

COMMON INTEREST COMMUNITY ASSOCIATION ACT A SUMMARY WITH COMMENTARY

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The Common Interest Community Association Act (the "CICA Act"), Public Act 96-1400, was signed into law on July 29, 2010 and became effective on that date.

The CICA Act was introduced as Senate Bill 3180, whose prime sponsor was Senator A.J. Wilhelmi (D-43rd Dist.) and which had its "origins" as a much different "homeowner's bill of rights" which went nowhere in the Legislature.

The CICA Act has borrowed certain concepts/provisions from the Illinois Condominium Property Act ("ICPA") and makes them applicable to so-called common interest communities, which is very broadly defined.

Highlights of the CICA Act are:

Section 1-5 (Definitions)

"Common interest community" is real estate, which is subject to a declaration and administered by an association, with respect to which a person by virtue of his/her ownership of an interest or a unit in that real estate, is obligated to pay for the maintenance, improvement, insurance premiums or real estate taxes of common areas described in that declaration. Common interest communities "may include, but not be limited to" attached or detached townhome, villa, or single family home or a master association. A "master association" is defined as "a common interest community association that exercises its powers on behalf of one or more condominium or other common interest community associations or for the benefit of unit owners in such associations." Note that condominium and cooperative associations are expressly excluded from the definition of "common interest community".

COMMENT: This very broad definition covers virtually all types of associations that are not condominiums or cooperatives.

Section 1-10 (Applicability) The CICA Act applies to all common interest communities, "unless expressly provided otherwise" in the CICA Act.

COMMENT: The CICA Act applies unless the CICA Act itself creates an exception.

Section 1-15 (Construction, interpretation, and validity of community instruments)

(a) The definitions used in the CICA Act apply to the declaration and other governing documents except to the extent otherwise provided in those documents or unless “the context otherwise requires”.

(c) A declaration provision limiting ownership, rental or occupancy of a unit to persons 55 years of age or older is deemed valid and not in violation of the Illinois Human Rights Act and does not prohibit continuing ownership, rental or occupancy of under-55 persons in certain situations.

COMMENT: Similar to ICPA Section 4.1.

Section 1-20 (Amendments to the declaration or bylaws)

(a) The common interest community is governed by its recorded declaration and bylaws, amendments thereof must be recorded and are deemed effective upon recordation, unless the amendment sets forth a different effective date.

(b) Declaration and bylaws amendments must be executed and recorded by the president of the common interest community association board or such other officer authorized by the association or its declaration.

(c) If a common interest community association currently [that is, on July 29, 2010] permits leasing of units but later amends its governing documents to prohibit leasing, such prohibition shall not apply to a unit owner which is incorporated under 26 USC 501(c)(3) which is leasing a unit until such time as that unit owner voluntarily sells the unit and such unit owner cannot be fined or penalized or subject to any fees for leasing its unit.

COMMENT: Subsections (a) and (b) are similar to ICPA Section 17. Subsection (c) is an exception (somewhat crudely and inaccurately worded) for non-profit corporations which are tax-exempt under Section 501(c)(3) of the Internal Revenue Code; such corporations are immune from rental restrictions unless and until they voluntarily transfer the unit.

Question: What happens if the unit is foreclosed and has an involuntary sale? What happens if the control or ownership of the 501(c)(3) corporation is transferred to another 501(c)(3) corporation? Most likely, Subsection (c) was intended to create an exception for organizations promoting affordable housing or half-way transitional housing; note that prior attempts to make such an exception in the ICPA failed. Is this the camel’s nose under the tent?

Section 1-25 (Board of managers, board of directors, duties, elections, and voting)

(a) The board must be elected from among the unit owners.

- (b) The terms of at least 1/3 of the board must expire annually and all board members “shall be elected at large”.
- (c) Board members serve without compensation unless the governing documents provide otherwise.
- (d) A board member’s or officer’s term cannot exceed 3 years but he/she may succeed himself in office.
- (e) Vacancy on the board may be filled by a 2/3 vote of the remaining board members until the next annual meeting, or by unit owners at a special election meeting for the balance of the term.
- (f) President, secretary and treasurer must be board members.
- (g) If a board election is not held within the time period specified in the bylaws or within a reasonable time thereafter (but not exceeding 90 days), then 20% of the unit owners can file a lawsuit to compel an election. In that case, if the court determines that the election was not held due to the bad faith acts or omissions of the board, then the unit owners are entitled to recover their attorney’s fees from the association. However, this subsection does not apply if the election is not held solely due to a lack of quorum even though the relevant notice requirements were met
- (h) If a unit has multiple owners and only one of those owners is at an association meeting, that owner can cast all the votes allocated to that unit. A unit owner can vote by (1) proxy, (2) submitting an association-issued ballot in person at the election meeting, or (3) by submitting an association-issued ballot to the association or its designated agent by mail “or other means of delivery specified in the declaration or bylaws.”
- (i) The association may adopt rules to conduct elections by secret ballot. A candidate for election to the board or his/her/its representative has the right to be present at the counting of the ballots.
- (j) An installment purchaser of a unit (other than a sale by the developer) who resides in the unit, shall be counted toward quorum in election meetings, shall have the right to vote at the election, and shall have the right to be elected to the board unless seller expressly retains any or all of such rights in writing.

