enforcement mechanisms and (2) a sure-fire method of getting the rules into every resident's hands and make sure all new residents receive a copy, as well.

VIII. Amending the Documents

Where an Association wishes to amend its Declaration and/or By-Laws, the Amendment procedure is generally outlined in the document itself. There are statutory references to the requisite majority necessary, however:

Section 17 states that the documents may be amended and must be recorded to become valid. §27(a) requires either a two-thirds (2/3) majority or the percentage stated in the instruments, except no amendment provision can require greater than a 75% majority. §27(b) allows the Board of Directors to adopt an amendment by a two-thirds (2/3) majority for the correction of errors and/or omissions or to correct a scrivener's error. Most authorities believe that a §27(b) can also be used to update a document to bring it into conformity with the law, provided there are no material changes. §27 provides that a court can reform or amend the Declaration.

A proposed a §27(b) amendment must be sent to all Owners and under subparagraph (3), the Owners can petition the Board to call for a special meeting

and conduct an Owners' vote within thirty (30) days of the petition, before it can be recorded. A majority of all Owners under this procedure can overturn the Board's vote. Once the amendment has been adopted and where applicable, notice has been sent to mortgagees, the amendment may be recorded and the recording date becomes the effective date.

The Illinois Appellate Court has implied that an Amendment creates a stronger assumption of validity and less susceptible to attack than a rule change. A Board could even prohibit leasing of Units without a vote of the entire Association. *Apple II Condo Assoc. v. Worth Bank*, 213 Ill. Dec. 463, 1995. Although the same strict tests would apply.

Lastly, a Board cannot change the percentages of ownership by Amendment without the consent of all Owners, even if it is to correct a developer error. *Hustay v. Board of Managers of Edelweiss Inc.*, 231 Ill. Dec. 457, 1998.

IX. Rule Enforcement

A. There are various methods of enforcement; but what is most important for a Board to keep in mind while adopting rules is:

- 1) make sure you can enforce what you adopt
- 2) the punishment must fit the crime

3) the Association is taking on police powers so they must afford all violators, fundamental due process, i.e., notice and an opportunity to be heard

4) rule enforcement must not be arbitrary nor capricious

B. Warnings

Communication is the key word. Frequently, an Owner will plead innocent due to alleged lack of knowledge. This is why it is strongly recommended that each resident sign for a copy of the Rules, so even if they choose not to read them, they cannot plead ignorance.

One or more warning letters might be more effective for lesser violations than immediately commencing with fines or legal action.

After the Board of Directors has notified the offender at least once, it may be appropriate for legal counsel to send one (1) cease and desist letter. At this juncture, after previous notice, it may trigger the application of a Declaration provision which provides for the violator to pay the Association's attorney's fees.

C. Fines

Section 18.4(l) of the Act provides for Boards to levy "reasonable" (and the emphasis is in **reasonable**) fines for violations, "after notice and an opportunity to be heard." An Owner is subject to late charges and interest on an unpaid balance of general and special assessments which accrued prior to

commencement of legal action, plus 7% interest on amounts awarded and expenses incurred in connection with an action pursuant to the Declaration does not constitute an impermissible fine. *6334 N. Sheridan Condo Assn. v. Ruehle*, 109 Ill. Dec. 907, 1987.

In adopting Rules, the Committee/Board must first outline the process of warning, notice of violation, opportunity for hearing, rules on conducting a hearing, Board notification and notice to the violator. Many Associations have a scaled fine schedule for first and subsequent violations and even daily fines for continuing violations. The most important factor is that the fines must be reasonable and the opportunity for due process must be made available before the fine takes effect. When sending warnings and levying fines, “there is no such thing as too much notice” and fines cannot be levied without the opportunity for a hearing. In some instances, Associations hold the hearing regardless of whether the accused chooses to appear or not.

Once a fine is levied, it can be assessed to the Unit Owner’s account and remains as a lien against the Unit until satisfied. (§19.4(l)).

Late fees can be levied against unpaid Common Expenses, but are not appropriate for unpaid fines. (§18.4(l)).

Fines can also be collected by filing a lawsuit. Based upon a court validating the Association's rules and procedures, it would also be appropriate for the Association to recover its attorney's fees and costs.

The punishment must be appropriate to the crime. Thus, \$100 per day for installing a swing set in violation of the rules may be overreaching.

However, most Associations prefer to carry unpaid fines and late fees as a lien on the Unit, until the Unit sells or is refinanced.

D. Denial of Privileges

Many Associations adopt policies that withhold fundamental rights of ownership from delinquent owners and rule breakers or sometimes it is even stated in the initial By-Laws recorded by the developer.

