



It seems like just yesterday, we were starting 2022 and now, the year is almost over! It is a time to be thankful for all that 2022 had to offer - a further return to “normal” - and to start planning for 2023. From all of us at Keough & Moody, we wish you a happy holiday season. We hope that our readers are able to enjoy time and festivities with their friends and family and to bask in the joy of the season. We thank you for your continued support of our firm and we look forward to continuing to support you and your communities in 2023.

Chuck, Dawn, and Gabby

## **KEOUGH & MOODY'S 2023 WEBINARS BEGIN AGAIN**

**"How Not to be a (Fill In the Blank)"  
January 18, 2023, at 12:00 p.m.**

*\*Pending approval for continuing education*



Join Dawn and Gabby on January 18, 2023, from 12:00 p.m. to 1:30 p.m. for “How Not to be a \_\_\_\_.” 2022 brought out many different personalities within the community association world. Often people act in a manner that spirals out of control and leads the association down an unintended path. It is not just unit owners who act in a way that causes the association to lose control, but it is also members of the board and managers. In this webinar, Gabby and Dawn will talk about how not to be the nasty person; the one who holds a grudge; the people pleaser; the know it all, etc.. They will explain how to identify these people, how to reel them in, and how to use those characteristics to HELP not hinder the association. Of course there will be time for attendees to ask questions.

Join us for what we believe will benefit all board members and managers. As always, come learn and have your questions answered. Registration is required.

Register in advance for this webinar below.

## New Case from the Illinois Supreme Court Further Clarifies Section 22.1 of the Illinois Condominium Property Act

As we previously reported, last year, a ruling in the case of *Channon v. Westward Management, Inc.*, 2021 IL App. 210176 was issued by Appellate Court. The *Channon* court ruled, among other things, that Section 22.1 provides an implied cause of action in favor of the seller of a condominium unit against the property manager, as agent for the Association, for charging excessive fees to provide the documents required to be produced by Section 22.1.

Then, in May of 2022, the Illinois legislature passed an amendment to Section 22.1 that caps fees that may be charged to comply with Section 22.1 at \$375, and shortens the deadline for response from 30 to 10 days. The amendment to Section 22.1 allows associations to charge an additional fee of up to \$100 to complete the request within 72 hours. **These changes become effective January 1, 2023.**

Now, the Illinois Supreme Court has weighed in on Section 22.1. In a review of the *Channon* case discussed above, the Illinois Supreme Court considered the certified question of whether Section 22.1 provides in implied cause of action in favor of a condominium unit seller against the property manager for excessive fees. The Supreme Court answered the question in the negative, thereby reversing the Appellate court. In reaching this decision, the Supreme Court interpreted Section 22.1 to impose a duty upon the seller to make certain disclosures, not a protection. It is the buyers, the Supreme Court reasoned, that Section 22.1 is intended to protect.

So what does this mean for condominium associations, their Boards, and their managers? While the Supreme Court did not go as far as to say that buyers have an implied right of action under Section 22.1, it did lay the groundwork for a court to reach that conclusion. Associations should also be aware that, under amended Section 22.1 and *Channon*, fees charged to comply with Section 22.1 will be more closely scrutinized than they historically have been. Even though new Section 22.1 caps the fees that may be charged, those fees still must be limited to “direct out of pocket costs” incurred by the association. These costs should be limited to printing and copying costs, and actual administrative costs charged by a professional management company. Also keep in mind that, as we discussed in prior newsletters, lender disclosure requirements have become more onerous. Costs to comply with lender requirements are separate from the limitations and requirements of Section 22.1. Hence, it may be necessary to charge additional or higher fees to complete all requirements for sale of a unit, simply because the burden is high. When that occurs, Boards and management companies should use care to ensure that charges are clearly explained and broken down. Charges should be related to actual costs incurred, including document retrieval, copying, printing, and administrative costs. This will help prevent associations from inadvertently exceeding limits for what can be charged to make a proper disclosure pursuant to sale of a condominium unit.



For children, there is nothing quite like the joy of receiving the Amazon Christmas catalog (or those of us old enough to remember the “Sears Christmas Wish Book” or the “Toys R Us Toy Book”) catalog and putting together the “wish list” for Santa. Even though Santa no longer visits us (whether that is because we are old or attorneys is anyone’s guess), the attorneys at Keough & Moody wanted to experience the joy of crafting a “wish list” for this holiday season. The items on the Keough & Moody attorney wish list are not items for us; rather, they are our wishes for our clients.

