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by Howard S. Dakoff, Esq. and Adam T. Kahn, Esq.
Levenfeld Pearlstein, LLC

CORONAVIRUS PANDEMIC PLANNING:

WHAT TOPICS SHOULD CONDOMINIUM ASSOCIATION BOARDS CONSIDER GOING FORWARD?

By now, condominium associations have dealt with the initial, immediate, and obvious issues caused by the Coronavirus (also known as "COVID-19") pandemic. For example, many condominium associations have temporarily closed common element amenities and on-site management offices to residents, instituted an increased cleaning regimen in accordance with CDC guidelines, and directed residents and staff (if any) who are experiencing symptoms consistent with Coronavirus to self-quarantine and adhere to CDC guidance to minimize the possible transmission of the virus.

The foregoing proactive measures were necessary and a good start to ensure the health and safety of residents and staff; however, as the pandemic continues, condominium associations will need to manage more long-term issues related to the Coronavirus pandemic. Below is a summary of issues and recommendations that condominium boards should consider to be better prepared to navigate the next wave of issues related to the Coronavirus and its impact on condominium life.

At the outset, it should be noted that the Coronavirus pandemic is a "moving target" and seems to be changing daily (if not hourly). The below recommendations are based on the current facts and circumstances and are subject to change based on changes in circumstances, regulations or new government directives.

1. Prudently Navigate Delinquencies. Monthly assessments are vital for the continued operation of condominium associations. Unfortunately, the Coronavirus pandemic may pose a financial hardship to many unit owners and result in increased assessment delinquencies. It is understandable that boards may reflexively wish to show compassion to neighbors who are in an unfortunate situation due to Coronavirus; that said, condominiums are not banks or for-profit businesses and in the event of a budget shortfall, the unit owners collectively are still responsible for "picking up a budget shortfall," most commonly by a special assessment.

Boards need to be mindful of the association's ongoing funding needs (to which even delinquent unit owners receive a benefit of services) and their fiduciary duty to all unit owners and the association when navigating delinquency issues. Hope is not a strategy,

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and unfortunately, there is no guarantee that delaying collections will improve the situation in the near term—and may even lead to a greater deficit for the association. Plus, it should be noted that the collections process can take as long as six (6) months from start to finish (not including delays due to court closures), so delaying the commencement of an assessment collection action will delay the association receiving the necessary funds to operate and/or taking possession of a unit.

TIP» **Subject to any new legislation that frustrates an association's ability to collect assessments, condominium associations should continue to adhere to their standard collections procedures to ensure that the association has funds to continue operating properly, pay its staff and vendors providing services, pay for utilities and insurance, maintain and repair the common elements, etc. Waiving late fees during the COVID-19 crisis is an option to consider.**

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2. **Evaluate Services and Ongoing Projects.** If practical, boards may consider reducing services to the unit owners built into the budget or defer elective or non-essential projects to garner a budget savings in order to reduce the budget (by following required approval protocols), which in turn reduces the assessment obligation of each unit owner pro-rata. However, it must be noted that most community association budgets do not contain superfluous expense items, but in fact contain fixed expenses for reasonable and expected services to the unit owners and maintenance, repair and repayment of the common elements, so a nominal reduction of the budget will be tantamount to only a nominal reduction in assessment obligation for each unit owner. Ongoing necessary maintenance projects should continue.

TIP» **Confirm vendor and contractor safety and COVID-19 protocols to protect the health and safety of residents.**

3. **Leverage Technology to Conduct Meetings.** "Social distancing" should not hamstring board and unit owner meetings. Technology allows association boards to easily conduct business via virtual connections (video conferencing and/or tele-conferencing). Even an annual meeting can be conducted virtually via phone and/or video conferencing with unit owners dropping off absentee ballots or proxies (depending on which the association uses) to avoid an in-person gathering. Meetings can also be rescheduled; however, there is no certainty as to when the CDC's "social distancing" guidelines will expire, and boards will need to continue conducting association business in the coming weeks and months to effectively manage the association.

TIP» **If proxies are used, the association can schedule staggered times for the proxyholders to "vote" the proxies in person to avoid close person-to-person contact.**

4. **Consider Association Policies and Procedures.** Many condominium associations have already adjusted their everyday operations to protect the health and safety of residents and staff. Examples include limiting the number of persons in common laundry rooms or elevators at a single time, enacting policies for package and food deliveries to the building, and limiting or prohibiting open houses or unit showings during the

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pandemic. Boards should continue to evaluate and update their policies and procedures, as needed, to comply with applicable guidelines regarding the Coronavirus.

TIP» **Boards should periodically monitor the CDC's website for guidance on Coronavirus: https://www.cdc.gov/coronavirus/2019-ncov/**

5. **Assist Residents in Self-Quarantine.** If a resident is self-quarantined in their unit (due to exposure to, symptoms of, or testing positive for, Coronavirus), the board or management (if the association is professionally managed), should consider working with that resident, as practicable, to coordinate "contactless" day-to-day necessities such as deliveries, garbage pickups, and any required departure from, and return to, the unit to obtain medical treatment.

TIP» **If the resident must leave their unit to seek healthcare treatment, the resident should phone ahead and make arrangements for a "clear path" to exit and re-enter the building and for the common elements to be properly sanitized afterwards.**

6. **Keep Unit Owners Updated (As Appropriate).** Transparency is important, especially during the Coronavirus pandemic. Boards should communicate updates and additional health and safety measures to residents and direct them to the CDC's website—but should refrain from giving medical advice. If a resident is self-quarantining, the board may reach out to the resident (see #5 above) and alert other residents that a resident is self-quarantined, but that resident's personal information (name, unit number) should be kept confidential.

TIP» **Personal medical information must be kept confidential.**

7. **Consult with Legal Counsel on Employment Issues (As Needed).** For associations with employees, boards should consult with the association's legal counsel on employment issues (what to do if an employee experiences symptoms of, or tests positive for, Coronavirus, for example) as they arise.

TIP» **Beginning April 1, employees who are adversely affected due to Coronavirus may be entitled to paid sick leave under the Families First Coronavirus Response Act.**

The Coronavirus pandemic will likely continue to pose new and more long-term obstacles for condominiums. By proactively taking appropriate measures to address these issues, the board not only fulfills its fiduciary obligations but also protects the health and interests of the association and all unit owners. The above considerations are intended to highlight common issues that condominium boards may face in the coming weeks and months, but is not an exhaustive list of all issues that boards will face with respect to the impact of the Coronavirus pandemic. ✠

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by Pamela Dittmer McKuen

Electric Vehicle Charging Stations: *Now or Later?*

For building owners, it's no longer a question of whether or not to install electric vehicle charging stations in their garages. It's a matter of when.

When MCD Media first wrote about electric vehicles and the charging stations that fuel them in 2011, the Big Question was a chicken-and-egg analogy: Which comes first? Apartment dwellers and condo owners don't want to live where they can't charge their cars, but building owners don't want to invest in pricey infrastructure if no one is going to use it.

Today the Big Question is entirely different: Not IF, but WHEN? When will you install electric charging stations on your property?

Since that article was published, all-electric and hybrid (electricity- and gasoline-powered) vehicles have arrived in droves. Vast more are coming.

A 2018 study by AAA Motor Club showed 20 percent of Americans will likely go electric for their next vehicle purchase. They'll have plenty to choose from. This year alone, makers are expected to introduce 20 new all-electric and hybrid models.

According to the Edison Electric Institute, nearly 1.5 million electric vehicles, or EV for short, are on the road today. That number is predicted to reach 18.7 million in 2030.

"Many homeowner associations, condominium and co-op communities are already getting out in front of the trend," says senior energy advisor Calvin Cornish of Nania Energy Advisors in Warrenville. "They've begun researching how adding EV charging stations to their premises can bring value to their organizations and tenants. Property managers are recognizing the value in being first to market with electric car charging options. It's not just about accommodating for the growing market. It's about accommodating your residency and upgrading your amenities."

Nania Energy Advisors provides comprehensive solutions and guidance to help users of electricity and natural gas minimize their energy bills while meeting cost and sustainability goals. The company does not sell products or projects.

Chicago-area property management executives confirm the growing demand for EV charging. Both Robert Meyer, director of engineering services at FirstService Residential, and David Barnhart, vice president of condominium management at The Habitat Company, say numerous client properties have either inquired about charging stations or had them installed.

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EV CHARGING STATION OVERVIEW

Current technology enables charging stations at three levels of speed and price point. The faster the charge, the more expensive the equipment to produce it.

LEVEL 1 is the standard 110-volt household outlet and the slowest method of charging. Simply plug the cord from the vehicle into a wall outlet.

LEVEL 2 requires a dedicated 240-volt outlet as well as installation of a small docking device.

LEVEL 3 or DC Fast Charge provides charging through 480V input and requires installation of a specialized, high-powered docking device.

Tesla has its own proprietary charging technology.

(Another factoid from the Edison Electric Institute: As of May 2019, there were about 68,800 Level 2 and DC fast-charging units in the U.S. About 10 million will be needed by 2030.)

THE CHICAGO SCENE

One insider to the exponential growth of EVs is SP Plus Corp. The nationwide company provides professional parking management and other solutions to expedite the movement of vehicles, people and personal belongings. The Chicago division focuses on residential parking facilities, including those of 70+ condominium and apartment buildings.

New construction developments are adding EV charging stations to their parking facilities from the ground up, and existing ones are looking to add them, says Roger Walters, vice president in charge of the residential division in Chicago.

"Everyone is getting into it because this is the appetite of the public," he says. "This has been driven in part by the rollout of the new midsize Tesla and the commitment by the auto industry to emphasize electric vehicles going forward. It is inevitable that new electric vehicles will surface in most if not all apartment and condo buildings."

As the industry evolves, charging has become faster, and prices have become lower. For retrofits, SP Plus partners with ChargePoint and charges between $750 and $1,500 per charging station, depending on the unit. ChargePoint, an international EV infrastructure company based in Campbell, California, installs, sells and leases EV charging equipment.

SP Plus does not levy additional payment from parking customers to use the charging equipment.

Walters points out that EV charging stations are not a big money-maker for either SP Plus or its building owner clients, but they are a tremendous marketing tool.

"It's an amenity, but it might make the difference of someone buying or renting a unit, based on whether they have it in the building," Walters says. "Or they might go to the garage next door."

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director at ChargePoint in Chicago. "You don't have to come up with a bunch of money upfront."

In contrast, Levin ballparks a DC Fast Charger for between $40,000 and $50,000. A two-station Level 2 charge, which charges two vehicles at one time, runs about $7,000.

Another reason for leasing: Easy upgrades.

