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Condo Lifestyles©

THE SOURCE FOR INFORMATION ON COMMUNITY ASSOCIATIONS, CONDOS, TOWNHOMES, CO-OPS & HOAS $8.95

5 BEST PRACTICES FOR PASSING SUCCESSFUL RULES AND REGS

FEATURES

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Project Contractor:
Woodland Windows & Doors

Project Manager:
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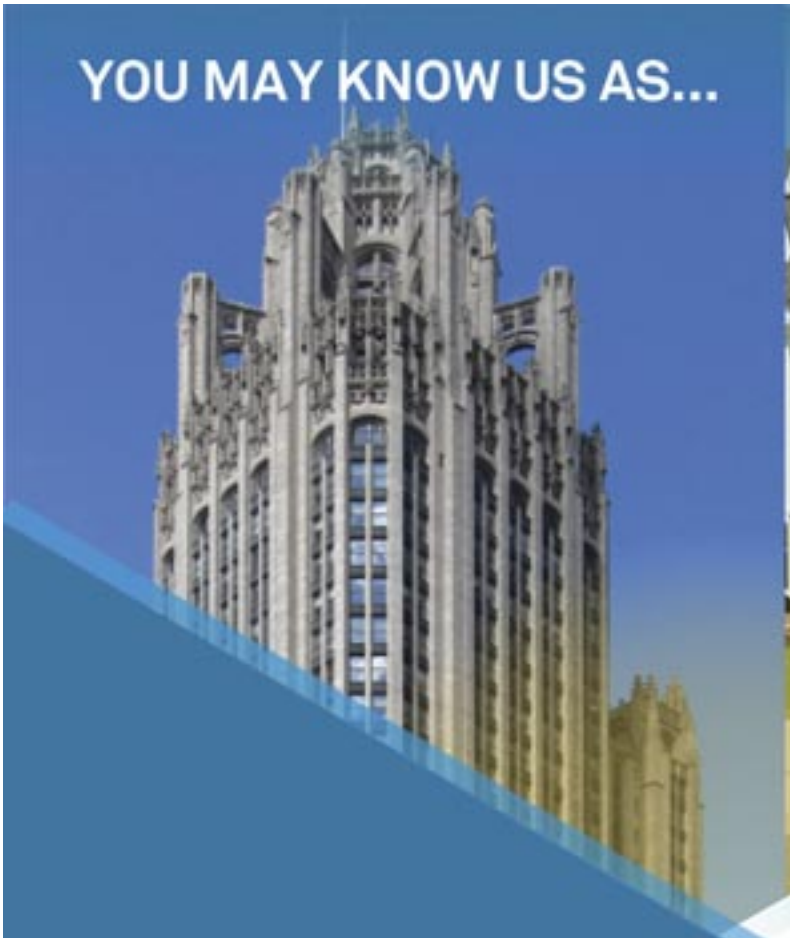

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by Pamela Dittmer McKuen

5 Best Practices *for* Passing Successful Rules and Regs

A suburban common interest community of 1970s-era single-family homes has never had a set of rules. The HOA is part of a master association that includes patio homes, condominiums, a swimming pool and two parks, all of which are governed by rules everyone must abide by.

It's a somewhat odd situation, but everything worked fine until recently. Some board members got to talking and decided certain rules were in order. Among their concerns: Recreational, commercial and inoperable vehicles parked on the property; hoards of trash left in the open, and trash cans not put away after they were emptied on pickup day; mismatched styles and quality of boundary fences between homes; and holiday decorations displayed past their prime.

"Mostly, it was about standardization and trying to make the community look better to protect property values," says Thomas Skweres, vice president at ACM Community Management, a Division of RealManage, in Downers Grove. He and his wife live in the single-family home section.

After learning of the proposed rules, a faction of owners protested loudly about their rights being trampled. They caused such a commotion that further discussion was tabled. A couple of seats opened on the board, and candidates ran on an anti-rules platform. The story is to be continued. Or maybe that's the end.

"Why communities have to have rules is misunderstood, and some harmony in lifestyles has to be established and maintained," Skweres says.

Rules Are Subject to Trends

Just like fashion, food and politics, community association rules and regulations follow societal trends. Industry veterans are sure to recall the popularity of rental restrictions in the 1990s only to be rescinded after the real estate market crash of the late aughts when tenants became more desirable than empty foreclosed units. These days, new rules are likely to respond to such issues as curb appeal, Covid-19, electric vehicles, political discourse and the environment.

"During the past two years of the pandemic, residents are in their units more than ever," says Brian Butler, senior vice president at

FirstService Residential in Chicago. "Boards have, in turn, focused on quality of life and safety regulations to address the evolving needs of communities. Regulations surrounding masking in public spaces, building quiet hours, construction hours and notices, and nonsmoking amendments have gained steam as remote work has become more common."

Aside from the pandemic, smoking issues are high on association dockets, notes association attorney James A. Slowikowski at Dickler, Kahn, Slowikowski & Zavell, Ltd., in Arlington Heights. He attributes the trend to the legalization of recreational cannabis.

"People seem to have more trouble with the smoke and odor from pot smoking than from regular cigarette smoking," he says. "And for some reason, I think there are a lot of people who will smoke cannabis who won't smoke tobacco products."

He's also seeing associations, particularly townhomes, dealing with requests for the installation of radon mitigation systems, and he expects to receive more inquiries about solar panels and electric vehicles in the near future.

In other parts of the country, associations in California have restricted water usage, and those in wildfire-prone areas have enacted preparedness and mitigation measures. A recent article in "National Wildlife" magazine featured HOAs in Florida, Maryland and Colorado that have relaxed rigid landscaping rules to permit wildflower and pollination gardens and other practices that promote environmental sustainability.

Make Good Rules to Live By

We at Condo Lifestyles want the next time your association takes on making new rules or tweaking existing ones to be not only understood but also welcomed. To make the process smoother, we consulted a panel of industry professionals who have spent long hours around association board tables. Their advice is compiled here in 5 Best Practices for Passing Successful Rules and Regulations:

PRACTICE #1

Ask whether the rule is needed.

Will the rule benefit the association as a whole? Or is it a knee-jerk reaction to something that is annoying a handful of owners? It's a huge waste of time, effort and money to enact a rule only to have to eliminate it a year later.

"Don't rush into it," Skweres says. "Don't do it because it's the trendy thing to do right now. Every community is different."

"The creation of a new rule is often borne out of very specific circumstances or one-off events," Butler says. "Rule change processes can be unexpectedly contentious, so boards should act deliberately when in those discussions with the community at large."

"An unnecessarily extensive set of rules over-regulating resident behavior can help create a negative perception of the association and possibly elicit a homeowner challenge," says association attorney Scott A. Rosenlund at

Bartzen Rosenlund Kasten, L.L.C., in Chicago.

One rule that can backfire is raising the amounts of fees and fines, especially if it is done often. While the money can help balance your operating budget, the charges can seem heavy-handed.

"This approach can create a perception of an association that charges for each and every little thing and service," Butler says. "While it's important that residents who are using certain services pay for them and not have these costs come from the community at large, I've seen strong pushback from communities when fees continue to expand and become more expensive year after year."

Don't even think about making a rule you can't enforce evenly among all the owners. You're likely to lose in court if someone proves you issued violations on some people but not on others.

"If you have a rule that says you can't put your garbage bins out before 5 p.m. the day before pickup, and people are putting theirs out at 3 p.m., who is going to police that?" Skweres says. "If you have a weight limit on dogs, who will do the weighing and record-keeping?"

PRACTICE #2

Choose your words carefully.

Crafting an association rule is no time to practice your literary artistry. Make yours easy to understand without being invasive.

"My thought is, don't make it 15 sentences long," says Tom Purrazzo, executive director at HG Haleas Group Property Management in Lemont. "Make it one sentence, and try to make it as clear-cut as possible, so the homeowner can't say, 'It sounded fuzzy to me.'"

