

Functioning after Palm v. 2800 Condominium Association is Possible for Community Associations

By Gabriella R. Comstock

Over the last several years, Illinois Courts have issued quite a few opinions related to community association living. Yet, no case had more practitioners talking, scratching their heads, and has silenced even the most vocal board member like Palm v. 2800 Lake Shore Drive Condo. Ass'n.¹ The case is commonly referred to as Palm II because it was the second appeal that arose from the case originally filed in 2000. After the fourth or fifth reading of Palm II, it became apparent that the fear installed by it is not necessary. The purpose of this article is to provide practical advice to practitioners so as to free their community association clients from the paralysis they believe Palm II bestowed upon them.

Palm v. 2800 Lake Shore Drive Condominium Association

Gary Palm, an Illinois lawyer, was a unit owner and former board member for the 2800 Lake Shore Drive Condominium Association (hereinafter "2800 Association").² He filed suit against the 2800 Association and the President of the Board of Directors.³ In 2013, the Illinois Supreme Court ruled on an issue related to Palm's document request to the 2800 Association, under the City of Chicago's Condominium Ordinance.⁴ Only the issues addressed in Palm's second appeal will be summarized and highlighted in this article.

Palm alleged that the Association and its Board of Directors failed to comply with several provisions of the Association's governing documents and the Illinois Condominium Property

Act (hereinafter "the Act").⁵ Palm alleged that the board of directors for the 2800 Association violated the Act by conducting workshops.⁶ During these workshops, notice was not given to the members of the Association, but only the board of directors.⁷ Yet at these meetings, the board of directors discussed business related to the 2800 Association.⁸ The 2800 Association argued that in these workshops no decisions were made by the board of directors; hence a meeting of the board did not occur and the 2800 Association did not violate the Act or its governing documents.⁹ The Appellate Court ruled that conducting board business means directing or taking part in the operation or management of the Association. It further held that it is a meeting, when a quorum of the board meets to discuss or address association business, even if no decision is made.¹⁰ Moreover, Appellate Court held that the plain language of the Act, specifically Section 18(a)(9), does not support the 2800 Association's interpretation. The Appellate Court held that the workshops were board meetings and they should have been opened to the members.¹¹

Palm also alleged that the 2800 Association improperly decided whether to exercise its right of first refusal by e-mail, instead of making the decision in an open meeting.¹² Palm alleged that the Board took action on a pay increase for the employees simply by engaging in a written canvassing of the board members instead of voting in an open meeting.¹³ The Appellate Court again relied on the language of Section 18(a)(9) of the Act in ruling that the 2800 Association and its board violated the declaration and the Act.¹⁴

5. 2014 IL App (1st) 111290, ¶¶ 5-8.
6. 2014 IL App (1st) 111290, ¶ 49.
7. 2014 IL App (1st) 111290, ¶ 60.
8. 2014 IL App (1st) 111290, ¶¶ 52-60.
9. 2014 IL App (1st) 111290, ¶ 52.
10. 2014 IL App (1st) 111290, ¶¶ 59-60.
11. 2014 IL App (1st) 111290, ¶ 60.
12. 2014 IL App (1st) 111290, ¶¶ 61-68.
13. 2014 IL App (1st) 111290, ¶ 63.
14. 2014 IL App (1st) 111290, ¶ 67.

1. 2014 IL App (1st) 111290.
2. 22014 IL App (1st) 111290, ¶ 3.
3. 32014 IL App (1st) 111290, ¶ 1.
4. 2013 IL 110505 (2013). This ruling resulted in a change to the City of Chicago's ordinance related to the inspection of documents. Chap. 13-72 Section 080.