"As battery technology improves, charge times continue to drop," Cornish says. "Leasing allows you to upgrade at the end of your lease term. You can make sure your charging station is up-to-date and continues attracting users."

Before you make decisions, consult an energy advisor to discuss your needs and options, he advises.

LEASING IS AN AFFORDABLE OPTION

Just like cell phone providers and car dealers, EV charging station manufacturers and networks are adopting the leasing model.

Cornish points out several reasons for building owners to consider leasing their EV charging equipment: Lower upfront costs, and reduced management and maintenance responsibility. Because vendors own the devices, they bear the costs and liability for servicing and repairing them. Their software can be programmed to track usage and charging costs.

"When you lease a commercial station, you're operating on an expense model versus a capital expense model," says Brian Levin, regional sales

BEST PRACTICES BEFORE AND AFTER

Plan for the future by developing an EV charging policy or program before installation begins. Questions to ponder: Will chargers be an amenity to be shared by all building residents, or will individual owners be permitted to install chargers for their private use? How will costs be

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handled for both installation and charging?

"In all instances that I have seen, individual charging stations are solely at the cost of the unit owner," Barnhart says. "A license agreement between the association and the owner is executed to create an administrative framework for the installation. Unit owners are responsible for any insurance associated with the installation. When an owner sells or moves from the association, he or she is responsible for the disconnection of the sub-meter and electric line."

"For charging stations that will be an amenity to the association, the association will typically use parking spaces they already own and contract the charging station and labor through the association," Meyer says. "These types of chargers will usually have a credit card payment option to activate the charger. Depending on how many electric vehicles are in the building and what level of charger is installed, this may eventually offset the cost of the charger install, but certainly the cost of the consumed electricity is covered from Day One."

Meyer also advocates establishing clear rules for using the chargers. For example, if your vehicle needs a 4-hour charge from an amenity charger, you must move it from the charging station within a reasonable time after your charge is complete.

REASONS NOT TO JUMP IN

Not every association or building owner should rush to install EV charging stations. The two biggest barriers are space and cost. Even if a garage layout has the space, it might not have a convenient power source.

"Many associations do not have adequate 'common' space to add charging stations," Barnhart says. "This is often the case in newly created associations where all spaces are deeded and there is no guest parking. Where electrical capacity is limited, cost may be prohibitive to be able to add charging stations, either in a common garage area or in individual spaces."

Getting adequate power to the installation site might be tricky, especially in older buildings, Cornish says. Even if owners plan to lease, they will be responsible for this "make ready cost."

"Old infrastructure with inadequate voltage, an exceptionally long run from the nearest power connection, running under or through concrete, upgrading an electrical panel to make space and/or allow space for future expansion—any of these issues would increase the upfront investment and possibly make the whole project a non-starter," Cornish says. "But it's very hard to know without due diligence."

"We try to install on a wall rather than free-standing," Levin says. "That will decrease the costs because you're really just running the power. We also try to get as close to the power source as we can. The farther the run, the more expensive it will be."

Some building owners put in signage, striping and protective bollards, which add to the cost, he says.

Still other associations are taking a wait-and-see approach. "If the association isn't seeing the need (owners purchasing electric vehicles), they may be deferring until such time it makes sense for the association to absorb this cost based on the return on investment," Meyer says.

"If there are nine people on the condo board, it's very challenging to get them to agree to anything," says Walters at SP Plus.

ILLINOIS TAKES ACTION

Several legislative bodies around the country have enacted laws in support of the electric vehicle industry and its customers. In addition, many states and utilities offer incentive programs, rebates and tax credits for purchasing and installing EV charging equipment.

Illinois HB-4284, also known as the Electric Vehicle Charging Act, has multiple sponsors.

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Among its provisions: A new or renovated residential building is required to have a certain percentage, based on the number of units in the residential building, of its total parking spaces either EV-ready or -capable. A new or renovated nonresidential building is required to have 30 percent of its total parking spaces EV-ready.

The International Code Council, which sets voluntary building standards, in January approved a new provision that will make all new homes EV-ready.

It calls for builders to install panels, outlets and conduits that can enable at least one full-size electrical vehicle in a single-family garage to be charged overnight. Multi-family buildings will need two such spots. Property owners will have to purchase and install their own EV charging equipment.

The new EV-ready provision will appear in October as part of the 2021 International Codes. It's up to individual states and municipalities whether to adopt them. Similar building codes already exist in Atlanta, Denver, Seattle, California and now Chicago.

Chicago already has followed the spirit, if not the precise letter, of the ICC standards.

In Chicago, multi-family residents may soon find greater availability of charging stations where they live. The City Council on October 16, 2019, voted to require new buildings with 24 or more residential units to have at least two EV charging-ready spaces for electric vehicles. Developers do not need to install the chargers, but they must be sure chargers can be installed easily if property owners decide to do so in the future. The requirement will help avoid extensive renovations in the future, which might discourage owners from taking on the installations.

MORE LEGISLATIVE APPROACHES

California lawmakers have taken a proactive approach by adopting an official policy to promote, encourage and remove obstacles to the use of EV charging stations. They also passed a couple of significant pieces of legislation in recent years.

Senate Bill 209, which went into effect January 1, 2012, bars common interest developments (CID), which includes condominium developments and planned unit developments, from prohibiting or restricting the installation and use of EV charging stations.

This law allows the CID to make reasonable restrictions that do not significantly increase the cost of the charging station or decrease its efficiency; approve the installation of the charging station within 60 days; require the charging station to meet state and local building and safety codes; require homeowners to comply with the CID's design specifications and engage a licensed contractor if the charging station is to be located in a common area or exclusive-use common area.

In addition, homeowners are responsible for the cost of electricity they consume and for maintaining and repairing their charging stations.

Another pertinent California law, Assembly Bill 2565, gives tenants new rights to install EV charging stations in the parking lots or structures of their buildings. The law applies to all leases executed, renewed or extended on or after January 1, 2015. It applies to tenants of commercial properties with more than 50 common area parking spaces but fewer than two EV charging station spaces for every 100 parking spaces. Like Senate Bill 209, this one allows landlords to make reasonable restrictions that do not significantly increase the cost of the charging station or decrease its efficiency.

Colorado, Oregon and Hawaii have enacted similar legislation.

"It is only a matter of time before legislation spreads to other major metropolitan areas," Cornish says. "As demand grows, existing facilities will be pressed to fall in line." ■

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by **Gabriella R. Comstock and Dawn L. Moody - Keough & Moody, P.C.**

COVID-19 and Community Association Living: How to Move Forward

Our lives today are very different than they were just two (2) months ago. On March 20, 2020, when Governor Pritzker issued his Stay at Home Order, we all thought "how will we do this". Almost one (1) month later, we are adjusting to our new "normal" and hopefully all staying safe and healthy as a result. As we wait to hear what will happen next, we know that what lies ahead for us, at least temporarily, will not be an immediate return to the usual course of business. This may ultimately be for the best. For this reason, we should reconsider now how we guide and manage community associations.

As the song says, "People are People". During this pandemic, people's true colors have shone. While we would hope that those colors would have shined brightly, for some they certainly did not. For the most part, these are the same people who made life difficult before the pandemic. We must remember that when dealing with difficult people, we are not always dealing with creatures of logic, but with creatures of emotion. So, while we will not change others, we can change how we respond to them and how we let them affect us and our communities.

What can a Board of Directors do to control this negativity? A Board can be mindful of its authority and not act in heavy-handed ways. It can continue to run the association as a business. The Board can continue to conduct board and owner meetings in a controlled manner. It can work with its Owners to address covenant issues and to collect assessments. A Board can, and also should, learn from these recent experiences and consider what policies, procedures, and rules can be put in place to help the Association run more smoothly in the event that we are again directed to stay home. At the end of the day, Boards should be focused on not just what they can do, but also what they should do, so as to promote respect with the community and encourage all to work together.

Recognize the Board of Directors' Limited Authority

Over the last several weeks, I received many requests about what can a Board of Directors do to stop: in unit construction that is not essential; an Owner who is not following the CDC guidelines; an Owner who continues to receive deliveries; or an Owner

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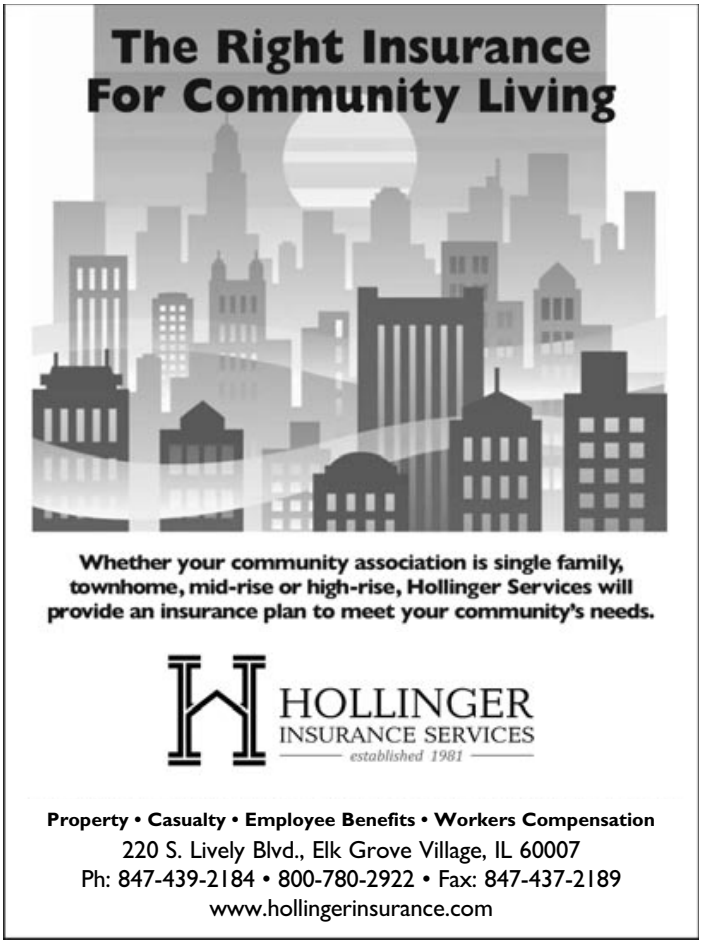
who continues to have visitors in his/her unit. The simple answer to these inquiries was that there was not much the Board could do. The Board of Directors is not authorized to enforce the Governor's Executive Order. The above described conduct appears to violate the terms of, or at least the spirit of, the Governor's order, which was to ensure self-isolation to slow the spread of COVID-19. We all are used to reporting a violation to the Board of Directors and the Board taking action to stop the violating conduct. Yet, with COVID-19, a violation of the Executive Order or CDC guidelines, is not within the authority of the Board of Directors to address.