"If people can read something a different way, they will do it," Slowikowski says. "They will say, 'The rule says I can't park over here, but it doesn't say I can't park over there,' and that's where they'll park. It might seem like common sense to you, but if it's not clearly written, it's harder to enforce."

Over the years, he has seen judges disallow associations from collecting fines because the rule wasn't clear enough, he adds.

"Rules should be drafted to suit the particular type of association and individual needs of the property," Rosenlund says. "Using a 'boilerplate' set of rules that has not been sufficiently customized can lead to confusion and diminish the credibility of the board."

Exercise extreme caution to be sure your rule cannot be construed as discriminatory. It's fine to require outdoor holiday decorations to be removed by a certain date, but it's not a good idea to ban religious holiday decorations.

"Well-intentioned but poorly drafted rule provisions can result in inadvertent exposure of an association to housing discrimination claims," Rosenlund says. "For example, rules should use age-neutral language that cannot be construed as discrimination against families with children."

If you're planning a restriction or requirement of some type, you'll get more cooperation if you provide a degree of protection to owners who are doing whatever it is you are trying to get rid of. Grace periods, which set an effective date in the future, or grandfather clauses, which allow current owners to maintain their status quo, often until they sell their units, can do that.

PRACTICE #3

Build consensus among the owners.

Boards generally can pass rules without the approval of the owners, but opposition can make your lives miserable. Seek the input of owners early to assure a process that is transparent and resident-driven, so the board isn't accused of operating in secrecy. Communicate with owners throughout the process, perhaps by mail, email, town hall meetings or all three.

"Get people who don't have an agenda to form a committee to talk to residents," Skweres suggests. "Ask people what they want restricted and what they don't want restricted."

"With respect to resident quality-of-life issues such as parking, pets and the use of common amenities, the rules and regulations should reasonably reflect the collective wishes of the homeowners," Rosenlund says.

Rules that address the welfare and safety of the owners are more palatable than those that restrict behaviors, Slowikowski adds.

PRACTICE #4

Offer grace periods.

If you're planning a restriction or requirement of some type, you'll get more cooperation if you provide a degree of protection to owners who are doing whatever it is you are trying to get rid of. Grace periods, which set an effective date in the future, or grandfather clauses, which allow current owners to maintain their status quo, often until they sell their units, can do that.

For example, current owners might agree that chain-link fences are tacky, but they don't want to have to spend the money to buy a fancier one. A grandfather clause could satisfy them.

"A slow burn" is what Purrazzo calls it. He prefers grandfathering rather than rental caps--which must be monitored--when associations want to reduce renter populations. "It's a nice way to dwindle it down and make it go away eventually."

A downside of grandfather clauses is they can take a long time to achieve a desired result, Slowikowski notes, but can be useful to help owners avoid financial or other hardships.

PRACTICE #5

Let your attorney be your guide.

Passing a new rule seems simple enough because it's usually a board action, but there are plenty of pitfalls along the way. For one, you can't make a rule that contradicts your declaration and bylaws, and that can be tricky to decipher. For another, there's a detailed process involving notices and meetings to get the job done even if you are sure you have the appropriate authority.

Using smoking restrictions as an example, Slowikowski says, "I've been asked by boards pretty frequently about what they can do. By rule, they can only regulate the common elements. Eliminating smoking in the unit itself would require a declaration amendment," which requires a vote of the owners.

If someone is going to challenge a rule, the easiest way is to say the board didn't follow the proper procedures, he adds.

"Association legal counsel can assist with many aspects of the rule-drafting process," Rosenlund says. "Counsel can analyze whether the proposed rules fall within the scope of the association's rule-making authority. Association attorneys can help ensure that the proposed rules conform to the other governing documents and applicable law. Counsel can draft language relating to technical legal issues such as mail-in election ballots, rule enforcement procedures and the collection of delinquent assessments."

by Molly E. Mackey, Esq. & Howard S. Dakoff, Esq. – Levenfeld Pearlstein, LLC

EMERGING ISSUES FOR CONDOMINIUM ASSOCIATIONS IN 2022

The issues that have emerged in 2022 as 'hot topics' for condominium associations continue to be directly related to the ongoing COVID-19 pandemic and the tragic condominium building collapse in Surfside, Florida. With the two-year anniversary of the pandemic upon us, condominium associations continue to have to adjust to ever-changing COVID-19 protocols and guidelines while staying focused on protecting the health, safety and welfare of residents and staff. Likewise, associations are also grappling with how to respond to new lender questionnaires related to the condition of condominium buildings in the wake of the Surfside condominium collapse.

State of Illinois and City of Chicago Indoor Mask Mandates Lifted

Due to declining statewide COVID-19 metrics and the CDC's February 25, 2022 updated guidance regarding indoor masking, the State of Illinois and City of Chicago indoor mask mandates for venues other than hospitals and public transit were lifted on February 28, 2022. As such, the State and City requirements to wear masks in indoor common element areas and amenities are no longer in place.

While community association boards still have authority to continue requiring masks in indoor common element areas and amenities (should they elect to do so), given the updated CDC guidance regarding wearing masks indoors in congregate settings and the repeal of the Illinois and City of Chicago indoor mask mandates, at present there is little basis for community associations to keep their indoor mask mandates in place (or institute a new indoor mask mandate).

As long as the current metrics remain in place, it is reasonable for community association boards to repeal their indoor mask mandates for indoor common element areas and amenities (i.e., masks would be optional for owners, residents, renters, guests and invitees) as well as modify any temporary COVID-19 protocols, as appropriate, while continuing to monitor metrics prospectively for any changes that could require another pivot in COVID-19 protocols. Recommended best practice is for boards to continue to communicate any changes with unit owners regarding COVID-19 policies.

Associations Can Mandate that Certain Union Employees Be Fully Vaccinated Against COVID-19

Recently, ABOMA has entered into memorandums of understanding with SEIU Local 1 and the Teamsters (collectively, the "MOUs") related

to mandatory vaccination policies for specified condominium union employees. The MOUs allows for employers, including condominium associations, to adopt policies that require employees receive the COVID-19 vaccine as a condition of employment, provided that certain factors are met. Associations must adopt the MOUs to receive the benefits of their terms.

While the Teamsters and SEIU Local 1 MOUs have some differing requirements, condominium associations may generally require vaccination as a condition of employment, as long as the following factors are met:

- Employers must provide reasonable accommodations for employees unable to be vaccinated due to religion, disability, or pregnancy, as required by law; and
- Employers must provide up to four hours of paid time off per dose for employees to receive the vaccine.

In addition to the above requirements, condominium associations subject to the SEIU Local 1 MOU must meet the following requirements:

- Employees are provided at least 45 days' written notice of the requirement;
- Employers must provide an additional one day of paid sick leave, if necessary, for employees dealing with side effects related to the vaccine *(Note: This is in addition to paid sick leave provided in the collective bargaining agreement)*; and
- In the event that any employees subject to the CBA Covering Doormen, Receiving Room Employees, and Others is deemed an "essential frontline worker" while a stay-at-home order is in effect, such employees shall receive hazard pay of 5%.

Employers may require proof of vaccination, typically a COVID-19 Vaccination Card. Once collected, COVID-19 Vaccination Cards must be kept in a separate folder from the personnel file. Employers must go through an interactive process, as required by law, if an employee asserts that they cannot take the vaccine because of disability, pregnancy, or religion. Accommodation requests must be handled on a case by case basis to determine whether a reasonable accommodation exists to allow for the employee to return to work without vaccination. The standard accommodation contemplated by the MOUs is submission to weekly COVID-19 testing and the requirement to wear a facemask at all time while on premises.

New Fannie Mae Lender Questionnaires Related to the Condition of Condominium Buildings

In the wake of the tragic Surfside condominium collapse, Fannie Mae issued new temporary eligibility guidelines for loans insured by Fannie Mae for condominium units (and co-op apartments) starting January 1, 2022 and added new questions to their Condominium Project Questionnaire related to the condition of association buildings. Many other lenders have followed suit and incorporated additional questions in their Condominium Questionnaires related to the condition of association buildings.