This year for Christmas, **Shannon** wants Boards and managers to know that they do not have to wait until things are out of control before reaching out to the attorney with questions and concerns. **Jon** has a similar wish - ask before doing. It is easier (and more cost-effective) to fix an issue or problem on the front-end, rather than after the fact. Put another way, Jon’s wish is that associations be proactive rather than reactive.

Similarly, **Karen** wishes that she could counsel Boards before the big event happens. (See the common theme?!) Karen wishes that she would be contacted to discuss special assessments before they are adopted, and that she would be asked about election procedures before the annual meeting materials are sent to owners. Karen said she likes helping Boards implement best practices at the outset, rather than helping to address problems after they occur.

**Mike’s** wish is for Boards to adopt an official collection policy. While the biggest advantage to adopting a collection policy is to assist Boards with turning delinquent accounts over for collection, there are many small benefits as well. A collection policy can outline the Board’s requirements for accepting a payment plan. This will aid the Board in treating payment plans equally. Further, it will take the guesswork out of when to allow a payment plan. Additionally, a collection policy can outline how late fees will be applied to an account, such as the late fee amount and the posting date. A collection policy will help volunteer Boards effectively govern.

**Gabby** wants Boards to establish a goal for 2023, which is not related to the budget (i.e., capital projects). Gabby wants Boards to think about what it can do in 2023 to make things better not only for the community, but also for the Board. This could mean working on improving communication with the membership, so that they feel informed, even if they are not able to attend meetings. Alternatively, it could mean working on adopting policies and procedures, so that the Board works more efficiently with its manager and is able to tackle more. Just like we go into a new year with resolutions to help create a better us, the Board should go into 2023 with resolutions to make a better Board and community.

**Dawn** wants Boards to remember to be reasonable in all aspects of association governance. Let’s be honest, associations are not a beloved institution. They are often criticized and mocked. More times than not, it is because a specific association’s Board has not acted in a reasonable manner. This could include not providing reasonable communication to the membership regarding major projects (and assessment increases), by enforcing rules in an

unreasonable manner, or by not providing owners with a reasonable opportunity to be heard. Dawn wants Boards (and community association managers) to treat all individuals in a reasonable and respectful manner (even though the individual may not deserve it). Taking the high road, acting reasonably, and leading by example will have a positive impact on your association.

**Chuck** wants Board members and community association managers to give themselves a pat on the back. Between COVID and the political climate, it has been a trying couple of years and yet, you have all persevered. While you may not hear it enough, your efforts on behalf of your community are sincerely appreciated and valued. Commend yourself for getting through another year with aplomb!

All of us at Keough and Moody wish you and your community a successful 2023!

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## **BUT WE'VE ALWAYS DONE IT THIS WAY: PROXIES**

While the bulk of association governance is handled by a duly elected Board of Directors, there are topics, such as the election of the Board members, which require the vote of the membership as a whole. Often, members are unable to attend meetings where their vote is required. Therefore, proxies are a common tool to allow those members who cannot be physically present cast their vote.

What is a proxy? A proxy is a document, which authorizes another person to act on your behalf. Generally speaking, a proxy allows a designated individual, *who is physically present at the meeting at issue*, to vote on your behalf in whatever manner he/she deems fit. For annual elections, most associations utilize a directed proxy, which directs the designated individual to cast the vote as directed. Even in those circumstances, however, the proxy-holder must still be physically present at the meeting and cast the ballot as directed.

Over the years, directed proxies have been treated as ballots. In other words, many associations have accepted the directed proxies as an owner's vote, regardless of whether the proxy has been properly completed and/or whether the proxy holder is physically present. This is an error as again, a proxy requires that the designated proxy holder cast the owner's ballot, regardless of whether the proxy is directed or not.

Both the Illinois Condominium Property Act (following adoption of appropriate rules) and the Illinois Common Interest Community Association allow for associations to conduct elections by ballot (as well as electronically). In such instance, an owner is simply able to complete his/her/their ballot, submit the same to the association (either in person or by mail), and have his/her/their vote recorded. This process does not then legally require that someone physically show up to the meeting to vote. Despite the relative ease of this ballot process, most associations continue to conduct annual meetings via proxy. Why? **Because we've always done it this way.**

As we go into 2023, we encourage Boards to review their election processes. If the goal is a more streamlined and easier election process (which we believe that it is), we encourage you to

reach out to your attorney to discuss what changes may be necessary to move to either balloting or electronic voting. Please note that for condominium associations, rules providing for electronic voting or balloting must be adopted at least 120 days prior to the next annual election.

If you have any questions or we can be of assistance to you and your community, please do not hesitate to contact us.

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