However, this does not mean that the Board must "approve" such conduct. Instead, when faced with a situation that may interfere with social distancing or otherwise encourage the spread of COVID-19 within a community, the Board of Directors should approach the Owner and discuss the situation. We want the Board of Directors to follow the motto of "it is not what you can do, but instead it is what should you do". This should become the motto of every community association. Owners should be reminded that perhaps they can act in a particular manner under the Executive Order, but should they? Before acting, they should ask themselves, should I subject my neighbors to more people within the common areas than is necessary? They should consider if they would want someone to act in a similar manner in a building where their parent resides. Fortunately, most times, the Owner reevaluates the conduct and either completely refrains from it or takes additional steps to better protect everyone.

Remember, the Board of Directors' primary obligations and responsibilities relate to the oversight and maintenance of the common areas. While it should manage those areas in an effort to help protect the well-being of Owners and residents within the community (i.e. increased cleanings, closures of recreational facilities, etc.), the Board of Directors has neither the obligation, nor the right to police how an Owner is individually protecting his/her health. Not all aspects of an Owner's life are within the control of the Board of Directors.

Open Board Meetings

Many associations cancelled all meetings this past month. Some only met to address time sensitive business. Many worry how Boards will conduct business in the future if they cannot have face-to-face Board meetings. We need to remember that an open Board meeting does not necessarily require a face to face meeting. The Illinois Not for Profit Corporation Act allows members of a Board of Directors to attend a Board meeting by phone or other electronic means, so long as all persons can hear one another and be heard. This means a meeting can occur by conference call, Skype, Zoom, or other acceptable technological means. While neither the Illinois Condominium Property Act, nor the Common Interest Community Association Act, specifically address this situation, both Acts acknowledge the use of technology. More importantly, let's follow the motto above: Boards could decide to not meet and not conduct business, but should they? Boards could just discuss issues by e-mail, without involving Owners, but should they? The answer to both



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questions is no. We all need to remember Palm II, and the Court's reminder to all within the industry as to the rights of Owners. These rights can and do co-exist with COVID-19.

The Board of Directors should not allow COVID-19 to prevent it from running the business. Meetings should resume and each association should determine which technological means will work best for their community. It is likely that even once the Governor's Executive Order is revised or lifted, there will be a period of time when we will be exercising social distancing as the threat of COVID-19 will remain. So, while we could then meet face to face and sit six feet apart, should we? Should we do that when there is a viable, safer option available? Change can be hard, but it can also be for the better. While there is a learning curve associated with conducting meetings through acceptable technological means, once we start doing so, we may see meetings being more productive, shorter in length, and pursuant to a strict agenda. Time can still be and should be allowed for Owner participation. However, guidelines controlling Owner participation will need to be adopted and followed. More productive and respectful meetings may have a positive effect on community associations. Further, it may actually encourage more people to be on the Board!

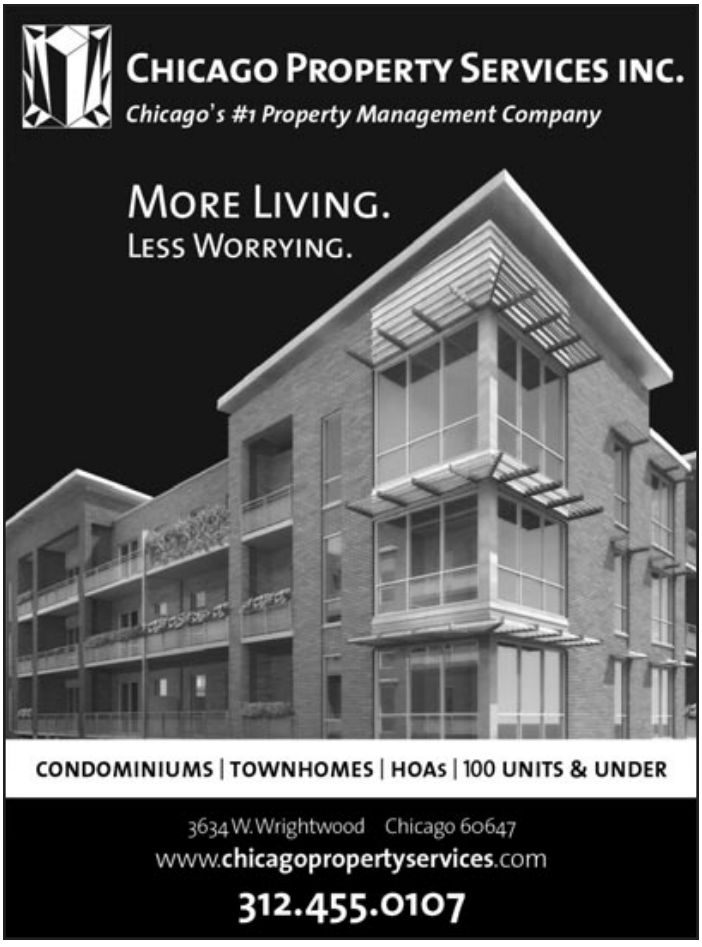
The Board of Directors is still Running a Business

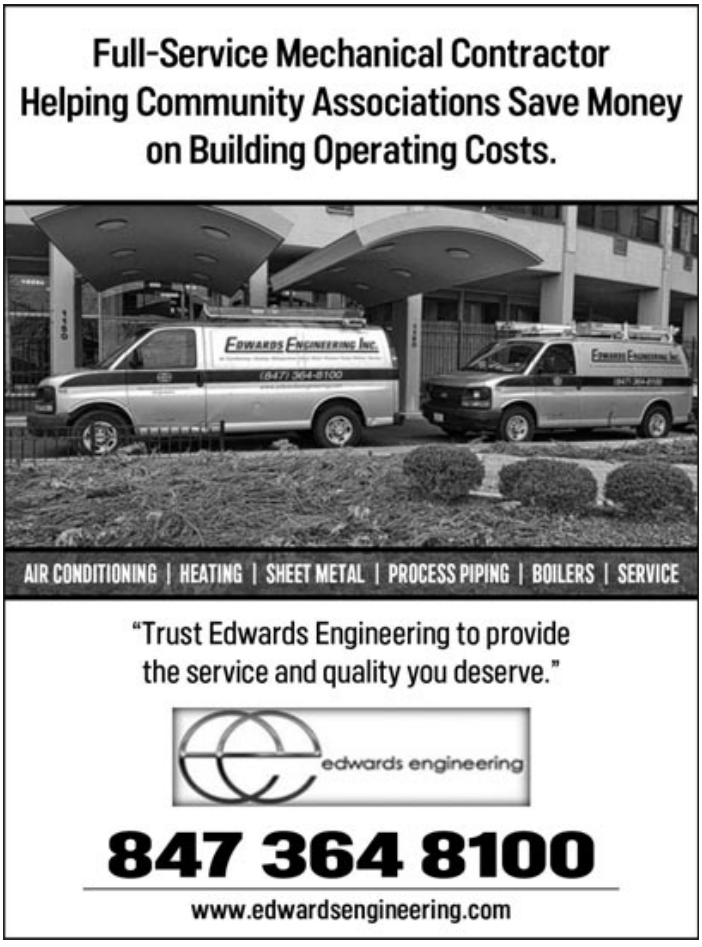
Even during the COVID-19 pandemic, the Board of Directors still has a business to run. In addition, the Board of Directors must fulfill their fiduciary obligations to their members, which includes adhering to the terms of its governing documents. This means that the Board of Directors must continue to make all decisions in the best interest of the Association, a corporate entity. Projects, maintenance and repairs to the common areas still generally must be completed. A Board of Directors may reconsider completing a redecorating project, but it should not defer needed maintenance. After all, failure to maintain the common areas can be detrimental to the value of the Units and potentially open the Association up to liability. Delaying necessary maintenance generally results in greater costs to the Association and its members down the road.

I expect we will see more requests for financial accommodations from Owners than we did in recent years. However, these requests must be balanced with the Board's legal authority as well as with the needs of the business. The Board of Directors must find a way to balance the Owner's need with that of the Association's need. Remembering that these are different times will help the Board in achieving this goal.

Collection of Assessments

COVID-19 has not only had a physical effect on our country, but also it has affected our economy. Only time will tell us the true impact it will have on the economy. However, we know from past experiences in 2007-08, that a severe downturn in the economy has an adverse effect on community associations. Assessments are the lifeline of all associations. While a Board of Directors could change the association's collection policy now, should it? It should not. It is not likely that a "one size fits all" collection policy will work in the immediate future. Instead, Boards should del-





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egate specific authority to management, and a board member or two, to consider requests for payment plans (or other accommodations) from Owners. The Board should have a set policy that all such plans must be in writing, how late fees will be addressed, and what steps will be taken if an Owner defaults. The policies should not be dependent on the Board determining if the effects of COVID-19 are "detrimental enough" to an Owner so as to warrant a payment plan. The Board can agree to be more open with payment plans for Owners who did not default on their payments until April of this year. The ultimate goal with any payment plan should be to work with the Owner while collecting the money owed to the Association as soon as possible.

THE BOARD OF DIRECTORS SHOULD NOT ALLOW COVID-19 TO PREVENT IT FROM RUNNING THE BUSINESS. MEETINGS SHOULD RESUME AND EACH ASSOCIATION SHOULD DETERMINE WHICH TECHNOLOGICAL MEANS WILL WORK BEST FOR THEIR COMMUNITY.

Amendments to the Association's Community Instruments

Over the last month, community associations have been faced with issues they never dreamed would be before them. It is during unprecedented times, such as this, that we see the actions, in retrospect, that we wish our Boards would have taken to make conducting association business easier. It is likely that we will see continued effects of COVID-19 throughout at least this year. Therefore, Boards should be looking to take action now to amend community instruments, adopt rules and regulations, and adopt policies and procedures to permit easier functioning of the Association.

Prior to closing certain common facilities, we learned how challenging it was to clean these areas and how important it was to prevent the spread of the virus. Association's rules should allow the Board to limit one's access to common facilities if the person is suffering from a contagious illness. Boards should be looking to adopt necessary Rules to permit electronic notice and aggressively solicit consent for such notices from its membership. In addition, Boards should be looking to adopt Rules, as needed, to allow for electronic voting or voting via absentee or secret ballot (for condominium associations, this requires adoption of rules at least 120 days prior to the annual election). To date, it has been much easier for associations that conduct elections by ballot to proceed as scheduled. Boards and management should be looking at those areas of association governance, which have been difficult to address or otherwise accomplish during this pandemic, and ensure that rules, policies and procedures are put in place to help assist the association in addressing those issues in the future.