While associations are not required under Section 22 of the Illinois Condominium Property Act ("Act") to provide a response to these specific new requests, boards may feel forced to provide responses to these new questions in order to facilitate unit sales and refinancing opportunities for owners. Boards will have to make a decision as to (i) whether to provide re-

sponses to the new questions related to the condition of their building(s); and (ii) if so, the extent of those responses and what, if any, reports or supplemental documents they are willing to provide to lenders.

Because the new disclosures are factual and vary from association to association, boards, with the help of their professional property managers, should review their files and provide their legal counsel with draft factual responses and documents so that legal counsel may review and revise, if appropriate, to minimize liability.

If boards have specific knowledge regarding the answer to a particular question and are comfortable providing an affirmative "yes" or "no" answer to these new questions, they may do so. However, if boards lack such knowledge or are not comfortable providing responses, we recommend that boards and/or management gather responsive documents (e.g., reserve studies, engineering reports, building code citations, etc.) and discuss with their legal counsel.

No matter what response(s) an association ultimately decides to make, we recommend that all responses be reviewed and approved by the board at an open board meeting and so reflected in the meeting minutes.

Continued Increase in Reasonable Accommodation Requests for Assistance Animals

In general, condominium associations have seen more reasonable accommodation requests for assistance animals in the last two years than ever before. This trend may be here to stay with many condominium unit owners and residents continuing to work from home.

Federal law makes clear that housing providers, including condominium associations, must reasonably accommodate residents with disabilities, including allowing a resident to keep an assistance animal, which term includes both emotional support animals and service animals—even if the association's declaration or rules expressly prohibit animals—provided that the requester submits documentation that is legally sufficient to support such request. The Fair Housing Act ("FHA") and Illinois Assistance Animal Integrity Act ("Act") set the standards for what is required of an owner or resident who makes a reasonable accommodation request to keep an assistance animal.

Associations should have a procedure in place for how to handle assistance animal requests. Recommended best practice is for boards, through management, to forward to the association's legal counsel any documentation related to an assistance animal request so that the attorney may review and provide an opinion as to whether the documentation is legally sufficient under the FHA and Act to support such a request.

Boards should exercise an abundance of caution when evaluating reasonable accommodation requests for assistance animals, especially because Federal law allows a requester to recover monetary damages as well as their attorneys' fees from a condominium association if it is determined that their assistance animal request was improperly denied. ✠

by **Angela Duea - FirstService Residential**

Editorial Note - Kristin Ward -FirstService Residential, Jeanette Catellier - Hammerbrush Painting & Construction and Kristy Dalby - G3 Construction contributed to this article.

Ice Damming Leads to a Structural Surprise at Orchard Gate

When a townhome community weathers a heavy snowstorm and a polar vortex, and then reports icicles 8-10 feet long stretching from roof to ground, the association has a plethora of issues to deal with at once. At Orchard Gate HOA in Westmont, Illinois, severe weather in December 2018 led to just those conditions. FirstService Residential brought in a team including experts from Hammerbrush Painting & Construction and FirstService Project Management (FSPM) to mitigate the problems.

Orchard Gate was built in the mid-1980s as a homeowner's association of 33 buildings containing 182 townhomes. Before the severe weather in 2018, another roofing contractor had recently replaced the roofs of the buildings using proper ice and water shield material to reduce the risk of ice dams. However, the ice dams occurred again, despite the new roofs, and the dams were made much worse by the volume of snow atop the roofs.

Diagnosing the Problem

Work crews began chipping the ice away and removing the long icicles from the fascia, gutter and downspouts. Underneath, ice dams had caused water infiltration that required residents to file insurance claims. Some residents in end units experienced frozen granite countertops and windowsills, issues they had been bothered by for some time. But as the teams continued analyzing the roof and exterior, they were shocked at what they found. The homes were built with insufficient, low-quality insulation along with inadequate 1/8" foil backed sheathing that had begun to deteriorate.

FSPM did a pre-construction analysis to determine the scope, project phases and budget, starting with the homes that had the worst damage. Then they created a request for proposal and reviewed all submitted bids to provide the Board with their recommendation for the awarded contractor, paired with oversight from FSPM.

The association was somewhat apprehensive about hiring a project management firm, but the magnitude of the problem and the rapidly increasing scope made it clear that a project leader was necessary. "On some projects, when coordination and project manage-

ment play such an important role, there's only one right choice," said Zack Dubs, project lead. "The Board and residents need a professional team working toward their best interest to ensure all details are managed properly and the phases are coordinated effectively." This frees up the property manager to handle day-to-day business while the project is underway.

The Project Work Stages

The construction work required the following phases of work, expected to be completed over three years:

- Removal of all siding, sheathing, insulation, shutters, trim, soffits and gutters
- Install new insulation and ¾" OSB sheathing
- Install new vinyl siding, shutters and LP trim
- Remove all debris and schedule landscaping repairs
- All trim, vinyl siding, board and batten were color-matched and pre-finished to avoid unnecessary painting and maintenance.

To make the project more complicated, each building chose different shutter, trim, and siding colors. FSPM had to log all product and material selections, as well as check availability and lead times for each to ensure it fit within the established schedule. Once submittals were approved and material was released, FSPM posted notices throughout the community to alert the residents of the upcoming work.

"A pilot building was done so the engineer and inspector could see the finished product and approve the means and methods to install before moving forward with the other 32 buildings, "said Jeanette Catellier, Director of Client Relations at Hammerbrush Painting & Construction. "This pilot building was completed before the winter and FSPM received no complaints from the homeowners. Residents noted that their HVAC units were turning on less frequently and they noticed a reduction in their heating bills." With the approval of the project engineer and village inspector, the team was then ready to start the full-scale upgrades to all the community association buildings.

Though the original plans called for the work to be completed in three years, with the approval of the Board, FSPM worked with Hammerbrush to determine what could be done to complete the project faster to avoid additional ice damming. The decision was made to add additional manpower and modify staging so that each crew could work more efficiently. This method created a bigger footprint in the community, as they were now working on five buildings at a given time, but with the proper communication, the residents were accepting of the team's new approach.

The increased crews and expert planning allowed them to complete the work in a year and a half. "This acceleration gave the community many benefits," said Dubs. "Residents spent less time navigating around dumpsters and material while getting to enjoy energy savings sooner. Reducing our time on site also minimized the disruption to the overall community

that a project of this nature inevitably brings.

We were able to work within our budget while keeping up with the debris removal and housekeeping tasks that can be the downfall of a community wide capital project such as this."

Success Factors Abound

There were several success factors that led to efficient, quicker than expected resolution. Most notably, the Board members and Hammerbrush crew leaders raved about the effective communication from FSPM. The project leader held weekly meetings with the association board members, contractors, and engineer to address any issues in the field and refine their process. FSPM also kept in constant communication with residents to update them as to when they could expect work to start on their buildings. Expert detail management made sure the colors, resident needs, damages and other factors were carefully documented and addressed. This oversight was achieved by appointing a full-time superintendent to be on site each day until the work was completed.

This $3 million project was financed via a FirstService Finance and Insurance (FFI) loan in lieu of a special assessment, since the community was already under a special assessment for other necessary improvements. The project was completed ahead of schedule and under budget with $12,000 in unused contingency funds being returned to the association. Board members and residents alike were happy to report that the problems that had plagued their community for so many years have not returned since the project was completed. ■

by Kris Kasten, Bartzen Rosenlund Kasten LLC

QUESTIONING PROPERTY MANAGER FEES FOR PROVIDING 22.1 DISCLOSURES:
Harry Channon and Dawn Channon V. Westward Management, Inc. and Pending Legislation

In October of 2021, an Illinois Appellate Court decision addressed a longstanding complaint of sellers and buyers of condominium units. During the sale of a condominium unit, a buyer routinely asks the seller to provide certain information, including but not limited to, a copy of the association's declaration, bylaws, and rules and regulations, disclosures pursuant to Section 22.1 of the Illinois Condominium Property Act, and a paid assessment letter.

