KEOUGH MOODY

January, 2022
Newsletter

HAPPY NEW YEAR!

As we ring in 2022, it is a time for us to review the new changes for the year. In this newsletter, we review recent changes to the law and the impact on community associations.

765 ILCS 605/18: Bylaws

Effective January 1, 2022, Section 18(a)(1) of the Illinois Condominium Property Act reads as follows:

- (a)(1) The election from among the unit owners of a board of managers, the number of persons constituting such board, and that the terms of at least one-third of the members of the board shall expire annually and that all members of the board shall be elected at large; if there are multiple owners of a single unit, only one of the multiple owners shall be eligible to serve as a member of the board at any one time. A declaration first submitting property to the provisions of this Act, in accordance with Section 3 after the effective date of this amendatory Act of the 102nd General Assembly, or an amendment to the condominium instruments adopted in accordance with Section 27 after the effective date of this amendatory Act of the 102nd General Assembly, may provide that a majority of the board of managers, or such lesser number as may be specified in the declaration, must be comprised of unit owners occupying their unit as their primary residence; provided that the condominium instruments may not require that more than a majority of the board shall be comprised of unit owners who occupy their unit as their principal residence.

Based on the language of Section 18(a)(1), the bylaws for a condominium association can not only require those persons seeking to be elected to the Board of Directors be a member of the association, but it can also require that no more than a majority of the Board of Directors shall occupy their condominium Unit as their primary residence.

As with any amendment, the condominium association should consider the effect a residency requirement will have within the association. Will it make it more challenging for the association to find people to run for the Board of Directors? Will it ensure that the members of the Board of Directors are more in tune with the needs of the community? Will it create more division within the community? Will it ensure that those serving on the Board of Directors are more invested and interested in doing what is best for the association?

The answers to these questions will differ for each community. Therefore, consult with your legal counsel prior to adopting any such amendment. Please note that this change is to the Condominium Property Act and only applies to Illinois condominium associations. There is no

similar provision within the Common Interest Community Association Act (yet).

55 ILCS 5/3-5048: Unlawful Restrictive Covenant Modifications

This new legislation allows a person or entity to execute and file a restrictive covenant modification (hereinafter "RCM") to an unlawful restrictive covenant, if the person or entity has an ownership in the property that is subject to the unlawful restrictive covenant or is a common interest community association, a condominium association, a unit owners' association, a residential housing cooperative, or a master association of a parcel subject to an unlawful restrictive covenant.

If the entity executing and filing the RCM is an association, the following conditions must be met:

1. The Board, with majority approval, must execute and file the RCM.
2. If the Board received a written request by an owner or member of the association to exercise its authority to execute this RCM, within 90 days of receipt of the request, the Board shall investigate whether it is an unlawful restrictive covenant and if it determines it is one, the Board shall execute and file the RCM.
3. If the Board fails or refuses to execute and file the RCM after it received a request from an owner or member of the association, the requesting owner or member may bring an action to compel the Board to file the RCM. Any owner or member who prevails in such an action shall be entitled to recover reasonable attorney's fees and costs from the association.
4. After receiving a recorded copy of the RCM, the association shall give written notice and a recorded copy of the RCM to all owners and members of the association.

An RCM shall include:

1. a complete copy of the original instrument containing the unlawful restrictive covenant with the language of the unlawful restrictive covenant stricken; and
2. a petition to modify the unlawful restrictive covenant, which
    - is signed by the record owner of the property or accompanied by a certification that a majority of the Board has agreed to the RCM;
    - includes the permanent index numbers for which the RCM is recorded against and any other information that is required by the county recorder or State's Attorney.

Upon receipt of an RCM, the recorder is obligated to provide a copy of the RCM to the State's Attorney, who shall determine whether the recorder shall record the document.

For purposes of this statute, "unlawful restrictive covenant" shall mean any covenant or restriction that is void under Section 3-105 of the Illinois Human Rights Act, which purports to forbid or restrict the conveyance, encumbrance, occupancy, or lease on the basis of race, color, religion or national origin.

DISCLOSURES TO PROSPECTIVE PURCHASER AND/OR LENDERS FOR THE PURCHASE OR REFINANCE OF A UNIT

In recent months, prompted in large part by the events of Surfside Florida, buyer and lender requests for information pursuant to a unit sale or refinance have become increasingly long and detailed. Questions are being asked about – among other things – the structural soundness of

the building, and its compliance with code requirements.

As a starting point, associations should remember that their obligations for disclosure when a unit is sold or refinanced are limited, and are defined by statute. For condominiums, Section 22.1 of the Illinois Condominium Property Act ("ICPA") will apply. For non-condo common interest community associations, Section 1-35 of the Illinois Common Interest Community Association Act ("CICAA") will apply. In either case, the required disclosure is far more limited than what banks and buyers have been asking for.