We will continue to live with COVID-19 and we hope to continue to learn not only about it, but also how we can change our community living for the best. Stay safe and healthy during this difficult time. ■

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by Robert Nesbit – Kovtiz Shifrin Nesbit

3 Lessons 2020 Community Association Board Members Can Learn from 2008

During this COVID-19 crisis, it serves us to look back to the last time our economy was in terrible shape: the 2008 recession. Millions of homeowners lost their homes and suffered significant financial losses during the years after the real estate crash. To this day, property values in the greater Chicagoland area remain at levels below what they were at the peak.

While the current pandemic has different origins and is dissimilar in many ways from what happened in 2008, we are seeing the beginnings of something similar that could end up contributing to significant problems for condominium, homeowner, and townhome community associations.

Board members and property managers are reaching out to our law firm daily and asking:

Should the association waive assessments during this coronavirus outbreak?

The same question was posed during the 2008 recession and our answer remains the same. While everyone should have a measure of compassion and understanding for their neighbors, boards do not have the legal right to allow owners to skip payments.

Below are three reasons why associations must be proactive to ensure history does not repeat itself.

1. Board Duties

Board members are charged with the duty to act in the best interests of the association as a whole. Allowing certain owners to skip payments ultimately results in other owners having to pick up the slack.

This is not to say that owners should not be given payment plans or that late fees should not be waived for the time being. Boards can and should consider and respond to any unit owner requests.

2. Assessment Policies

During the 2008 recession, even boards with a good policy in place addressing delinquent assessment payments delayed legal pursuit of past due assessments. This was mostly out of sympathy for fellow owners and in the hope that financial circumstances would improve. Unfortunately, in most cases they did not.

Boards should have a formalized assessment collection policy in place and send out a reminder to all owners that assessments are due and payable as always. If an owner cannot make their regular assessment payment, they should provide the Board with an explanation and a proposal for eventual repayment.

3. Association Budgets

All community associations require routine maintenance, repairs, and replacement. The task of ensuring the association retains sufficient funding to pay for this ongoing maintenance falls squarely on the shoulders of the board. In 2008, many associations allowed owners to go months or even years without paying, only to finally have the owner foreclosed on. This resulted in budgetary shortfalls.

An association's largest asset are the homes that reside within the community. Failing to take proactive measures to safeguard the association's financial health can impact operations and vendor services, resulting in future funding concerns that will be that much more difficult to remedy. Subsequently, current board members must take a firm and fair stance regarding assessment collection and budgeting.

Unlike 2008, the federal government is responding to the coronavirus crisis by providing relief efforts and support in the form of payments to individuals, families, and businesses. Additionally, there are enhanced unemployment payments to qualified individuals who have lost their jobs. If boards communicate clearly and owners know that assessment payments are still expected (along with the consequences if payments are not received), a repeat of 2008 can be avoided.

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INDUSTRY HAPPENINGS

The Habitat Company

The Habitat Company, a leading U.S. multifamily developer and property manager, announced recently that the firm has been awarded property management of Park Tower, a 724-unit condominium building at 5415 North Sheridan Road in Chicago's Edgewater neighborhood, effective Jan. 1.

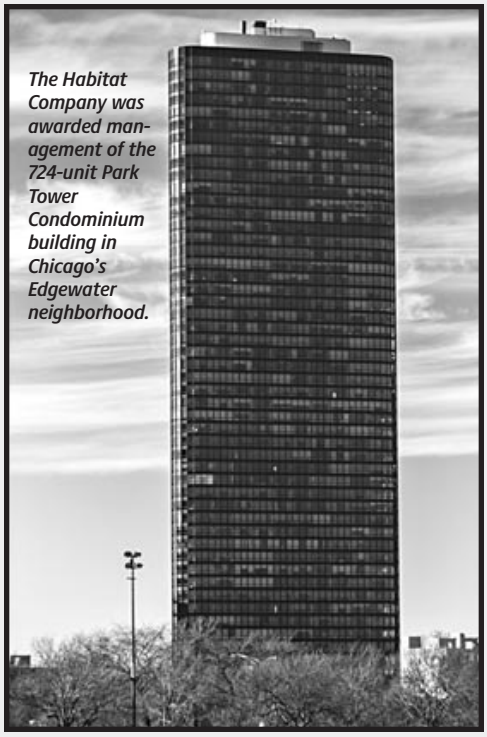
"With beautiful lake views and shared spaces, Park Tower is the crown jewel of Edgewater condominiums," said **David Barnhart**, vice president of condominium management at Habitat. "Park Tower has extensive amenities and is a great fit for Habitat's growing condominium portfolio. It's truly an honor to have been awarded management of this property."

Constructed in 1973, Park Tower Condominium is a lakefront high-rise climbing 55 stories. It is one of the largest buildings by unit count among all-residential buildings in Chicago.

"We put the management contract for the building out to bid to four large companies we believed were capable of handling both our association and the size of the property," said Michael Parrie, board president, Park Tower Condominium Association. "We chose Habitat because of its extensive experience, stellar reputation and commitment to implementing systems that simplify the association's daily operations, which can be vast given the number of people living in the building. We are looking forward to a seamless transition and positive working relationship."

Park Tower is situated close to the shopping and dining of the Historic Edgewater and Andersonville neighborhoods, lakefront beaches and the CTA Red Line. The property boasts a rooftop garden, grocery store, dry cleaners, clubhouse, parking garage, 24-hour doormen and security, a fitness center, racquetball courts and an indoor/outdoor pool.

About The Habitat Company: Founded in 1971, The Habitat Company is a full-service residential real estate company specializing in property management, acquisitions and development. One of the largest residential property developers and managers in the United States, with over $3 billion in assets and more than 22,000 units under management across six states, the company's portfolio spans a range of property types, from mid- and high-rise condominium, apartment and adaptive reuse developments to senior and affordable housing communities. Headquartered in Chicago, with more than 800 employees throughout the United States.



The Habitat Company was awarded management of the 724-unit Park Tower Condominium building in Chicago's Edgewater neighborhood.

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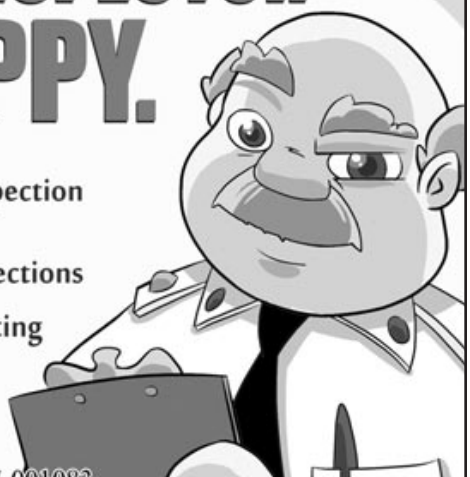

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INDUSTRY HAPPENINGS

CIT Group – Mutual of Omaha

CIT Group recently announced that its banking subsidiary, CIT Bank, N.A., completed the acquisition of Mutual of Omaha Bank on Jan. 1, 2020. This transaction advances CIT's strategic plan through the addition of a stable, lower-cost homeowner association deposit channel from the market-leading community association banking business. The acquisition will also build on CIT's commercial banking strengths through the addition of relationship banking teams and expanded product and technology solutions.

"The completion of this transaction accelerates CIT's strategic plan to further enhance our capability as a leading national bank and create additional long-term shareholder value," said CIT Chairwoman and Chief Executive Officer Ellen R. Alemany. "The addition of the homeowner association deposit channel has significant growth potential and will reduce CIT's overall cost of funds, and the middle market banking franchise will expand our footprint and customer base. These capabilities complement CIT's core strengths and will allow us to unlock greater potential and create an even stronger company."

The purchase price was approximately $1 billion, comprised of $850 million in cash and about 3.1 million shares of CIT stock, which were issued to Mutual of Omaha Insurance Co. The transaction includes $6.8 billion in deposits, $4.5 billion of which are community association deposits, and $8.3 billion of total assets, including $3.9 billion of middle-market commercial loans, as of Sept. 30, 2019. In total, CIT now has approximately $42 billion of total deposits and $60 billion of total assets.

"We are excited to welcome the teammates and clients of Mutual of Omaha Bank to the CIT family," Alemany continued. "We look forward to strengthening existing relationships, building new ones, and continuing to deliver value for our customers, colleagues, shareholders and communities."

Mutual of Omaha Bank will begin to transition to the CIT brand and the retail branch locations will adopt the CIT Bank brand over the coming months. Customer accounts remain unchanged at this time and can continue to be accessed through Mutual of Omaha Bank branches, website, mobile apps and relationship managers.

About CIT - CIT is a leading national bank focused on empowering businesses and personal savers with the financial agility to navigate their goals. CIT Group Inc. (NYSE:CIT) is a financial holding company with over a century of experience and operates a principal bank subsidiary, CIT Bank, N.A. (Member FDIC, Equal Housing Lender).The company's commercial banking segment includes commercial financing, community association banking, middle market banking, equipment and vendor financing, factoring, railcar financing, treasury and payments solutions, and capital markets and asset management. CIT's consumer banking segment includes a national direct bank and regional branch network.

Waldman Engineering Associates

↗ *Kate Hoglund*

Kate Hoglund is a registered Professional Engineer in the State of Illinois with over 8 years of engineering and design experience in the energy industry. She is a 2011 graduate of the University of Illinois at Urbana-Champaign with a B.S. in Civil Engineering and a 2013 graduate of the University of Illinois at Chicago with a M.S. in Civil Engineering. Kate joined Waldman Engineering Consultants in early 2020 to assist clients with their foundation issues, facade inspections, balcony assessments, building envelope verifications, and construction oversight. Prior to joining WEC, she provided structural engineering services for natural gas, oil and nuclear facilities throughout the country. These services included concrete and steel designs for various buildings, skidded equipment, pipe supports, exhaust stacks, and access platforms as well as performing OSHA fall protection surveys.

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INDUSTRY HAPPENINGS

Solidarity at 8

↗ *Various high rise buildings including condo residents in Chicago have sent messages by coordinating special lighting at their buildings that show support for our Health Care employees and those on the front-line of the Covid-19 pandemic. Group sing-a-longs (from their balconies) and light displays have also been taking place nightly in the South Loop and elsewhere as a show of unity and community. Called Solidarity at 8, the neighbors were inspired by Italians singing from their balconies united against the coronavirus. Other areas such as the neighborhoods of Rogers Park and Edgewater as well as Oak Park have done sing-a-longs as well.*

FirstService Residential

↗ *Daniel Valdes*

FirstService Residential Illinois is pleased to announce the promotion of **Daniel Valdes** to Vice President, Property Management. In his role, Daniel will oversee the strategy and operations of our city portfolio management division, and will report directly to President Asa Sherwood. Daniel joined FirstService Residential seven years ago as a portfolio manager, and also served as a part-time onsite manager. In 2016, Daniel was promoted to Regional Director, and has supervised some of Chicago's most high profile downtown associations. Daniel is known throughout the organization as a hard-working strategic thinker, who lives the firm's core values every day. He holds CMCA and AMS licenses, and graduated from DePaul University with a Bachelor's degree in Industrial and Organizational Psychology.