The obligation to provide that information usually falls to the managing agent of a professionally managed condominium. In some instances, a managing agent uses a third-party vendor for providing that information. The managing agent typically charges the seller or the buyer or both a fee for providing the requested documents and information. Increasingly, sellers and buyers have complained that those fees are unreasonable or excessive.

In Harry Channon and Dawn Channon v. Westward Management, Inc. (2021 IL App (1st) 210176U), the Court of Appeals of Illinois, First District, addressed the question of whether a seller of a condominium unit has an implied cause of action under Section 22.1 of the Illinois Condominium Property Act against a property manager (acting as the managing agent of a condominium association or its board of managers) alleging that the property manager charged excessive fees for providing documents and information as required by statute.

Not a Published Opinion

First, it is important to note that the Channon decision is not a published opinion. It is an Illinois Supreme Court Rule 23 opinion, which means that it is not precedential case law. However, it can be used (in compliance with Supreme Court Rule 23) as persuasive authority. The Channon case is instructional because it shows the Appellate Court's reasoning and how other Illinois Appellate Courts may handle similar situations.

For the purposes of brevity, I omit a detailed procedural background describing how the issue came before the Appellate Court. Suffice it to say that the trial court found that an implied cause of action exists under Section 22.1 of the Illinois Condominium Property Act in

favor of a seller and against a property manager contesting the reasonableness of the fee charged by the property manager. Before the case concluded at the trial level, the question of the implied cause of action was certified by the trial court and appealed to the Appellate Court, who then reviewed the case and provided its Rule 23 opinion.

The Appellate Court goes through a detailed analysis of statutory construction principles, prior Illinois and Federal Appellate cases dealing with Section 22.1 of the Illinois Condominium Property Act, and the four recognized factors that must be met under Illinois law for finding a statutorily implied private right of action. Relying on the plain language of the statute, the Appellate Court in Channon concluded that Section 22.1 protected both buyers and sellers of a condominium unit and that the four factors were satisfied to imply that a seller has a cause of action under Section 22.1 when that seller is charged excessive or unreasonable fees for obtaining the information and documents under Section 22.1.

The Channon Appellate Court also provides a detailed analysis on the question of agency. The Appellate Court found that a condominium association is permitted to engage a managing agent and delegate duties of the association to that managing agent. Those duties that may be delegated include the duties of the association and board of managers under Section 22.1 of the Illinois Condominium Property Act. The Appellate Court further found that the managing agent's scope of power is limited to that of the association or board of managers. Therefore, the provision of Section 22.1 limiting the fees that can be charged to a seller for providing documents and information under Section 22.1 applies not only to the association/board of managers, but also to the managing agent. Specifically, the statute limits such fee to "a reasonable fee covering the direct out-of-pocket cost of providing such information and copying may be charged… for providing such information" (765 ILCS 605/22.1). Accordingly, the implied cause of action alleging excessive or unreasonable fees can be brought against the association/board of managers or the property manager.

Courts Being Sensitive to Unit Owner Complaints

The Channon case follows a continuing trend of the Illinois Appellate Courts being sensitive to individual unit owner complaints against their association's board of managers and managing agent. The courts seem to be willing to scrutinize the actions of associations/boards of managers and property managers (by way of agency) when it may appear those actions are overbearing or overreaching with respect to individual owners.

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willing to scrutinize the actions of associations/boards of managers and property managers (by way of agency) when it may appear those actions are overbearing or overreaching with respect to individual owners.

Since the Channon decision is a Rule 23 opinion, it is not the final word on the issue of fees charged in connection with the documents and information provided under Section 22.1 of the Illinois Condominium Property Act. The Channon decision does mean that the case against the property manager can proceed at the trial court level. It is still to be decided at the trial court level whether the fees charged will ultimately be found to be unreasonable and excessive in violation of Section 22.1.

New Legislation Proposed

Subsequently to the Channon case, a bill was introduced in the Illinois General Assembly to amend Section 22.1 of the Illinois Condominium Property Act. In January 2022, Representative Wheeler introduced House Bill 5246 (HB5246), which is similar to bills Representative Wheeler has introduced during past legislative sessions. That bill would reduce the time the association has to respond to a request from 30 days to five business days. That bill would also impose a fee cap of $100 that an association could charge the seller for providing a response to a request under Section 22.1. In addition to HB5246, amendments were filed to Senate Bill 3193 (SB3193) that would amend Section 22.1 of the Condominium Property Act and Section 1-35 of the Common Interest Community Association Act, which amendments would impose a fee cap on the amount an association could charge a seller for providing disclosure responses. Although at the time of writing this article HB5246 and SB3193 were not moving through the General Assembly, the author is aware of efforts to amend a different bill that would make changes to Section 22.1 and impose a fee cap.

With the Illinois Appellate Court's opinion in Channon and the bills that have been introduced in the Illinois General Assembly in both the House and the Senate, fees charged by an association, whether through a managing agent or otherwise, in connection to sale transactions is an issue that is not going away. Only time will tell whether the issue is ultimately resolved by the courts, legislation, or the marketplace, but in the meantime, it is something that associations and managing agents should be thinking about.

INDUSTRY HAPPENINGS

Bartzen Rosenlund Kasten, LLC.

Altus Legal, LLC and Rosenlund Legal, P.C. are proud to announce the merger of the two firms effective January 2022. The new firm will be Bartzen Rosenlund Kasten, LLC (or "BRK Legal") and will continue to represent condominium and homeowner associations in Chicago and throughout Illinois. The partners – **Nicholas Bartzen, Scott Rosenlund,** and **Kristofer Kasten** – are very pleased with the merger and bring a uniquely qualified set of skills to the representation of community associations from high-rise condominiums to suburban HOA's. The three partners are joined by a staff or four, including Clifford Garrett as associate attorney, as well as paralegal and legal assistant staff.

MCD Golf & Bocce Invitational

The 26th annual MCD Golf & Bocce Invitational will be held on July 22, 2022 at Eaglewood Resort in Itasca. Last year, over 200 participants played golf or bocce and enjoyed industry networking at a special reception. For more information visit www.condolifestyles.net or call 630-932-5551. To view photos from past mcd media events, visit Facebook.com/MCD Media.

FirstService Residential Illinois

↗ *Barbara Al-Saigh*

↗ *Brian Butler*

↗ *Jennifer Stopka*

FirstService Residential, a leading residential property management company based in Chicago, has appointed **Barbara Al-Saigh** as Vice President of Portfolio Property Management.

Ms. Al-Saigh began her career in property management as an administrative assistant seven years ago, and quickly moved through manager, supervisor and regional director roles at FirstService Residential. Barbara brings to us a wealth of knowledge and in-depth professional experience through her oversight of a vast range of communities throughout Chicago, including her most recent work with the iconic Tribune Tower Residences.

"We are extremely fortunate to have Barbara's diverse experience and depth of knowledge on our leadership team," said Asa Sherwood, President. "In her new role, Barbara will be overseeing and supporting our city portfolio regional directors and their portfolio management teams."

Senior Vice President of FirstService Residential of Illinois, **Brian Butler** has been elected to the Community Associations Institute's (CAI) national Community Association Managers Council, a specialized advisory group for residential property managers. Mr. Butler is distinguished by being the only executive to represent the U.S. Midwest on the council. In his role, he and his fellow council members will provide input to CAI Trustees on policy matters and education, appoint community managers to slots on the board, and nominate board members for trustee slots. He will serve a two-year term.

FirstService Residential welcomes back **Jennifer Stopka,** PCAM, as Vice President of Suburban Operations. In this role, she oversees the property management operations of the growing FirstService Residential Illinois suburban management team. This is the second time she has held the position, the former being from 2014 – 2019, where she has alternated between leadership roles and leading the Training and Development function for management firms. In all, Ms. Stopka has been in the property management field since 2009.