Section 1-35 of CICAA requires that an association, upon request, provide the following: (1) the governing documents; (2) a statement of account and amounts owed for the unit; (3) a statement of anticipated capital expenditures; (4) a statement of the status of reserves; (5) a financial statement; (6) a statement of the status of pending suits or judgments; and (7) a statement stating what insurance is provided by the Association. Section 22.1 of the ICPA includes all of these and adds: (8) a statement as to whether improvements to the unit or limited common elements comply with the governing documents; and (9) the identity of the person or entity who received notices on behalf of the Association. As neither CICAA or the ICPA require an Association to provide a statement regarding the structural soundness and code compliance of the buildings, should a Board answer such questions when asked and, if so, how?

While it is not statutorily required to provide information other than what is listed above, the Board should likewise avoid interfering with unit sales by refusing to cooperate with *reasonable* requests for additional information. After all, the association, as a whole, benefits when units are sold or owners can refinance for favorable rates. Yet, caution should be used when sharing information pursuant to Section 1-35 of CICAA or Section 22.1 of the ICPA, and even more caution should be exercised when providing information that exceeds what is required by statute.

Initially, the Board should decide what additional information it will provide, and how it will be provided. Often, Boards will authorize management to provide additional requested information under the guidance of legal counsel. This is a good arrangement because it protects both management (because the additional information will be provided upon specific authority of the Board), and it protects the Board (because requests and answers will be vetted by legal counsel, to avoid potential liability issues). Counsel will also be in a position to identify when a question does not warrant an answer at all. While lenders often ask for a "yes" or "no" answer to specific questions, such a response often cannot be given as the question seeks a legal conclusion. Even so, lenders try to box associations into a "yes" or "no" response, which can result in additional liability to the association and/or managing agent.

Further, it is imperative that neither Boards nor management offer opinions or promises, or make representations upon which a buyer or his lender might rely. For example, questions such

as "is the development structurally sound" or "is the development compliant with code requirements" are not matters of fact. Rather, such request are opinions and legal interpretations which neither Boards nor management should give. A standard response to such questions is that the association declines to render a legal (or engineering) opinion, and that the buyer or lender should consult with their own legal counsel. Standard responses to these questions, without regular review, may become more challenging for associations.

The additional burden placed on associations when it comes to unit sales ties into a recent Illinois Appellate Court case, *Channon v. Westward Management, Inc.*, 2021 Il App (1st) 210176. In the *Channon* case, the court held that Section 22.1 of the ICPA creates an implied cause of action in favor of a condominium unit seller against a property manager, for charging excessive fees to provide information required by Section 22.1. It should be noted that the issue in *Channon* only related to the fees charged to provide information pursuant to Section 22.1. The *Channon* court made it clear that only reasonable fees related to the actual costs incurred for providing the information required under Section 22.1 could be assessed. The Plaintiffs in *Channon* paid $245.00 for requested documents that included: 1.) a paid assessment letter at a cost of $150.00; 2.) a year to date income statement and budget at a cost of $20.00; 3.) a "Condo Questionnaire/Disclosure Statement/22.1(each)" at a cost of $75.00; and 4.) insurance contact information at a cost of $0.00. The *Channon* court held that the fee to receive documents and information required by Section 22.1 for fees that did not reflect Defendant's out of pocket costs for providing this information was excessive.

So, what are associations to do if they are being asked to provide extensive additional information pursuant to unit sales, while the courts are cracking down on high fees to do so? Prior to assessing such fees, it must be clear that *more* is being provided than transmitting the required information pursuant to Section 22.1. That is, the services being rendered for the fee being charged should clearly be explained.

As noted above, Section 22.1's requirements are actually small compared to what is being asked for today by lenders. So, associations may continue to charge a reasonable fee for providing Section 22.1 information. In addition, to the extent it is requested, it will be reasonable to charge an additional fee for additional information above and beyond what is actually required by Section 22.1 This will allow associations to recover administrative costs actually incurred to gather the detailed information, while not running afoul of the cautions outlined in the *Channon* case. This will also require us to refrain from referring to these charges as "22.1 fees." It is recommended that both the management agreement and rules and regulations for the association make it clear that the fees are related.

K&M 22.1/LENDER QUESTIONNAIRE RETAINER

To encourage our clients to ask questions about the disclosures and answers being provided, K&M is offering a 22.1/Lender Questionnaire Retainer for a fee of $600.00/quarter. Clients may elect to accept this retainer agreement, which includes:

- Monthly review of the association's 22.1 or Section 1-35 disclosures;

- Review of lender questionnaires or specific questions submitted as part of the loan review process.

(Please note that the retainer does NOT include preparing or reviewing Paid Assessment Letters or addressing specific questions related to a Unit that are not related to the loan review process, i.e. violations within a unit)

If you are interested in learning more about this retainer, or if you have any questions about anything within this Newsletter, please contact Chuck Keough (cmk@kmlegal.com), Dawn Moody (dlm@kmlegal.com) or Gabby Comstock (grc@kmlegal.com).

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