↗ *Rachel Eibl*

Rachel Eibl has joined FirstService Residential as the Vice President of Human Resources. Rachel has over 13 years of experience in HR management and business and has spent her career working in the environmental, manufacturing and healthcare industries in Milwaukee, Chicago, and Paris. Rachel brings expert skills in talent strategy, employee relations, organizational change management and performance to transform the talent management initiatives in the Illinois market. She graduated cum laude with a Bachelor's degree in Business Administration and a Master of Science in Human Resources Management from Marquette University. She is also a lifetime member of the business fraternity, Beta Gamma Sigma.

FirstService Residential Illinois also recently announced a new division to their roster of business solutions: FirstService Construction and Maintenance (FSCM). This division provides quality maintenance and construction services exclusively to high-rise, mid-rise, cooperatives and townhome communities in Chicago managed by FirstService Residential. Their professional crews have a depth of experience with our properties as well as strong industry knowledge, and the powerful resources and systems of FirstService Residential. This addition brings an even stronger roster of service offerings and solutions to communities managed by FirstService Residential.

IREM Chicago

Two companies and four individuals were recognized for excellence and outstanding contributions to the property management industry March 6 during the 16th Annual IREM Chicago Premier Awards and Casino Night. More than 300 industry professionals and guests attended the gala event held on March 6, 2020 at the historic Drake Hotel in Chicago.

These four professionals earned individual Premier Awards in their respective categories:

- **Crystal Stude, CPM®, Community Specialists CPM® of the Year**
- **Angel Edwards, ARM®, Baum Revision ARM® of the Year**
- **Shari Vass, CPM®, Braeside Community Management -- Leadership Award**
- **Tasha Rush, ARM®, A & R Katz Management Rising Starr**

Two companies that provide products and services to the metropolitan Chicago property management industry earned awards in these categories.

- **Smart Elevator Industry Partner of the Year**
- **The Habitat Company – Property Management Company of the Year**

The 2020 Premier Awards featured a Roaring 20's theme, and some participants dressed in period costumes. Table centerpieces included a three-foot tall champagne glass draped with beads and pearls. The evening included food and beverage, casino games, music, camaraderie, and recognition on stage for the Premier Awards entrants and winners.

↗ *Shown above (L to R) are Dave Barnhart, Wendy Deetjen, Kim Sisney, Maureen Vaughn (award), Gina Fortune-Harmon (back row), Sheila Byrne, Shruti Kumar, Charlton Hammer (back row) – all from The Habitat Company, Tasha Rush –A&R Katz Management, Crystal Stude - Community Specialists, Suzy Martin -Smart Elevator, Shari Vass – Braeside Community Management and Angel Edwards – BR Property Management.*

Before the Premier Awards were announced, IREM 2020 National President Cheryl Gray, CPM® delivered an inspirational message via video, which concluded with the lines: "Become what you want to be. We're IREM."

The awards ceremony was hosted by 2020 Chapter President Angela Aeschliman, CPM® and 2016 Past President Brian Lozell, CPM®. Aeschliman encouraged members to pursue volunteer positions with the Chapter and concluded: "We are IREM, and we are here because of you. And, we are here for you." Chapter President-Elect Steve Schimmel, CPM®, participated by announcing entrants and handing out awards.

A total of 19 nominations were submitted for consideration during the 2020 competition. More than 40 Industry Partner companies supported the event through sponsorships.

The Premier Awards were created to recognize people, organizations and companies for excellence in areas that include innovation and technology, energy conservation, community involvement and leadership, property management, vendor services and embodying the core principles of the ARM® and CPM® credentials.

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Condo Lifestyles attempts to provide its readership with a wide range of information on community associations, and when appropriate, differing opinions on community association issues.

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From the Editor

↗ *Mike Davids*

Times like what we are currently experiencing test our faith and our resolve. Much of what we have all had to do to fight the Coronavirus pandemic was unthinkable just weeks ago. Covid-19 has changed our life as we knew it and some of the changes will likely become the new normal until an effective vaccine and/or treatment(s) can be developed. Some of the new behaviors, activities and methods will likely become part of our "new normal" way of life, work, travel and entertainment.

Community associations, especially multi-story buildings, are challenged even more by the Coronavirus crisis because they have people as neighbors located in close proximity to each other and sharing common entrances, facilities, hallways, stairs or elevators.

It's so important that we all stay informed and follow the latest guidance and updates issued by the government and Centers for Disease Control and Prevention. Community association board members should consult with their professional partners, including community managers, attorneys and others on how your community can best handle the various issues and requirements related to Covid-19.

Important issues that have caused challenges and changes in associations related to Covid-19 range from resident safety & privacy, staff & vendor safety and performance, increased communication, canceled or postponed meetings, closing down or restricting access to common areas (lobbies, laundry rooms, elevators, etc.) new cleaning regimens as well as handling of guests, short term rentals, and other particulars of community living.

The fact that so many people are now working from their CA homes adds to the challenge. I do believe, however, that we all can and will meet the challenges that Covid-19 has brought us. I also believe that we will become stronger and wiser as a result.

We delayed publishing this issue to include some articles and information about how the Covid-19 pandemic is impacting Community Associations. We will continue to address the impact of the virus on community associations and managers in future issues. Please understand that most of the articles in this issue were completed prior to the pandemic being announced. We've also posted this issue on our website and provided it as a pdf to our customers.

Amidst the turmoil, one thing that has become readily apparent to me is that we all have a deep felt desire to be connected with others personally. We've always placed a premium on providing personal attention to everyone that interacts with us through publications and programs. We feel privileged to have a role in helping you be connected with other leaders (and the trends) in our industry. While we are limited in what we can do in person right now, we will be glad to help you in any way that we can. If you have an idea or new message that you would like to share, please send it to me or feel free to call me.

I believe that our doctors, scientists and other leaders will help us overcome this tremendous challenge. We are optimistic and cautious at the same time and hope that you are too. It will require teamwork and cooperation from all of us to beat this thing. While we have been physically apart, we are really more connected emotionally than ever before. So let's use that emotional connection to our advantage to encourage and help others, show leadership and demonstrate our resilience. We are all in this together - and together is how we will move forward! ✠

Be Safe and Stay Healthy,
Mike

Michael C. Davids
Editor & Publisher

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HOW THE CORONAVIRUS PANDEMIC HAS REDEFINED COMMUNITY ASSOCIATION LIVING

Originally conceived as a new housing form in Puerto Rico, community living took shape in Chicago in the early 1960's by way of the passage of the Illinois Condominium Act in 1963. The concept offered home buyers a less expensive alternative to buying a single family home and promised fewer headaches and issues related to maintenance and repairs.

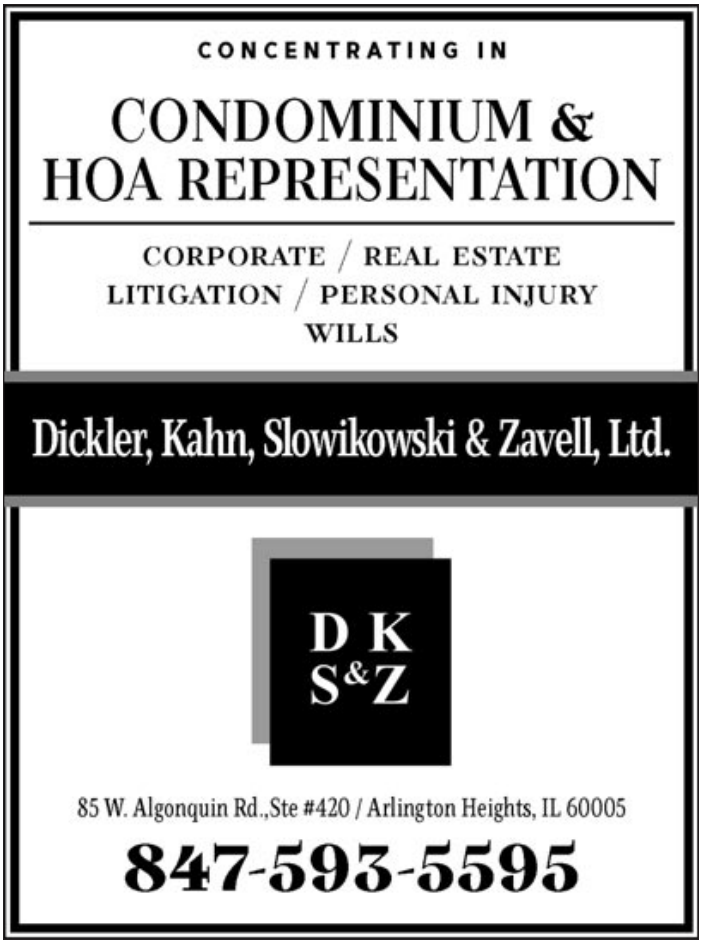
Since then, urban planners and developers have built a tremendous amount of community associations in and around Chicago with the larger high rises mostly along the lakefront, smaller condominium associations within the heart of Chicago and larger Garden Style and HOA gated communities in the far suburbs. 60 years later, the number of community associations within the State of Illinois is now around 25,000. The other benefit behind community living envisioned was that it was supposed to encourage togetherness. The fact that so many individual homes are built so close together encourages the owners to connect with one another. Whether it is by serving on the board, attending board meetings or attending social events, homeowners have multiple ways to meet their neighbors and form friendships.

Togetherness Didn't Take Hold

Unfortunately, the concept of togetherness within community associations didn't take hold as it was originally intended. Over the last 20 years, the demands of our careers and work places have skyrocketed as the ubiquitous internet and rapidly increasing technology has made it easier for employers to demand more output from workers. This has made it more of a burden to serve as a board member and has resulted in fewer homeowners participating in board meetings. Nowadays, fewer people have the time to do things that they would normally do outside of their work and career.

New Challenge

And now we are all confronted with a new challenge within community living (and everywhere). And as a result, community association living is going through a transformation. Board meetings are now online, homeowners are sheltering in place, people are mostly working from home and vendors are working with staggered or skeleton crews



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that have hampered the amount of services normally available to community associations. Some association board of directors are asking janitorial/cleaning vendors and restoration vendors to sanitize the common areas more frequently while other boards are facing an increase in accounts receivables due to the large number of layoffs and company furloughs that are hurting (financially) homeowners within community associations. To make matters worse, community associations don't have any legal recourse at this time due to the current situation that has paralyzed our legal system/courts and government institutions. So where do we go from here? What is the response to this societal crisis?