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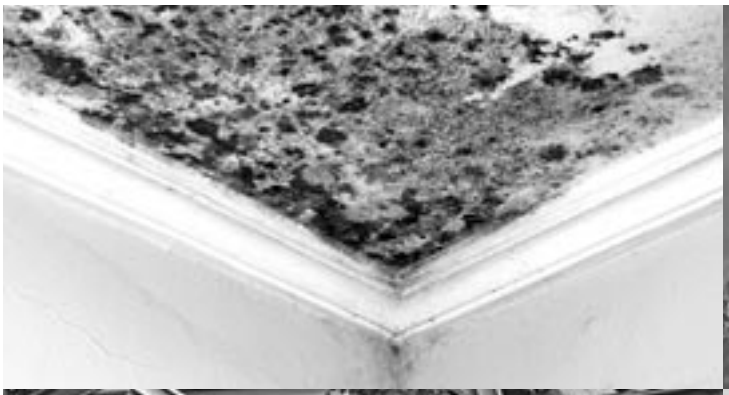

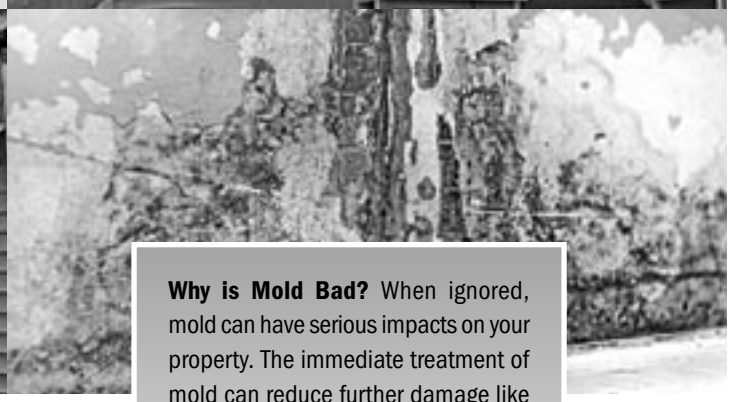

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Condo Lifestyles attempts to provide its readership with a wide range of information on community associations, and when appropriate, differing opinions on community association issues.

From the Editor

↗ *Mike Davids*

Spring has sprung and many of us are glad to put the Winter season behind us. Not only does the cold and snow keep us cooped up inside for several months, but the risks of catching covid are known to be much greater in the winter months. Thankfully, Covid-19 test positivity, hospitalizations and deaths have all greatly decreased in recent months. Although, experts are warning that we may have a Spring "bump" in cases that we all should be wary of.

While we can still get some cold weather in April and May, we typically enjoy more pleasant temperatures and sunshine that allows for much more outdoor activity. Not only does good weather help put people in a generally better frame of mind, but we need favorable weather to perform exterior maintenance, repair, and restoration projects that properties all over Chicagoland are ready to undertake.

Our cover story is on "Best Practices" and important considerations when updating your association rules and regulations. We also explore some of the most common reasons why associations are currently updating their rules and regulations. We also have another story on the topic of rules and regulations that offers the top five mistakes that boards make in rules enforcement.

Our second story is emerging issues for condo associations in 2022 that provides an overview on including lifting of mask mandates and other Covid-19 protocols, Fannie Mae lender questionnaires and the continued increase in reasonable accommodations for Service Assistance Animals. We also have two other legal update articles on Lender Questionnaires and Paid Assessment Letters; one article covers the specifics of what questions are typically included in lender questionnaires and paid assessment letters and the other outlines an Illinois Appellate Court decision that addressed a longstanding complaint of sellers and buyers of condominium units that questions the fees charged to provide certain information, including but not limited to, a copy of the association's declaration, bylaws, and rules and regulations, disclosures pursuant to Section 22.1 of the Illinois Condominium Property Act, and a paid assessment letter.

A special feature in this edition provides an overview of the findings of a National task force's efforts that involved more than 600 people over a three-month period and resulted in the publication of the Condominium Safety Public Policy Report (CSPP), released in October of 2021. The report contains specific policy recommendations on reserve studies and funding, building maintenance and structural integrity. Our article provides a summary of some of the key aspects of this report from the perspective of a Chicago area professional engineer.

An article in our Board Basics column offers insight on how to execute a successful capital project and an article in our maintenance memos column shares a success story on how Orchard Gate community association completed a successful project that solved their ice damming and related issues. We again offer our regular Industry Happenings column and highlights from various special events. A special thank you to everyone who attended our Condo Lifestyles'/Condolympics event on April 1st.

Upcoming MCD special events include our annual golf & bocce outing, which will be held on July 22 at Eaglewood Resort. If your association(s) has a special need or challenge, there will be a variety of experts specializing in community association issues including many members of our advisory board who will attend these events. MCD special events provide a terrific forum for association leaders to get questions answered, meet new vendors, share a story idea, or socialize with other volunteers and professionals.

We encourage you to make your association and your community all it can be. If you have an idea that would benefit other Community Associations, a story to share, or some advice on how to avoid a problem or overcome a challenge, please call our office at 630-932-5551 or send us an e-mail (mdavids@condolifestyles.net). ■

Warm Regards,
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by **Mark Waldman, S.E., P.E.**

Can We Feel Safe Living in Condominiums Again?

For many of us, especially those who are professionals engaged in providing inspection and consulting services for commercial and residential building owners and managers, the disaster that unfolded in the early morning hours of June 24, 2021, will not soon be forgotten.

In a little less than a quarter of a minute, approximately 55 of the 136 condominium units in the 12-story concrete structure were reduced to a pile of rubble resembling a mangled stack of concrete pancakes splayed out across the eastern-half of the beachfront property known as Champlain Towers South (CTS) in Surfside, FL.

Moreover, the partial structural collapse of the 40-year-old building which tragically killed 98 people, appeared to be unprovoked and unrelated to any readily obvious outside forces such as high winds from a storm event, an earthquake, or a blast from a terrorist attack. The apparent lack of a trigger for the collapse of a muti-story building sent a shock wave through the engineering and building design community. It also sent a wave of terror through the millions of residents who live in apartment and condominium style buildings throughout the United States and the world over. How could such a disaster happen in a country as wealthy and as technologically advanced as ours with building codes, and required inspections and property condition standards?

The general public and experts alike have hypothesized about the cause of the CTS collapse. Was the collapse caused by a flawed design of the building? Was it caused by vibrations from construction of the condominium on an adjacent parcel? Did the structural frame lack properly designed shear walls or structural redundancies that would have prevented a "pancaking-type" collapse? Or was it caused by construction defects, or changes to the building's original design made during its erection? Perhaps it was defective concrete placement or detailing of the reinforcing steel between the concrete slabs and the columns that allowed punching shear failures of floor slabs.

Engineers, building officials, and others speculated the CTS collapse may have been initiated by a foundation failure or subsidence of the soils under the building's supports that was caused by repeated wetting and drying of the lower-level parking garage. Florida is noto-

rious for having a karst landscape and many buildings have met their demise when a sinkhole opened up. Yet others have wonders if the collapse of CTS was initiated by an improper slope or poor drainage on the pool deck coupled with a lack of maintenance. Water penetrating the pool deck may have caused a corrosive environment that, if unabated, would have accelerated oxidation of the reinforcing steel in the concrete slab aided by the salt-enriched sea mist blowing in from the Atlantic Ocean.

The National Institute of Standards and Technology (NIST), the entity leading the investigation for the federal government, has been involved with the teams of first responders and rescue efforts from very early in the search /rescue and recovery operation. NIST and the team of experts organized under the NCST Act of 2002, has, among other things, the responsibility for preserving key pieces of the damaged building and sorting through the information from eyewitnesses. NCST's team of experts will conduct materials tests, build mathematical computer models to simulate the collapse, review historical information on the building's design, maintenance, and recent condition reports. All of this in an attempt to piece together the causes of the building's partial collapse. The effort to find the cause is complicated and time consuming.

Although we in the engineering community and other design professionals believe there will be revisions to local and national building codes as a result of the CTS collapse, perhaps more in-depth and frequently spaced structural condition assessments by licensed design professionals will also be required. The findings of NIST and the NCST are not expected to be complete for another year and a half or more. What can we do in the interim to give condominium owners and building occupants a sense of safety and security in their homes until then?