Palm alleged that the 2800 Association allowed only one or more officers, but less than a majority, to approve bids or contracts.¹⁵ The 2800 Association did not contest the fact that the Board delegated approval of certain contracts to management with only a segment of the Board approving the contract.¹⁶ The problem was that an issue was being submitted and decided by less than the entire board. The Appellate Court ruled that this delegation of authority was not allowed by the 2800 Association's documents or the Act.¹⁷

“Many boards believe that conducting business after Palm is impossible

Palm further alleged that the 2800 Association board failed to vote on litigation matters in an open meeting.¹⁸ The Appellate Court noted that while discussions related to litigation were not to be discussed in an open meeting, any decisions related to the issues not allowed in an open meeting, were to be made in the open meeting.¹⁹ The Appellate Court affirmed the trial court's ruling on this issue in favor of Palm.²⁰

Next, Palm alleged that the board for the 2800 Association transferred a surplus from the association's income to the association's reserve account. Palm alleged that this was in violation of the 2800 Association's governing documents, which provided that if at the end of the fiscal year there was a surplus in the association's operating account, a credit was to be given to the members of the 2800 Association.²¹ The board for 2800 Association asserted that it relied on the advice of its legal counsel before it acted.²² It also asserted that the "business judgment rule" protected it from liability.²³

15. 2014 IL App (1st) 111290, ¶¶ 70-84.
16. 2014 IL App (1st) 111290, ¶ 74.
17. 2014 IL App (1st) 111290, ¶ 78.
18. 2014 IL App (1st) 111290, ¶ 86-89.
19. 2014 IL App (1st) 111290, ¶¶ 87-89.
20. 2014 IL App (1st) 111290, ¶ 89.
21. 2014 IL App (1st) 111290, ¶ 110.
22. 2014 IL App (1st) 111290, ¶ 113.
23. 2014 IL App (1st) 111290, ¶ 119.

However, the board did not submit any evidence of a written opinion or legal advice from its attorney or accountant.²⁴ The Appellate Court noted that the "business judgment rule" protects directors who have been careful and diligent in performing their duties from being held liable for honest, mistakes of fact.²⁵ The Appellate Court also noted that relying on the advice of counsel is a proper exercise of the business judgment rule. However, it did not find the rule applicable to the 2800 Association since there was no evidence that such an opinion had been given to the board.²⁶ The inadequate evidence produced by the Association led the Appellate Court to affirm the trial court's ruling on this issue in favor of Palm.

Finally, Palm alleged that the board failed to properly give notice of board meetings to the members.²⁷ It was the practice of the 2800 Association to mail notice to the non-resident owners and deliver notice to the resident owners by leaving the notices in front of the owner's doors.²⁸ The 2800 Association's declaration specifically stated that notice to a board meeting had to be mailed to the members.²⁹ The Appellate Court concluded that the trial court correctly determined that the 2800 Association's board failed to properly give notice of the board meetings.³⁰

About the Author



Gabriella R. Comstock, an attorney at Keough & Moody, P.C., has been representing community associations since 1996. Gabriella received her J.D. degree from Loyola University of Chicago School of Law. Her undergraduate degree is also from Loyola. In May 2014, Gabriella was admitted to the College of Community Association Lawyers, a prestigious group of attorneys practicing community association law in the United States.

24. 2014 IL App (1st) 111290, ¶ 115.
25. 2014 IL App (1st) 111290, ¶ 119.
26. 2014 IL App (1st) 111290, ¶ 119.
27. 2014 IL App (1st) 111290, ¶ 125-128.
28. 2014 IL App (1st) 111290, ¶ 125.
29. 2014 IL App (1st) 111290, ¶ 126.
30. 2014 IL App (1st) 111290, ¶ 128.

How Do We Guide Associations to Conduct Business After Palm?

Many believe that the ruling in Palm only applies to condominium associations subject to the First District Appellate Court. Yet, the language from the Act that the Palm II court relied on is language that is similar to that within the Common Interest Community Association Act³¹ and the Illinois Not for Profit Corporation Act.³² Hence, it would be very difficult for an attorney for a non-condominium association to argue that Palm II is not applicable. So the message from the Judges in Palm II—that board of directors for community associations need to be more transparent and diligent—must be heeded by all community associations. Many boards believe that conducting business after Palm is impossible. Here are some tips on how you can help your community association clients comply with Palm and not meet more often.

1. Conduct workshops but give members notice

Any gathering of at least a quorum of the board to discuss and address association business is a meeting. For this reason, we can advise the Board they can still conduct workshops, so long as notice of the same is given to the members.