Adapt to the Situation

It is very simple. We adapt to the situation. We don't shrink in fear. When life gives you lemons you make lemonade. With the shelter in place order, many people have been feeling disconnected and alone. Don't let this happen to the homeowners within your community.

THE CORONAVIRUS PANDEMIC HAS TAUGHT US A LESSON. THE LESSON IS THAT COMMUNITY LIVING IS ALL ABOUT TOGETHERNESS NOT ABOUT DISCONNECTEDNESS. SEIZE UPON THIS OPPORTUNITY TO UNITE THE HOMEOWNERS WITHIN YOUR COMMUNITY, SHOW THEM THAT THEIR HEALTH AND WELL-BEING IS AT THE TOP OF MIND FOR THE BOARD OF DIRECTORS. TOGETHER, WE CAN MAKE GREAT THINGS HAPPEN.

Connect with Others

Now is the time to make a concerted effort to connect with fellow homeowners more than ever. Now is the time to reach out and connect with each homeowner within your community. Setup weekly online town hall meetings. Setup monthly online board meetings. Find ways to ensure all homeowners within your community feel connected. This will truly pay dividends in the long run.

If you have a management company, make sure that they communicate with the board and homeowners any change in response times or service performance due to the current situation. Make sure that any and all changes are communicated to the homeowners. Also, make sure to encourage homeowners to communicate with the board if they have fallen into financial hardship due to layoffs, furloughs or downsizing of staffing.

Try to Unite Homeowners in Your Community

It is also time to review the overall performance of the association by analyzing areas such as capital planning, maintenance and repairs, board meeting dates, rules and regulations and financial controls. The coronavirus pandemic has taught us a lesson. The lesson is that community living is all about togetherness not about disconnectedness. Seize upon this opportunity to unite the homeowners within your community, show them that their health and well-being is at the top of mind for the board of directors. Together, we can make great things happen. With all of the homeowners now spending most of their time at home, creating an enjoyable community living experience is now more important than ever. ✠

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by **Nicholas P. Bartzen – Altus Legal LLC**

GOVERNMENT MONEY for COMMUNITY ASSOCIATIONS DUE to COVID-19

Many are hearing about the Paycheck Protection Program (PPP) loans bundled into the language of the Coronavirus Aid, Relief and Economic Security Act (CARES Act). These loans are to be used for payroll for small businesses, so they can continue to operate while laying off as few employees as possible during the COVID-19 crisis. While PPP is loosely-termed a "loan," a more apt description, given how much of the loan amount is likely to be forgiven, *is a government grant program with certain conditions*. Effectively, it seems to be "free money" from the government. However, that money is effectively off-limits to associations for now.

Before we get further into it, I want to note that with all legislation COVID-19 related these days, from illness disclosures to collection issues, the details are sometimes "fuzzy" and change often (sometimes daily). Updates are frequent, so stay in close touch with your association's attorney on this and all matters.

PPP loans come from approved lenders – the association's bank may be approved to offer the PPP loans. The Small Business Administration (SBA), which is overseeing the loan process, issued an Interim Final Rule which effectively limits PPP loan eligibility for community associations (both condo and HOA's). The Interim Final Rule includes a list of businesses that are not eligible for PPP, including (1) "[p]assive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds …," and (2) "[a]partment buildings." **While the language does not clearly address community associations, we believe the language is sufficient to conclude a condo association or HOA would be rejected.** Before we advise our clients to apply for PPP, we recommend waiting for clarification from the SBA.

Note, however, that community associations *are* included in the Small Business Administration Economic Injury Disaster Loans (EIDL), but, again, are *not currently* included in the PPP, which potentially offers a much more effective and useful lifeline to the association that have employees and payroll responsibility. **Those associations *without* payroll obligations are better off looking into the EIDL for help shoring up a drop in revenue due to delinquencies brought on by COVID-19.**

The Community Association Institute ("CAI") is encouraging board members to lobby Congress to amend the rule to allow community associations to participate. The link to do so is http://p2a.co/4LvSG45? Filling out the form to lobby our representatives is imperative to making sure community associations may participate in the program.

A question that boards often ask concerns simply applying as an association and accepting the rejection if it comes in? Some boards are considering taking their chances and applying (i.e., "Do first, Ask Forgiveness Later,"). **We advise against this strategy.** The PPP loan application form includes a warning that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including by imprisonment of not more than five years and/or a fine of up to $250,000; by imprisonment of not more than two years and/or a fine of not more than $5,000; and, if submitted to a federally insured institution, by imprisonment of not more than 30 years and/or a fine of not more than $1,000,000. **Now, while we do not expect board members to spend a few years "in the clink" for applying for a loan based on a grey area of language in hastily-adopted legislation, *we still do not recommend knowingly applying given the risks.*** However, that is a decision each association should consider and make on the guidance of its legal counsel.

Practically-speaking, even if the SBA does amend the rules and open the doors to PPP for community associations, the board should be aware that there are other factors to consider before applying. The association's participation in the program is likely public information (which anyone can obtain under the Freedom of Information Act). It may reflect poorly on the association if it's listed as a recipient of money that it did not actually need (i.e. if the association does not actually see any drop in revenue due to delinquencies as a result of the COVID-19 crisis, is it ethical to take money that may otherwise be used for struggling businesses that have seen a drop in revenue?). Moreover, if the association does not have payroll obligations, it's unlikely that a PPP application will be approved for the association. Again, those associations without payroll to meet should explore the EIDL program mentioned above.

Ultimately, if the SBA does amend the rules to allow community associations to apply without ambiguity and if the board and its hired professionals decide it's worth applying, the association may want to get it's "ducks in a row" to be ready to apply. Speak to your association's attorney about the process and your accountant about filing the association's 2019 tax returns as soon as possible (having the most recent tax returns can be beneficial to the application process).

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by James A. Slowikowski, Esq. - Dickler, Kahn, Slowikowski & Zavell, Ltd.

Understanding "Being a Fiduciary"

If you are a board member, you have probably heard that you are a "fiduciary" or that you have a "fiduciary duty" to the association and the owners. But what does that mean?

What Is a Fiduciary Duty?

A fiduciary is a person who sits in a special position of trust and confidence with another person or an entity. The fiduciary is held to a higher standard to act in the best interest of that person or entity at all times. In the corporate setting, the directors and officers have a duty of loyalty to act solely in the best interests of the corporation. A director is required to act with utmost good faith and loyalty in managing the corporation and is prohibited from enhancing his or her own personal interests at the expense of corporate interests.

The directors and officers of condominium and community associations sit in such a position of trust. The board members are entrusted to manage and operate the affairs of the association on behalf of all the owners. The board is in control of the funds and makes all financial decisions. Homeowners have made significant investments by purchasing a unit. The directors, who are solely in charge, are entrusted to properly care for that property and the finances.

The duty of loyalty requires the board members to act in the best interests of the association. The board member cannot put his or her own interests above the needs of the association. Illinois courts have stated that the fiduciary duty owed by the board of an association requires the board members to act in a manner reasonably related to the exercise of that duty and the failure to do so results in liability for not just the association, but also the board and the individual board members.

The Business Judgment Rule

So, how do board members fulfill their fiduciary duty? There is a principle of law called the "business judgment rule," which protects directors from liability for honest mistakes in judgment. A court will not find a board of directors in breach of their fiduciary duty if they have exercised reasonable business judgment when acting in good faith. This does not apply where there is bad faith, fraud, illegality or gross overreaching.

To have such protection, the directors must exercise "due care" in carrying out their duties. The exercise of due care includes "becoming sufficiently informed to make an independent business decision." This means that directors need to exercise diligence to gather information before making decisions. This information may come from many

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sources, including personal observation and business records. Information often comes from professionals, such as property managers, attorneys, accountants, engineers, and contractors. While directors often have discretion to make decisions, those decisions should be made after gathering information. Directors cannot ignore facts that are available to them before making decisions.

How Do Directors Exercise "Due Care"

There are many ways directors can exercise due care. Most importantly, the directors must perform the duties that are imposed upon them by the association's declaration and bylaws, and by state and federal laws. Some of these duties may seem obvious. For instance, every board must assess and collect assessments, and adopt budgets which fix the amount of assessments. The board must collect those assessments

In connection with performing those required duties, each director must do what is best for the association even though the director knows it may negatively impact themselves or some owners. An example of this is increasing the amount of assessments or adopting special assessments. A board member who is unemployed or may feel that he or she cannot afford to pay higher assessments must still adopt a budget increasing assessments, or adopt a special assessment, if the funds are needed by the association to perform the necessary work. It may be in the owner's best interest to have lower assessments, but that may not be in the best interest of the association.

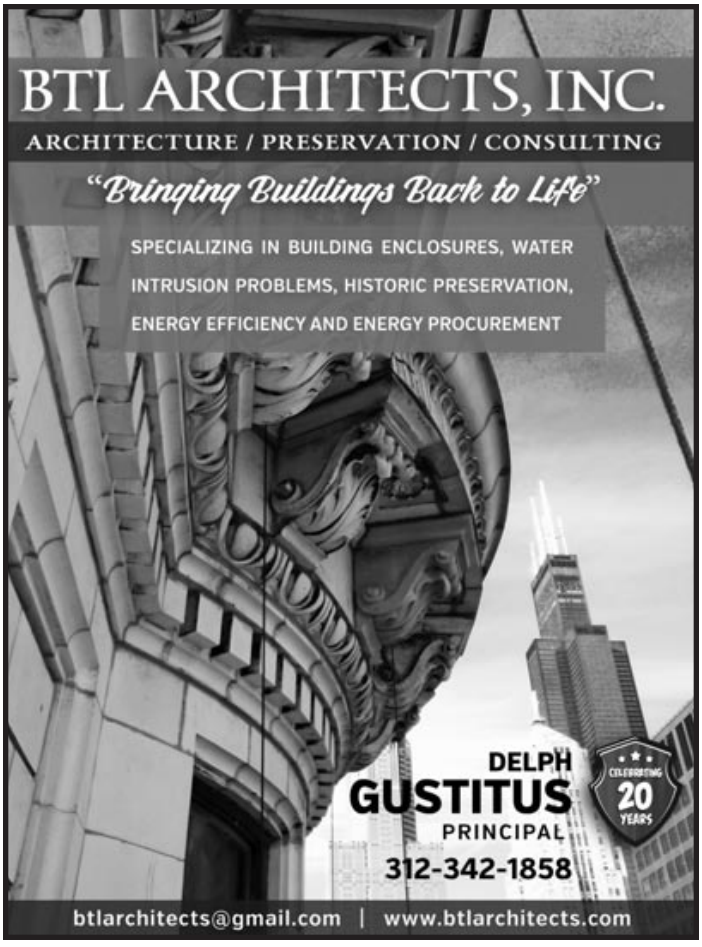
Almost every board has a duty to maintain, repair, and replace portions of the property. The failure or refusal to do these things could be a breach of duty depending on the circumstances. An example of a situation where an association board was found by a court to have breached its duties as a result of failing to maintain the property involved a condominium where an elderly resident had water leaks into her unit over a long period of time. The evidence presented showed that the board was aware of the leaks but did not take any action to repair the building for many months, even after an engineer's report was provided. The court found the association breached its fiduciary duty and the association was ordered to pay punitive damages to the homeowner.