"Condominium Safety Public Policy Report" – Reserve Studies and Funding, Maintenance and Structural Integrity

As the story of Champlain Towers South unfolded in the media, the growing concern over structural safety among millions of Americans residing in community associations and condominium buildings throughout the U.S. spread like wildfire. Within a few days of the disaster, the Community Associations Institute (CAI), an international advocacy group providing resources and training for all those involved in common interest real estate associations (CIRA's) including community leaders, board members, homeowner's groups, and industry professionals worldwide, organized and convened a task force. The intent of the task force was to take input and feedback from many stakeholders and industry professionals to develop a policy statement to help provide solutions and minimize the potential for a repeat event like the Champlain Tower South disaster.

The CAI task force's efforts of more than 600 people over a three-month period resulted in the publication of Condominium Safety Public Policy Report (CSPP), released in October of 2021. The 56-page report contains specific policy recommendations on reserve studies and funding, building maintenance and structural integrity. The publication was intended for use by all those involved in all aspects of the community association's indus-

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try – property management professionals, vendors, and those in governance of CIRA's – and to provide solutions for legislators endeavoring to improve residential building safety in their regional areas of influence. Although the CSPP Report is intended to influence public policy by helping to guide the dialogue and, specifically, State legislators, the 56-page document maps out a well-defined path with many signposts and landmarks for all industry professionals – engineers and architects among them – and all those who sit on the board of governance in their communities.

Reserve Studies and Funding

As an engineer who has practiced in the CIRA marketplace for over 30 years in the Chicagoland area providing structural evaluations, leak investigations, reserve studies and the like, I was keenly interested in the CSPP report, and the policy recommendations included therein.

Pages 11 and 12 of the CSPP report contain the reserve studies and funding policy recommendations, which included nine items that CAI supports as part of state's law and three Best Practices Recommendations. The Best Practices Recommendations (not statutory) identified by the task force included the following as it concerns advice for condominium boards and managers:

- Planning and funding for preventative maintenance repairs and replacement for aging buildings and other structural components that ARE NOT currently addressed in standard reserve studies.
- Frequency of the periodic updates for reserve studies to be a cycle of every three years as a best practice but no longer than five years for a reserve study update.
- The reserve funding for communities without significant or major common improvements should be allocated based upon estimated amounts of anticipated repairs or replacements determined by the governing board.

Illinois Reserve Studies

Understand that the State of Illinois currently has no statutory requirements under either the Illinois Condo Act (ILCA) or the Illinois Common Interest Community Association Act (CICAA) that require associations to conduct reserve studies. The ILCA was amended in July of 1990 to require condominium associations to set aside reasonable reserves for the long-term repair, maintenance, and replacement of the common elements of the community as defined in their governing documents. The ILCA also indicated that any professional reserve study conducted by the association should be considered in the determination of what was to be "reasonable" among other things to establish reserves and a reserve funding plan. It has been this engineer's experience that 30 years after the ILCA law was amended to require "reasonable" reserve funding, most associations are still woefully behind in making and maintaining those reserve contributions.

Reserve Studies, of course, are long term budgeting and financial planning tools; they are living breathing documents that need to be updated on a regular basis because of changes in environmental and physical conditions as well as economic conditions. Reserve Studies, as the CSPP report also clarified, are not structural

condition assessment reports of the common areas of the property. In fact, reserve analysts typically look at a fractional part or representative samples of the common elements and common areas as part of their field observations. Equally important to note is, that although there are pre-qualifications and relevant work experience and training necessary for obtaining a Reserve Specialist's designation from CAI, it does not require a license as an engineer or architect or professional designation in the construction industry as a prerequisite.

The task force and authors of the CSPP Report wisely point out that it is unclear and not possible to know if updated standards and requirements for reserve studies would have resulted in a different outcome at CTS. Maybe a reserve study done early in the life of the CTS history would have included a line item for the pool deck or corrosion investigations and crack repairs or improvements to the water proofing of the pool deck that would have eliminated the degradation observed in the ceiling of the parking garage years later during the 40-year review. Or, perhaps more frequent updates to the reserve study over time by the same astute RS would have allowed identification of changes in the building's structure or the pool deck leakage and parking garage damage. Ideally the pool deck line item and water proofing repair are elements reserved for over a period of time. The incremental cost to the condominium unit owners paid over a 20-year period could have potentially been far less than the multi-million-dollar repair costs identified by the consultants in 2018. Thereby allowing the Board of Directors to make maintenance repairs and extend the life of the structure without special assessments or loans. This version of the story has a much happier ending, but the analysis still assumes many things go right not the least of which is that the pool deck maintenance and water proofing was a line item in the reserve study and not summarily disregarded as a maintenance cost in the first place.

But still how do we address the overall concerns regarding the structural integrity and stability of the buildings we live in?

Once again, this is an area that the Task Force who authored the CSPP Report made profound recommendations for everything from developer requirements at or before transition and turnover of the property to ongoing building inspections that start early in the life of the structure and reoccur with a methodical frequency. All of this is aimed at helping minimize (and hopefully prevent) the runaway conditions of deferred maintenance we often see in buildings as they age. Because owners and managers and many of us in the design profession do not readily know how to deal with making repairs or implementing cost effective remedies. This can then result in tabling and deferring necessary repairs or inspections. As things get deferred, they get more involved and more expensive and more complicated and then what happens? We defer some more until things reach a critical status and a balcony or porch collapses or a window blows out of the exterior wall opening onto the street below potentially causing serious property damage; injury; or, worst of all, loss of life!

Policy Position Suggested

Turning to pages 25 through 28 of the CSPP Report, the Task Force concisely lays out the Policy Position on Building Maintenance & Structural Integrity for legislators and all industry professionals to work toward. These requirements include Developer involvement and initial benchmarking type recommendations. Things as simple as providing a set of IFC (Issued for Construction) drawings or better yet As-Builts and building permits and copies of required inspections and occupancy certificates. The CSPP Policy Statement also includes recommendations that the Developer provide a PM Manual and those prospective buyers be provided a copy of the future required building inspections.

Recommendations to do More in Illinois

The recommendations of the Task Force for on-going inspections after construction are something we as Chicagoans already know well. We have statutory requirements for periodic façade inspections, metal attachment inspections, water tank inspections, infrared

courtesy of Google Images

↗ *Partially collapsed Champlain Towers South Condominium Association, Surfside, FL*

inspections, boiler inspections, elevator inspections, energy benchmarking inspections, etc. However, I believe the preliminary findings from the CTS collapse is that we have to do more than visual inspections. Although they are absolutely a necessity and form the foundation for everything we as building design professionals do, careful and thoughtful visual observations from walk-through surveys must be the starting point for a longer, deeper look at the buildings we evaluate and assess. After all, these are the places where we and our clients live and raise our families.

Yes, we must start with a visual walk-through of the buildings, looking specifically at the exposed and accessible areas as it relates to critical supports: the foundation, the beams and columns, the exterior walls, roof, the interior hallways, and stair towers. We also must understand more about the overall structural

design and construction of the building and the maintenance or lack thereof. We need to review and know how building codes and structural designs have changed over time and look at the materials that were used.

Structural Condition Assessment

The CAI Task Force wisely points to and provides references to the ASCE Standard (ASCE 11-99) Guideline for Structural Condition Assessment of Existing Buildings on page 26 of the CSPP report. I would also encourage those of you reading this and especially my colleagues in the architectural and engineering business providing services to the CIRA to use and reference the textbook authored by Robert T. Ratay, Ph.D., P.E. titled Structural Condition Assessment – Evaluation Techniques For: Strength, Serviceability, Restoration, Adaptive Use, Code Compliance, and Vulnerability, Copyright 2005, John Wiley and Sons, Inc. To date, and in my professional opinion, this text is the single most comprehensive compendium of information and resources on assessing structural conditions of existing buildings; be they constructed of steel, concrete, wood, masonry, or hybrid combinations of the same.

