KEOUGH MOODY

July 2018 Newsletter

Hope you are enjoying the summer! We are off to a great start with David Hartwell and the former attorneys from Penland & Hartwell!

In this month's newsletter, we provide you with a summary of a case that reminds that after Palm II, judges expect the Board of Directors for a community association to strictly comply with the requirements of the Illinois Condominium Property Act and to govern in a fair and transparent manner. The policies and procedures for community associations must promote such governance.

In an effort to keep all up to date and provide practical guidance, we are offering an in house seminar on July 18, 2018, on "Hot Topics". Please click on the link below and register. We look forward to seeing you.

Chuck Keough

REGISTER FOR HOT TOPICS SEMINAR HERE!

BOUCHER v. 111 EAST CHESTNUT CONDOMINIUM ASSOCIATION, INC. - A NEW PALM?

Recently, the First District Court of Appeals issued a ruling in the case of Boucher v. 111 East Chestnut Condominium Association, Inc., 2018 IL App (1st) 162233, which addresses several topics related to Association governance. The facts of the case show that the Association imposed fines against Boucher, following a hearing, due to his offensive behavior directed at Association management. In response to that action, Boucher filed a lawsuit against the Association alleging that its actions violated the terms of the Illinois Condominium Property Act in that it impaired his First Amendment rights in violation of Section 18.4(h) and failed to provide audio and video recordings of the hearing in violation of Section 19(b). In addition, Boucher alleged that the Board breached its fiduciary duty in failing to disclose evidence, which was the basis of his fines. At the trial court level, the Court found in favor of the Association. Those findings were reversed by the First District Court of Appeals. Like Palm II, this decision serves as a reminder as to how associations should conduct business.

First and foremost, Palm II conclusively determined that a gathering of the quorum of a board for purposes of addressing Board business was a meeting, which must be appropriately noticed and opened to the members. In response to that ruling, the Illinois Legislature amended both the Illinois Condominium Property Act and the Illinois Common Interest Community Association Act to provide that a board could meet, outside of a noticed meeting, to discuss certain topics, such as an owner's violation of the governing documents. The Boucher Court has now held that while a board can meet outside of a noticed board meeting, the obligation to keep and maintain minutes of those meetings is not alleviated. In other words, there must be a record or minutes of any gathering of a quorum of the Board. These minutes should not be detailed, as with minutes of open meetings; however, they should address the date and time on which the Board met, the general topic of the meeting (i.e. violation hearings, vendor issues, consultation with legal counsel), and who was present. It remains our advice that minutes from executive sessions should not be overly specific and detailed.

In addition, the Boucher Court determined that minutes may not merely be the written document. Rather, video and audio recordings can be deemed to be meeting minutes for purposes of Section 19 of the Act. If your association records meetings, it is important to note that these recordings may now be requested for inspection by any member, including any segment of those recordings from executive session. If your association records meetings, it is advisable to consult with your attorney to determine whether this process should be continued and if so, whether executive sessions should be recorded; it is our general position that portions of meetings set aside for executive session should not be recorded.

Next, the Boucher Court addressed a board's fiduciary duty as it relates to the imposition of fines. The board's fiduciary duty includes a duty of fairness. This means that with respect to violations and fines, an owner contesting the same needs to be provided with access to the evidence relied upon by the board in reaching its determination. This means that if the board is relying upon a video or a written complaint to impose a fine, the violating owner must be provided with access to the evidence and be provided with the opportunity to rebut the same at his/her hearing. As a result, boards should not be relying upon anonymous complaints when seeking to fine an owner, where the complaint and corresponding violation cannot be independently verified by the board.

Finally, the Boucher Court determined that even though they are not state actors, associations similarly cannot infringe upon an owner's First Amendment rights. In other words, an owner can state a cause of action against an association for attempting to limit speech. Associations must be cautious not to infringe upon an owner's First Amendment rights. Legal counsel should be consulted before an association seeks to fine or otherwise penalize an owner for sharing his/her opinions or concerns, in writing or verbally. While we do not construe this opinion as requiring board members or management to endure abusive or harassing conduct by an owner, care should be taken to ensure that action is not being taken to penalize a member for simply expressing his/her opinion converse to the interests of the board.

Like Palm II, the Boucher case serves as a reminder of a board's obligations under applicable law. In light of this case, boards may need to adjust their practices. By way of example, boards will need to confirm that minutes of all gatherings are taken; this

means keeping a record of landscaping walks, vendor interviews, etc. In addition, Boards will need to take steps to make sure that their hearing procedures are fair; this may include eliminating provisions in the Rules, which permit the anonymous submission of violation complaints. Boards should continue to work with management and legal counsel in governing their associations in a fair and transparent manner and updating their policies and procedures as necessary.

DOES YOUR ASSOCIATION HAVE A WRITTEN DISPUTE RESOLUTION PROCEDURE?

The Condominium and Common Interest Community Ombudsperson Act ("Act") went into effect on July 1, 2016. The Act applies to all Illinois condominium associations that are governed by the Illinois Condominium Property Act and common interest community associations bound by the Common Interest Community Association Act. The Act requires those associations bound by the terms of the Act to adopt a written policy to resolve complaints by unit owners no later than January 1, 2019.

Please be sure your association complies with this deadline. Our office can assist in drafting the policy for a flat fee. Please contact Chuck Keough at (630)369-2700 x 211 or at cmk@kmlegal.com for a proposal or any questions.

Chicago
312-899-9989
info@kmlegal.com

Naperville
630-369-2700
www.kmlegal.com

STAY CONNECTED