Another example where a court found that the business judgment rule would not protect a board involved claims that the board failed to obtain required insurance to protect association funds, failed to review monthly bank statements that would have revealed embezzlement, and failed to obtain advice of their counsel regarding insurance coverages or association finances. That is a situation where directors may have ignored available information and as a result didn't take proper action.

The board also has a duty to follow and enforce its covenants, restrictions, and rules and regulations. So, if leasing is prohibited, the directors have a duty to enforce the leasing restriction. They cannot simply look the other way.

The board must follow all procedures required in the governing documents and the law, including procedures for meetings, elections, budgets, and providing proper notice of meetings. For example, in another court case it was ruled that a board breached its fiduciary duties by not providing notice of meetings as required in the bylaws, and by transferring funds between accounts in a manner which was inconsistent with the provisions of that declaration. Those breaches were the result of not following the declaration and bylaws.

Another court case found the board members to have breached their fiduciary duty where the board exercised a right of first refusal to prevent a



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resident from purchasing a unit. One of the problems was that the board did not properly follow the declaration procedures to exercise that right.

An example where directors may breach their fiduciary duty by failing to comply with the law is by failing to allow a reasonable accommodation or modification requested by a resident with a disability.

On the brighter side, other cases have shown how directors were not in breach of the fiduciary duty where they exercised due care by first informing themselves - even where the board decision turned out to be wrong. In one case, a board incorrectly allowed an owner to extend his balcony into the common elements. Even though the board was wrong and the extension was not allowed, the court found that the directors did not breach their fiduciary duty because they sought and obtained a legal advice from their attorney before making that decision. The directors informed themselves before making their determination.

> The board member cannot put his or her own interests above the needs of the association. Illinois courts have stated that the fiduciary duty owed by the board of an association requires the board members to act in a manner reasonably related to the exercise of that duty and the failure to do so results in liability for not just the association, but also the board and the individual board members.

Similarly, another court found that a condo board did not breach a fiduciary duty where it sought and obtained an opinion from its attorney regarding responsibility to repair and replace limited common elements. Again, the board first informed itself with professional advice.

Other professionals may provide advice which the board may rely upon. For instance, engineers and architects may advise the board if and when repairs or replacements are needed.

Consequences of a Breach

A breach of duty by directors will likely expose their association to liability. Also, a director who breaches a fiduciary duty may be found personally liable to the persons, and even the association, that suffered a loss as a result of the breach. Depending on the circumstances, directors and officers' liability insurance may not cover such liability, particularly if the actions were determined to be in bad faith or willful. The provisions in the declaration or bylaws that are intended to protect the directors from liability may not apply if the acts or the failure to act were in bad faith, grossly negligent, or fraudulent. In those situations, the director may be personally responsible for any judgment awarded. These are compelling reasons to properly fulfill the fiduciary duty by exercising due care and putting the association's needs first.

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by Angela Williams Duea and Ilir Mehmeti, FirstService Residential Illinois

Navigating the Workplace Transparency Act

At the end of 2019, the State of Illinois passed a groundbreaking new law titled the Workplace Transparency Act and Sexual Harassment Training, which went into effect on January 1, 2020. This expansion of the Human Rights Act is intended to address sexual harassment and discriminatory conduct to employees and holds employers liable if they know or should know about the conduct and do nothing to stop it.

In passing this sweeping law, Illinois is the latest state to follow in the trend of other jurisdictions, including New York and California, which have passed similar laws expanding protections against harassment and discrimination in the workplace.

This Act is pertinent to Board Members, as they are the employers in this situation and their doorpersons, engineers and other staff members are the employees to be protected. This Act also protects non-employees from the harassment of employees. In the past, the Human Rights Act applied to employers who managed 15 or more staff members, but the new Act applies to any employer who has even one employee, or an independent contractor – like many of our associations and co-ops that often have fewer staff members.

What does the Act require boards to do? First, employees cannot be required to sign an employment contract that limits them from reporting the unlawful conduct to officials. The employer has limits to how much they can prevent employees talking about harassment in a settlement or separation agreement. Finally, all employers must conduct harassment training by December 31 each year or face civil penalties. Employers can use the model training program that the Illinois Department of Human Rights developed OR employers can use alternative training that is equal to or exceeds the Department's standards, and at a minimum, include the following:

- An explanation of sexual harassment consistent with the Illinois Human Rights Act (IHRA);
- Examples of conduct that constitute unlawful sexual harassment;
- A summary of relevant federal and state statutory provisions concerning sexual harassment, including remedies available to victims of sexual harassment; and
- A summary of responsibilities of employers in the prevention, investigation and corrective measures of sexual harassment.

Because this new act also applies to independent contractors, please be mindful of and remember to contact the various vendors that provide your community association(s) with 3rd party services (i.e. janitorial/maintenance services) and ask them to provide proof of this mandatory annual training for their employees that are providing these services to your community association(s).

Furthermore, the act also requires all professionals licensed by the Illinois Department of Financial and Professional Regulation to take one hour of sexual harassment prevention training as part of their continuing education.

All employers are required to prevent a hostile work environment. But the new Act holds employers liable if they should know about harassment or discrimination, and they either don't act on the knowledge or aren't vigilant in noticing a hostile work environment. Note that this may look like the Boucher case last year, where hostile, offensive language was called protected speech under the First Amendment. However, sexually harassing or racially offensive language is not a protected class of speech, and boards are responsible for acting when speech or actions become persecution.

When a board becomes aware of a hostile act, they should immediately conduct an impartial investigation. It is important to document everything scrupulously during the investigation. It's helpful to have a disciplinary process place for handling this situation, so that the people involved are subject to a due process and progressive discipline. For employees violating the Act, it can start with an oral warning or reprimand, moving to a written warning through to termination. If an owner is the culprit, their disciplinary action can range from warnings and fines to legal action. The key is to be consistent and to ensure the discipline fits the severity of the situation.

The association's lawyer and a union representative can be invaluable in helping with extreme cases. Develop a relationship with the union rep before problems surface. Keep good lines of communication going between all people involved in the investigation and be sure to document thoroughly. And always be sure your board maintains an open-door policy to employees.

While most boards will never have to deal with such an unpleasant situation, protecting their employees and residents are an important part of their duties. Preparation, education and vigilance will go a long way to fostering a positive work and living environment. ■

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by Jason Wilen, AIA CDT RRO - Klein & Hoffman

PRICE UNCERTAINTY -

The Challenges of Budgeting for Low-slope Roof Replacement

As a forensic architect I am sometimes asked to evaluate existing low-slope roofs to document the condition of roof system components and to determine likely remaining useful life of roof areas and estimated costs for eventual roof system replacement. Such cost estimates can be used for budgeting purposes by building owners and are often considered to be a capital expense (as opposed to a repair or maintenance expense) as the cost of commercial low-slope roof system replacement can be significant.

What are Low-slope Roofs?

Low-slope roofs (sometimes called flat roofs) are most commonly found on commercial, institutional, high-rise and larger residential buildings. These types of roof systems are designed to be "waterproof" as opposed to water-shedding systems used for steep-slope roofs such as asphalt shingles. Low-slope roof systems are traditionally comprised of a roof membrane over rigid insulation attached to a structural deck—most often structural metal decking or concrete though can be wood, gypsum or other materials. Common roof membrane types include thermoplastics like TPO or PV; EPDM; multiple-layer membranes such as modified bitumen or built-up (BUR); or newer reinforced liquid-applied urethane, PMMA or PUMA membranes. In some instances, a membrane more-commonly associated with waterproofing is used such as hot-applied rubberized asphalt. Sometimes other components are added—vapor retarders; air barriers; cover, substrate, and protection boards; conductive grids for electronic leak detection are some examples. Slope to drains, scuppers or gutters is typically required for surface drainage and sometimes overburden is installed above the membrane—some examples are pedestals and pavers to create level walking surfaces or vegetation for "green roof" spaces. In some designs the insulation and other components are installed above the roof membrane.

How are low-slope roofs evaluated?

In order to establish the remaining useful life of low-slope roofs and determine estimated replacement costs, the existing roof areas must be evaluated. Evaluations can be general or more extensive.

General roof system evaluations (visual only)

The most basic roof system evaluation involves a one-time visit to a building where roof areas are observed. Sometimes such an evaluation is done as part of a larger whole-building review—such as is typically done for a reserve fund study or pre-purchase building review. This level of evaluation is most often limited to a visual-only review of roof areas that may be close-up, from afar (from other roof areas, from other buildings, using a drone, etc.) or a combination of both. Sometimes the underside of roof areas are also viewed, if accessible, to look for signs of leakage (interior water damage is a possible indicator of localized roof system issues in the area above). If available, sometimes owner-provided