Dig Deeper, Look Beyond the Surface Cracks

From my perspective, the true answer to the question of structural integrity and stability of our existing buildings and "…are they safe?" is, just as the investigation at CTS is showing us, multi-faceted, and complicated. The answer requires those of us in the engineering and architectural communities to seek a deeper understanding of the uniqueness of the buildings we look at—it requires us to dig deeper into the design and construction and look beyond the surface cracks and conditions we observe in the necessary walk-through type surveys we complete. We should also look at the overall design and construction of the building and employ, if necessary, the latest tools and technologies including; infrared scanning for air and water leakage, GPR (ground penetrating radar) to locate steel reinforcement in foundations, columns and beams, and LIDAR to develop as-built drawings to compare to the original designs if they do not exist. We can perhaps, categorize our buildings into groups based upon age and materials of design to prioritize those that may be at greater risk. This was a solution employed by the City of Chicago Building Department and the building officials there helped to refine the façade inspection process and requirements for frequency of the critical façade inspections.

The Takeaway

The fundamental takeaway from the tragic event of June 24, 2021, in Surfside, FL, is the solemn reminder of the duty and burden we all as professionals involved in design, consulting, governance, and management of common interest communities need to bear. The need for all of us to look deeper, be more mindful, and thoughtful about not only what we see, but what we can learn from looking back at the design and maintenance of the buildings we manage and work on. Together, if we keep our collective eyes open and pay careful attention, we can minimize the risk of a repeat of the tragedy of June 24, 2021--always mindful of those who lost their lives.

EVENT HIGHLIGHTS

MCD's St. Paddy's Day Soiree

March 17 2022

by Salvatore Sciacca – Chicago Property Services

A Guide to Successful Capital Improvement Projects

A Primer for Community Association Board of Directors

Now that Spring is here, it is time to switch gears from hunkering down and weathering Old Man Winter to planning for successful capital improvement projects.

Capital improvement projects are the most expensive undertakings for a community association. As a result, associations must ensure that there is professional oversight every step of the way from capital planning to project execution and punch list remediation.

Capital Planning

The first step to ensure a successful capital project is to take a proactive approach and plan. Planning is essential to ensure the funds are available when the capital project needs to take place. One common way associations plan is to hire a reserve study company. The reserve study is a very detailed document that documents all the capital components of an association and provides the timeline of when those items should be replaced and useful life of various building components. The study should also document how much the assessments should be for the association to have enough money in your capital reserve account to fund the project. Currently, it is very difficult to estimate some material costs accurately because of volatility in material pricing and supply chain disruptions. So be prepared to revise your reserve study more frequently than you might otherwise to keep your anticipated project expenses up to date.

Alternatively, the association can forego the reserve study and create a simplified version of the reserve study which would be a capital plan. However, it is essential that the association have some type of forward-looking capital plan document so that the association can plan the large-scale expenditures and avoid expensive urgent or emergency repairs.

Bid Specification

The next step in the process is to create some type of bid specification document that specifies how the vendors should bid on the capital repair/improvement project. This document is essential to ensure that all vendors submit bids that are comparable with each other. Otherwise, there will likely be no easy way to compare the bids. This in turn would make it very difficult for the board of directors to make a good decision on who to hire for the capital project.

Bid Solicitation

Once the bid specification is created, the vendors are issued the document and are requested to submit a bid by a certain date. The vendors are given the opportunity to review the bid spec and visit the association and examine the scope of work in greater detail. Then the vendor submits the bid to the association.

Bid Review and Comparison

At this stage, the association has received multiple bids and the project manager takes the bids and puts them in a spreadsheet and creates an analysis that compares the bids. This is an essential step in the process for the board to make a good decision.

Vendor Selection

The next step is to have a board of directors meeting and select the vendor. The board can only make a good decision if all the previous steps have been followed. This step might also entail the board interviewing a few vendors by inviting them to a board meeting or having a meeting with the vendor finalists. The board should always look to hire the vendor that will provide the best long-term value, not necessarily the cheapest price. Even though there is a scope of work involved in the bid process, there are always reasons why the bids vary from vendor to vendor. And those nuances are important to understand before a decision is made.

Project Oversight

Once the board has made a vendor selection, the project execution phase begins. During this phase, it is very important that the project manager provides effective communication with notices and updates to the board members and homeowners on the status of the project from start to finish. In addition, the project manager should meet the vendor at the association and review the timeline of the project before the project commences. Lastly, the board and homeowners should know the best way to contact the project manager when there are questions. This is essential so that complaints, issues and questions are promptly addressed by the vendor and project manager. The project manager can be a board member, a representative from the management company or a representative from the architect/engineering company. What is most important, is that someone is clearly identified as the project manager.

Punchlist Remediation

During this phase, the project manager conducts a full review of the workmanship of the vendor and compares the work to the bid specifications and vendor contract. The project manager then generates a list of items that need to be corrected and/or items that were not completed. Even though the project manager provided oversight during the project, there is likely to be a punch list that will need to be remediated by the vendor. Therefore, it is very important to hire a vendor that is reputable and reliable and stands behind their workmanship.

Successful Completion

Once the punch list is remediated, the project is completed. This should result in a successful execution of the capital project assuming all the steps have been followed.

Summary

Capital improvements are very expensive, and associations must plan years ahead to ensure smooth execution of these large-scale projects. As a result, associations must always keep capital planning on board meeting agendas and constantly plan ahead for the next large-scale project. Following these steps will ensure associations stay ahead of the curve and don't get stuck reacting to stressful emergency situations. Board of directors should ensure that there is never a situation where homeowners are dealing with water infiltration issues and funds are not available for the large-scale repairs necessary to deal with those issues.

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

TOP 5 MISTAKES IN RULE ENFORCEMENT

Spring is here and with it, rule enforcement season will be in full force. Before those warning and fine notices start flying, both Board members and their community association managers should take a step back and review their Rules and Regulations in order to ensure that their association is not inadvertently committing one of our Top Five Mistakes in Rule Enforcement.

MISTAKE #1

Acting without a proper complaint

This particular mistake most commonly involves those "nuisance and offensive conduct" violations or other violations, which are not observed and reported by the community association manager or a Board member. All too often, when an owner lodges a complaint, the association will simply act by issuing a violation notice and then, issue fines upon subsequent complaints. These acts are often taken in response to a mere phone call or email, without any support. Why is this a problem? The association is treating a report as a violation, without confirming that a violation actually exists. This can be problematic as the association is potentially placing itself in a position where it is being weaponized by one owner against another. This could potentially have adverse effects on the association, such as Fair Housing Complaints.

Nuisance violations, such as those related to smoking or noise, can be difficult to address. More times than not, due to the timing of these issues, the manager or Board is not in a position to independently confirm whether the smell of smoke or level of noise is unreasonable. As a result, by issuing a violation based upon a phone call or email from one owner, the association is allowing the owner to determine that a violation occurred without adequate support. So, what is an association to do here as certainly, we want to ensure that all residents are able to reasonably enjoy their units, free from smoke or unreasonable noise? Prior to acting, associations should be ensuring that a proper complaint has been made. In that regard, associations should be adopting policies and procedures regarding owner complaints, specifically as it relates to those associated with noise or smoke. These policies and procedures should include requirements that complaints cannot be submitted anonymously, that the complainants agree to cooperate with the association, that signed witness complaints be submitted, and that evidence be provided (to the extent possible) and/or that the unit be made available for inspection by the association as deemed necessary. In addition, before any notice is sent, the association should be reviewing the complaint and determin-

ing whether a violation exists. Associations should not just be acting on a submitted complaint alone without first conducting an assessment to determine whether a violation exists (no matter how many phone calls or emails the complaining witness makes or sends).