2. Limit e-mail communication

The board must be certain not to discuss issues via e-mail. Such discussions must only occur in an open meeting. We can advise our boards that they can utilize e-mail to complete ministerial tasks, i.e., schedule meetings, and forward information. However, we should advise them not to press "Reply All" as it may trigger a discussion that should only occur in an open meeting. Likewise, we must prevent them from voting via e-mail. While the Palm Court addressed voting via e-mail, it did not address how a board of directors should address an emergency situation. It also did not address a board of director's ability to utilize Section 108.45 of the Illinois Not for Profit Corporation Act, which allows a board of directors to take action without a meeting of the board, when unanimous written approval is given by the board of directors, when such action is not prohibited by the association's governing documents.³³ Reading the Condominium Property Act and the Not for Profit Corporation Act together, it appears that a board of directors can utilize the Not for Profit Act when necessary and when the board knows unanimous approval will be granted. Even so,

this should not become the "norm" for the Association, but instead a tool to be utilized only when necessary.

3. Only authorized authority should be delegated

Most community association's governing documents authorize a board of directors to engage the services of a managing agent. It is also not uncommon for a common interest community association's governing documents to allow a board to delegate certain authority to a committee. Such language allows a board to delegate authority to the managing agent or to a member of the board, so that business can be completed between meetings. The delegation should also be very specific so that it is clear what can and cannot be done in between meetings. Boards should be advised to include such delegation and the specific authority within the association's minutes. To stay in line with the ruling in Palm, this delegation must be approved by at least a majority of the board.

4. Ensure all votes are made in an open meeting

It is still proper under Illinois law to close certain portions of the board's meeting. Yet, the decisions of the board related to these sensitive subjects must be done in an open meeting. Therefore, after an executive session, the board must determine what votes are necessary and it must make such votes in an open meeting. Likewise, the board must be sure that its involvement in litigation, whether as plaintiff or as defendant, is made in an open meeting. This includes litigation related to the collection of unpaid assessments. As we direct our boards to take action, we should advise them to vote on the matter in an open meeting. We can also advise them specifically what should be included in their motions.

5. Obtain all advice in writing and act carefully and in a diligent manner

The board of directors is not expected to have all of the answers, but it is expected to have a team of professionals and to work with the professionals. When the board of directors seeks the advice of counsel, the advice should be in writing. In fact, any advice from an expert or professional should be in writing. When the board is taking action based on our advice, we should be certain we put the advice in writing and/or directed the board to adopt a resolution

explaining the basis for its actions, i.e. what it relied on to make this decision. This "paper trail" protects the Association and the individual board members. We need to remind our board of directors to obtain written opinions.

6. Follow the Association's governing documents as drafted

Under Illinois law the board of directors is to strictly comply with the association's governing documents. Failure to do so can be regarded as a breach of fiduciary duty. Not only do we have to guide our clients as to when it should obtain written advice from legal counsel, we should also review standard procedures with our boards of directors. For example, if boards want to give notice via e-mail, we should advise our boards as to how this can be done legally. Regularly reviewing basic "how to's" with our board of directors can avoid mistakes like those made by the 2800 Association. Also, on an annual basis or as a board undertakes a bigger project,

we can review with our boards how authority has or will be delegated. Our active involvement early on can avoid costly litigation.

Conclusion

It should be noted that the ruling in Palm relied on provisions within the law, which were already in existence. Except on the issue of workshops, we knew the requirements of the Condominium Property Act and that a board of directors must strictly comply with its governing documents. While at first glance, the Palm ruling seemed to create a fundamental change in the managing of an association, it really only reiterated the well-established law in Illinois. With proper planning and managing the association like a corporation, members of the board do not have to live in fear. In fact, when followed properly, Palm II should make being on a board of directors less intimidating and better, as the negative "personal agendas" of some board members should be eliminated. □

31. 765 ILCS160/1-1, et seq.
32. 805 ILCS 105/101.01, et seq.
33. 805 ILCS 105/108.45.

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