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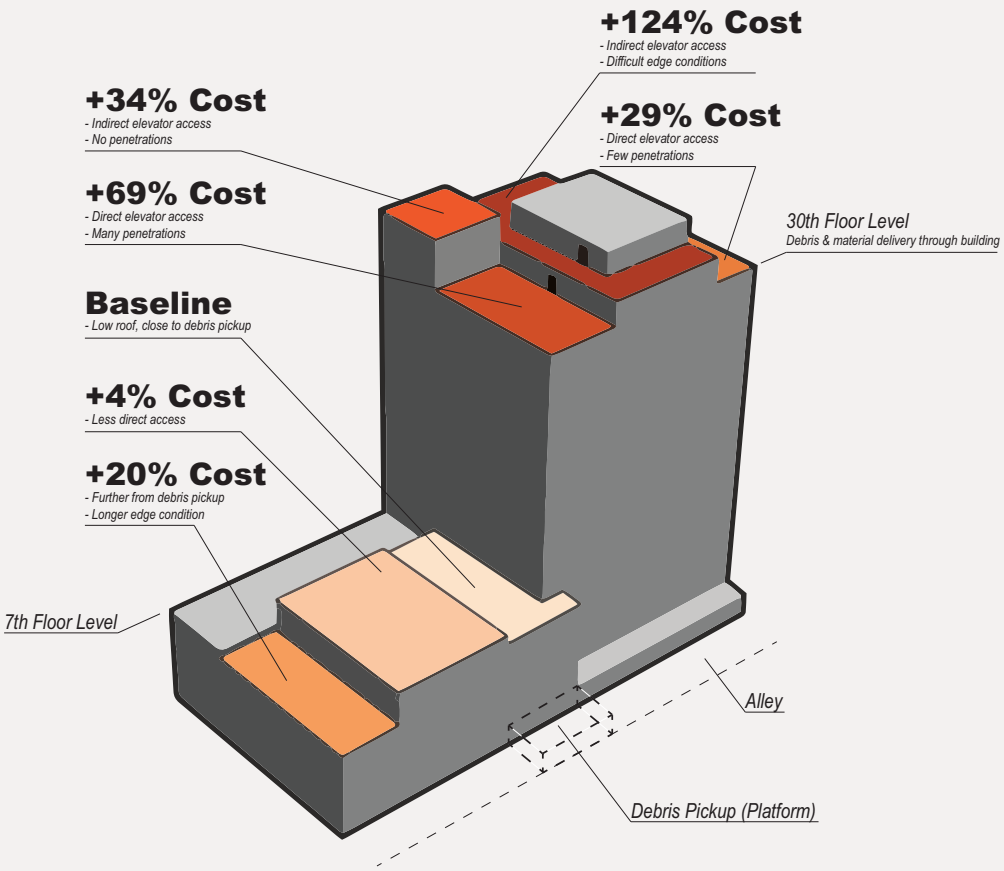
information is reviewed such as construction drawings, roof warranty paperwork, leak reports, interviews with facility staff, etc.

The advantage of a visual-only roof system evaluation approach is that they can be completed quickly with minimal disruption to building occupants. If the evaluator is experienced with the design of the type of roof system being reviewed, it is often possible to generate a reasonably accurate estimate of remaining roof system performance life and potential replacement cost.

The visual-only approach also has significant limitations. If there is overburden above the roof membrane, such areas are difficult or impossible to evaluate. Sometimes, evidence of roof system leakage is obscured or has been repaired. Sometimes roof systems can appear on the surface to be functioning properly but can have significant areas of damage under the membrane (for example, wet or damaged insulation from past leaks or interior vapor drive, damaged or corroded areas of structural deck, failed fasteners or areas of de-bonded adhesive, etc.). Estimates of useful remaining life or replacement cost made without considering these issues can affect the accuracy of such estimates.



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Extensive roof system evaluations

In order to produce more accurate estimates of remaining service life and potential replacement cost, more extensive roof system evaluation can be done where all roof areas are inspected from the roof surface in each area and the interior conditions within buildings are evaluated to determine how such conditions may affect roof system performance.

For these types of evaluations roof cores are generally performed so that a cross-section of existing roof system elements and the surface of the structural roof deck can be viewed. Depending on the size and number of roof areas, cores are generally made in multiple locations.

Sometimes interior surfaces are removed from the underside of roof areas so that the condition of the bottom of the structural roof deck can be evaluated. If overburden like rooftop pavers, insulation, or vegetation is in place, the overburden is removed so that the under laying roof membrane can be evaluated or so that roof cores can be taken in those locations.

Another method used during extensive roof system evaluations are the use of nondestructive moisture detection such as Infrared (IR) thermography, use of a nuclear moisture meter, or the use of capacitance meters. These methods, if utilized by experienced technicians, can provide important insights into the condition of internal roof system components and aid in providing a more accurate estimate of remaining service life and potential roof system replacement costs. The level of moisture within the "dry" portions of low-slope roof systems have a direct effect on how well, and for how long, such systems are expected to perform and how likely damage will be found to adjacent components, like the structural deck, that may be costly to repair.

While extensive roof system evaluations provide the opportunity for evaluators to gain a more complete understanding of each roof area and how the conditions within buildings may be affecting roof system performance, the cost for owners is obviously higher compared to a visual only approach. Also, destructive methods are sometimes inconvenient for building occupants and facility staff.

Owners should weigh the pros and cons of each approach and determine the level of evaluation appropriate for the level of precision required for a particular budgeting approach.

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How building use and access can affect cost

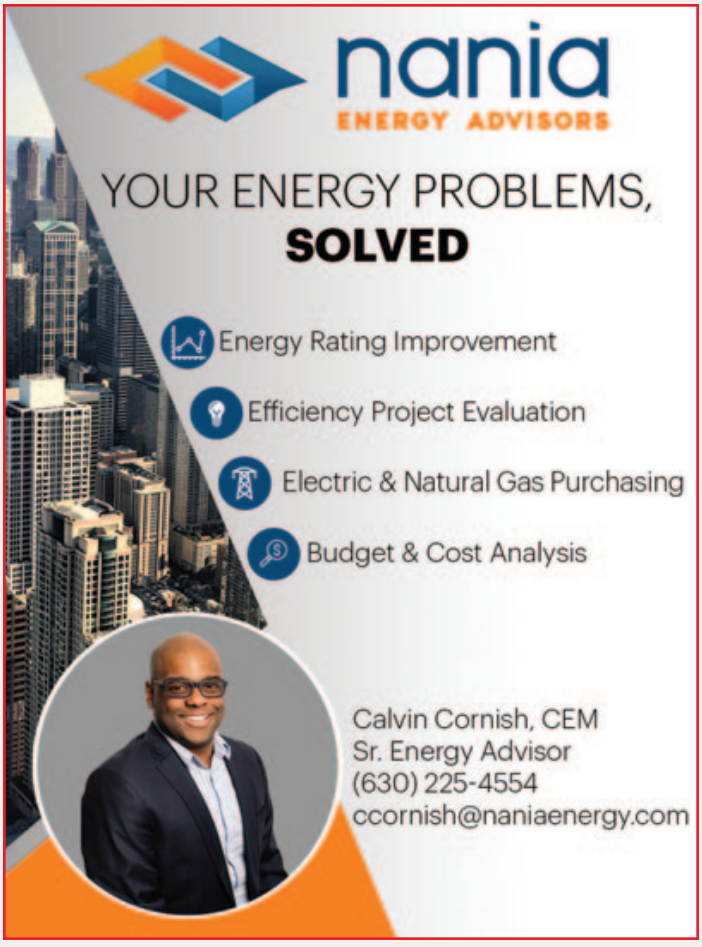
An underappreciated aspect of some roof system evaluators and owners is the degree to which a building drives the complexity and cost of roof replacement projects. For instance, on a square foot basis, high-rise roof system replacements can cost more than two or three times as much as the same system installed on low-rise roof areas. Also, roof system replacements on buildings located in a dense urban core generally are far more costly than more suburban buildings. There are many factors that drive these relative cost increases.

Tall and high-rise building roofs generally have a relatively small area compared with the overall size of the building, and often rooftop space is used for a variety of purposes, including HVAC equipment, communication equipment, dunnage frames, skylights, penthouse spaces, ductwork, signage, walking surfaces for observation or recreation spaces, overburden such as vegetative elements, structural elements for rails, equipment screens, and anchorage points and equipment for window washing and other vertical access activities. These elements present significant challenges during reroofing operations as they often must be removed for roofing areas to be replaced. Even when contractors can work around such elements, progress often is greatly reduced and, as a result, the cost increases.

Building layouts also can result in additional costs. Access to and from roof surfaces or to multiple rooftop areas and levels is a primary consideration. It is not uncommon for the top stop of freight elevators to be below rooftop level, which sometimes requires substantial ingress and egress paths to deliver materials and to remove tear-off and overburden from rooftop areas. Use of such paths also requires contractors to provide surface protection during projects, especially if transport through public or secure spaces is necessary.

For shorter high-rise buildings with existing staging areas at ground level, movement of material using external means via lifts, hoists or cranes may be a more cost-effective option.

Taller buildings, buildings on tight sites or buildings with sensitive uses such as health care may not be good candidates for external equipment access requiring movement of materials within the building. Dumpster placement also can require substantial planning and ingenuity.



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Dumpster placement must allow for ease of change-out, which can require multiple pick-ups during the day for projects with substantial tear-off, especially heavy tear-off elements such as pavers or when site restrictions limit dumpster size. Some buildings have loading dock areas with limited space and little storage space outside of dumpsters (requiring more extensive coordination of debris removal, material delivery and dumpster delivery).

Building location also can affect cost. Buildings in dense downtown areas generally are subject to more restrictions and permitting requirements. Mobilization, debris removal, material delivery, and the time and effort for workers to access the building also can be more difficult and costly. Some downtown areas also have special zones where construction may be limited during certain times of year such as during the holidays or for special events.

When budgeting for low-rise roof system replacement it is important to consider how building use, access, and location may change a "rule-of-thumb" square footage cost for a particular type of roof system. Also, as low-slope roof system type options have expanded in recent decades, there may be a better option than the roof system originally installed.

How construction culture can affect cost

Building owners and managers sometimes have restrictions regarding the methods used during construction and the systems installed within or on buildings.

Some owners require roof systems:

- Meet above-code level requirements (fire classification or wind-uplift resistance, for example)
- Satisfy voluntary program requirements such as LEED or Green Globes
- Include common sustainability features such as a reflective surface or vegetative elements
- Meet insurance carrier requirements
- Limit or be free of certain chemicals
- Restrict or impose moratoriums on hot work
- Limit work hours or use of elevators and loading docks to certain days or time of day
- Are installed by workers with particular roofing industry safety, technical and/or security certifications
- Be installed by companies that are members of local, state or national trade associations
- Comply with special building, organizational or governmental provisions

The construction culture of buildings where reroofing work is done should be considered when determining roof system replacement budgets. Building-specific requirements can limit roof system choices, installation methods and general operations during construction; and therefor affect the cost of low-slope roof replacement.

Final thoughts

The method of low-slope roof system evaluation; the particulars of specific buildings; and the construction culture of owners all affect estimates of remaining service life and potential roof system replacement cost. Sometimes it can be advantageous to consider other capital projects that are necessary in the life cycle of buildings and look for opportunities in sequencing these projects.

For example, if a building is due for repairs to exterior walls (tuckpointing, sealant replacement, parapet rebuilding, etc.); consider having the walls addressed before new roofs are installed so that flashings for new roofs systems are installed onto surfaces that are sound and watertight. Another example might be rooftop equipment installation or replacement. Consider having the new equipment installed before a reroofing project so that the new roof areas are not damaged in the process.

Having a "big-picture" approach can help keep capital projects in budget.

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