MISTAKE #2

Enforcing a Rule that Doesn't Exist

It is important that before a warning or fine notice is sent to an alleged offender that the association has confirmed that the conduct complained of actually violates a documented rule of the association. All too often, conduct will be reported or observed that while it seems like it should be a violation of the rules and regulations, it is not. While it is always possible to identify that conduct as being a violation of the "nuisance or offensive conduct" catch-all, associations should refrain from routinely issuing violations based upon that provision. If conduct is problematic enough that the Board wants to issue a violation notice, it follows that the conduct is problematic enough to be specifically noted in an association's rules and regulations. Over the past several years, Appellate Court cases involving condominium and other associations have made it clear that fairness needs to come into play with respect to rules and their enforcement. One of the best ways to help ensure fairness with rule enforcement is to make sure that members are made specifically aware of what conduct will potentially result in sanctions from the association. After all, would you find it fair if you were cited or ticketed for an action, which was not actually prohibited by law or ordinance? The same holds true for association members. If your rules are unclear or have not been updated in some time, now is a good time to consider updating your rules and regulations.

MISTAKE #3

Not affording the owner notice and a reasonable opportunity to be heard before a fine is levied

Both the Illinois Condominium Property Act and the Illinois Common Interest Community Association Act require that prior to the imposition of a fine that the alleged offending owner be provided with a notice and an opportunity to be heard. What does this mean? This means, very clearly, that before a fine is posted to an owner's account, he/she must receive notification as to what rule or regulation he/she allegedly violated and be provided with an opportunity to be heard. This notification needs to be sent to the owner and clearly provide details as to what violation has occurred. Most associations address the hearing requirement by noting in the initial warning notice that the owner has the right to a hearing. This way, when the stated fine is ready to be imposed, the owner has already been notified as to his/her hearing rights. What about, however, those violations, which may result in an immediate fine (after all, you are likely not going to give someone a warning about a life/safety violation)? Again, prior to posting that fine, you must provide the owner with an opportunity to request a hearing or even better, provide them with a date to meet with the Board to discuss why the proposed fine should not be assessed.

The hearings provided by the association need to provide the owner with a reasonable opportunity to be heard. The most practical advice that we attorneys can provide on this point is to provide the alleged offender with the same sort of opportunity to be heard as you, a Board member, would find fair and reasonable, if the situation were reversed. This means providing the alleged offender the opportunity to review and rebut the

evidence, which gives rise to the violation, and allowing him/her a reasonable opportunity to address the Board without interruption. The Board should then truly consider and determine whether a violation has been proven.

Boards should periodically review their rules and regulations (and the Declaration) and their violation notices in order to confirm that they are all consistent. For fairness purposes, the Board should adopt policies and procedures regarding hearings and how they are requested (or scheduled) and held. By adopting clear policies and procedures, the association shows that it intends to act in a fair manner and makes the rules of the association's enforcement clear to its members.

MISTAKE #4

Not voting as to whether a violation exists/fine should be assessed

As the Palm case made clear, Boards must conduct business, specifically vote, in an open meeting. While the discussion of violations is a topic to be discussed in executive session, both under the Illinois Condominium Property Act and the Illinois Common Interest Community Association Act, the decision coming out of that hearing must be voted on at an open meeting. Not all violations result in a hearing, so what about the imposition of fines – does that need to be voted on at an open meeting? The answer to that is yes. In short, the Board must vote at an open meeting to confirm that a violation occurred and that a fine be assessed (if so determined). At the end of the day, associations must be able to point to somewhere in the meeting minutes to substantiate each and every determination of violation and fine imposed. If determinations are not voted upon and the vote reflected in the meeting minutes, it is possible that the fine(s) will be held invalid. This is especially true in this climate where Courts are looking to make sure that an association has dotted all of its i's and crossed all of its t's when determining whether to rule in the association's favor.

MISTAKE #5

Imposing a Remedy that Doesn't Exist

An association's remedies for rule violations are generally set forth in the governing documents and/or the association's rules and regulations. As with Mistake #2, if the Board is going to be imposing a sanction or pursuing a remedy to correct a violation, it is important that the association actually has the authority to pursue that sanction or remedy. By way of example, if your governing documents and rules and regulations are completely silent on the issue of towing vehicles, the association cannot (at least not legally) utilize that remedy to address a parking violation. Prior to taking action in response to a violation, especially as it relates to remedies, such as towing or self-help (which associations should speak with association counsel before pursuing), associations should review their rules and regulations to confirm that it actually has the remedy, which it seeks to use.

These mistakes set forth herein are just some of the mistakes that we, as attorneys, see on essentially a weekly, if not daily basis, regarding rule enforcement. It is important to remember that rules and regulations are not "set it and forget it" documents, neither are the violation notices that are sent by the association. They are documents, which should be reviewed every couple of years to confirm that they are still meeting the needs of the community, are consistent with the law, and are clear. By paying attention to these documents and ensuring your actions comply (and can generally be viewed as fair), your association will be best protected. ■

by Omar Malik - KSN

Lender Questionnaires and Paid Assessment Letters

Many states have distinct disclosure laws that obligate sellers to inform prospective purchasers about the home or unit they are buying within a condominium, homeowner's association or townhome association.

These disclosures can include a variety of information and paperwork that outline the association's leasing restrictions, rules, regulations, and other owner obligations. For example:

- In Illinois, Section 22.1(a) of the Illinois Condominium Property Act describes the information that the unit owner must obtain from the board for inspection by a prospective purchaser, upon demand, in the event of any resale of a condominium unit by a unit owner other than the developer.
- Florida Statute 720.401 requires homeowner associations (HOA) to disclose a number of community membership requirements before the sale is executed.
- Under Wisconsin Statutes Section 703.33, the association is required to provide an executive summary "setting forth in clear plain language" information addressing several community issues including parking, special amenities, and the rental of units.

Along with state mandated disclosures, lender questionnaires and paid assessment letters can also be a part of a real estate sale or refinance within a community association.

Lender Questionnaires

In order to meet borrowing eligibility requirements, some lenders will require potential buyers to obtain a questionnaire covering information beyond state-mandated disclosures.

Below are some of the questions that are often included in a lender-specific questionnaire:

- If the community association is professionally managed, what is the management company's tax ID?
- In the event a lender acquires a unit due to foreclosure or a deed-in-lieu of foreclosure, is the mortgagee responsible for paying delinquent common expense assessments?
- What is the total square footage of commercial space in the building that is separate from the residential association?
- How many unit owners are 60 or more days delinquent on assessments?

These questions are asked because Lenders are performing their due diligence to

identify any potential red flags and risks that could impact their loan underwriting procedures. For example, the lender may not approve financing for a home or unit sale or refinance if the association:

- does not have adequate reserve funds
- is in the middle of a lawsuit or is pending litigation
- has a certain percentage of owners with delinquent assessments

Paid Assessment Letter

A paid assessment letter (PAL) is also known as an estoppel letter, or certificate of assessments.

The letter can be required in the sale or refinance of a home or unit within an association. For example, a paid assessment letter is required in Illinois pursuant to Chapter 765, Section 605/22.1 of the Illinois Condominium Property Act.

The paid assessment letter can include:

- the property's address
- the buyer's name and contact information
- the seller's name and contact information
- the closing date
- the amount of the assessment
- the frequency of the assessment (ex. monthly, annual)
- paid assessments through a given date
- unpaid assessments, association fees, and/or violation fines
- when the last assessment or fee payment was made
- if there are any outstanding liens for the home or unit
- if there are any unpaid special assessments

Recent Federal Requirements

The Federal National Mortgage Association (FNMA, otherwise known as Fannie Mae) established new regulations effective in 2022.

These regulations require certain types of community associations to provide extensive information associated with the condition of its building(s) in order to obtain a loan insured by FNMA.

These regulations will specifically impact an association when an owner sells or seeks to refinance their unit. Upon sale or refinance, the association may need to provide a Seller Disclosure document providing additional information regarding the association's:

- long-term financial condition
- structural integrity
- deferred maintenance information
- building code issues

Projects with unsafe conditions and/or significant deferred maintenance may be considered ineligible. Additionally, special assessments will be reviewed more stringently.

Documentation of any pertinent paperwork must be carefully maintained should an appraiser or lender submit a request.

Conclusion

Lender specific questionnaires and paid assessment letters protect the buyer, seller, and the association. Accordingly, they should be completed by a qualified representative of the community association.

Board members should work with their property manager, financial consultants, and attorney to confirm distinct information requests. ✠

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