If it is a policy, it must be adopted just as any other rule, and the criteria for one to avail themselves of privileges is defined as being a "member in good standing".

Owners who are not "members in good standing" are frequently denied privileges such as swimming pool passes, access to the health club, rental of the party room, etc. or disenfranchisement (i.e., losing the right to vote and be barred from running for office).

In some jurisdictions, Associations have even attempted to bar essential services, such as water, electric, gas and even the right to park an approved vehicle. The authorities are split on whether these types of policies are excessive.

E. Legal Action

Besides collecting fines, for more drastic violations and abusive conduct that disturbs and denies other residents the quiet enjoyment of the property may seek to terminate the rights of possession of a Unit by the offending resident.

Section 9.2(a) of the Act provides that “in the event of any default... in the performance of his obligations under this Act or under the Declaration, By-Laws or Rules and Regulations, ... the Board ... shall have the right ... to maintain an action for possession against the defaulting Unit Owner or his tenant...”

Needless to say, eviction is a summary disposition of the dispute and a judge must be convinced by clear and convincing evidence that the remedy is appropriate.

Mandatory injunctions are also appropriate for some infractions where all other efforts have failed. In an Association that restricts commercial vehicles, a Unit Owner that parks their panel truck in their driveway can be fined, but the truck is still there. An Association in this instance, cannot resort to self-help, and

as a result, must seek a court-order for injunctive relief to remove the offending vehicle or the Owner will be held in contempt of court.

When an Association must resort to injunctive relief, it is not necessary to offer the accused a hearing as the infraction must be serious enough to warrant immediate action. The Illinois courts have held that a suit against an Owner and their tenant for injunctive relief was not an attempt to levy a fine and thus, the provision requiring notice and an opportunity to be heard was not applicable. *Board of Managers of Village Square I Condo Assn. v. Amalgamated Trust & Savings*, 98 Ill. Dec. 872, 1986.

In these instances, an award of attorney's fees and costs would be appropriate. (§9.2(b)).

F. Alternate Dispute Resolution

One frequently overlooked method of rule enforcement is to seek the services of a mediator. Of course, this necessitates the agreement of both parties to participate, however, a mediated settlement allows both sides to express their views and reach a settlement of the issues at a fraction of the cost of litigation or even arbitration.

Section 32 of the Act encourages, but does not mandate mediation or arbitration, as is the case with many contemporary Declarations. However, it requires a proactive Board and a cooperative Owner to mutually seek out this

remedy. Without a mutual agreement, the dispute must be resolved through litigation.

X. Right of First Refusal

The right of first refusal or pre-emptive right has been enforceable in Illinois since *Gale vs. York Center Community Cooperative, Inc.*, 21 Ill. 2d 86, 171 NE2d 30 1960, where the Illinois Supreme Court found that this all important right was not an unreasonable restrict or alienation. Initially, an essential component of all documents used for cooperative governances, it came into vogue with the growth of the condominium form of housing.

Though most Associations waive this right as a mere formality, there are many instances where an Association has opted to purchase or lease a Unit and “preempt” the Owner’s right, so long as it is based on identical terms.

Declarations of Condominium Owners set forth the procedural steps for a Board to exercise this right including notice requirements, fine frames, etc. What is also a common requirement is Owner approval of the Board decision before Association funds can be expended in this instance.

Attorneys for developers routinely incorporated a right of refusal in Condominium Declarations throughout the 60’s and 70’s. However, in 1982, the 7th Circuit ruled in the matter of *Phillips v. Hunter Trails Community Association*, 685 F.2d 184, that the defendant homeowners Association must pay actual and

punitive damages to a family that was denied the right to purchase a home in an exclusive subdivision by virtue of a racially discriminatory exercise of the right of first refusal. (See Right of First Refusal, Jordan I. Shifrin, III. B.J. 1986).

This case, coupled with a shortage of mortgage money in the early '80s, was essentially the death knell for this type of provision as an option. (VA and FHA also frowned upon this restriction as imposing an unfair burden on open housing, and frequently rejected loan applications made for properties that had a right of first refusal.)

It still exists in the older documents, but rarely in any written since.

CONCLUSION

Although ripe with human conflict and too many night meetings, a Condominium lawyer must be proficient in multiple areas of law; contracts, torts, criminal law, real property, constitutional law, land use, litigation, labor, in addition to being an expert in construction. Although extremely stressful at times (what isn't?) it can also be very rewarding.

Always remember, it is the Association attorney's main job is to keep the Board members out of trouble.