COMMENT: Note that these provisions generally mimic various portions of ICPA Section 18. Subsections (a) and (b) require at large election of board members, which is contrary to numerous master associations’ governing documents and will disrupt the

governance of those master associations; this situation must be addressed and will likely be the subject of further legislation in the next session of the Illinois Legislature.

Section 1-30 (Board duties and obligations; records)

- (a) The board must meet at least 4 times annually.
- (b) The Board must notify unit owners and allow certain petition and referendum rights if the board intends to enter into a contract with a board member or his/her immediate family member.
- (c) Bylaws shall provide for maintenance, repair and replacement of common areas.
- (e) The association may hire a manager or management company.
- (f) Unless the declaration or bylaws provide otherwise, there is to be only one class of membership.
- (g) The board can levy reasonable fines after notice and opportunity for hearing.
- (h) Charging of fees to a unit owner by a managing agent regarding collection of delinquent assessments is subject to certain conditions.
- (i) The board is to make available for inspection and copying “at convenient hours of weekdays” by a unit owner, his/her mortgagees, agents and attorneys of various association records, including declaration, bylaws, rules and regulations, articles of incorporation, annual reports, records of receipts and expenditures affecting the common areas, contracts, leases and other agreements, and minutes of board meetings; also, with a written statement of proper purpose, ballots and proxies for elections and other matters voted on by the unit owners and other board records as are available under the Illinois General Not for Profit Corporation Act. Records are to be produced within 30 days. The board may charge a reasonable fee for retrieving and copying records. Wrongful failure by the board to provide records may subject the board to paying the unit owner’s attorney’s fees.
- (j) The board has legal capacity to act in a representative capacity in matters involving the common areas or more than one unit.

COMMENT: These provisions generally reflect various provisions of ICPA Sections 9.1, 9.2, 18, 18.4, 18.5 and 19.

Section 1-35 (Unit owner powers, duties and obligations)

- (a) Tenants are subject to association governing documents and the unit owner/landlord must provide the association with a copy of the signed lease.
- (b) If there are multiple owners of a unit, only one of them shall be eligible to serve on the board at any one time.
- (c) 2/3 of the unit owners can remove a board member.
- (d) In unit resale situations, the board must provide the purchaser, upon demand, copies of documents, including association governing documents, statement of liens (including statement of account of the unit), anticipated capital expenditures for the current or succeeding 2 fiscal years, status and amount of reserve fund, financial statement of the association, status of any pending lawsuits or judgments in which the association is a party, insurance coverages of the association and compliance of any improvements/alterations of unit and limited common areas. The records must be produced within 30 days after written request and the seller can be charged a reasonable fee covering the direct out-of-pocket cost of copying and providing the information.

COMMENT: These provisions generally mimic various portions of ICPA Sections 18 and 22.1.

Section 1-40 (Meetings)

- (a) Notice for membership meetings must be given not less than 10 nor more than 30 days in advance, stating the time, place and purpose.
- (b) Quorum for unit owners meeting is 20%, unless the governing documents provide otherwise. There must be an annual meeting, one of the purposes being election of board members. Special board meetings can be called by the president or 25% of the board members. Special unit owners meetings can be called by the president, the board or 20% of the unit owners. The board must give notice of its meetings at least 48 hours in advance by mail, personal delivery or posting. Subject to other provisions of the CICA Act, the board must give unit owners prior notices by mail or personal delivery “within 10 to 30 days” for any board meeting concerning the adoption of the annual budget, regular assessments or special assessment. The board meeting must be open to the unit owners except for discussion of litigation, employment or violation/assessment delinquency matters (however, a vote on such matters must be taken at an open portion of a board meeting). The board must reserve a portion of its meeting “for comments by unit owners”, provided that the duration and order of that portion is subject to the board’s discretion.

COMMENT: These provisions generally mimic various portions of ICPA Sections 18 and 18.5, except that the CICA Act mandates a unit owner forum at board meetings.

Section 1-45 (Finances)

- (a) Unit owners must receive a copy of the proposed annual budget at least 30 days prior to its adoption.
- (b) The board must provide the unit owners with an annual itemized accounting of the prior fiscal year.
- (c) If the budget or special assessment adopted by the board would result in all assessments payable in the current fiscal year to exceed 115% of all assessments payable in the preceding fiscal year, then upon written petition by unit owners with 20% of the votes in the association delivered to the board within 14 days of the board action, the board shall call a unit owners meeting within 30 days thereafter to vote on the budget or assessment and, unless a majority of the total votes of unit owners is cast at the meeting to reject the budget or assessment, it shall be deemed ratified.
- (d) Any common expense not set forth in the budget or any increase in assessment over the amount in the adopted budget must be separately (specially) assessed against all unit owners.
- (e) Separate assessments for expenditures relating to emergencies or mandated by law may be adopted by the board alone and are not subject to the unit owners' vote. "Emergency" is defined as "an immediate danger to the structural integrity of the common areas or to the life, health, safety or property of the unit owners."
- (f) Assessments for "additions and alterations to the common areas or to association-owned property not included in the adopted annual budget" must be separately assessed and must be approved by 2/3 of the total votes of all unit owners.
- (g) Multi-year special assessments are permitted.
- (h) The board has authority to establish and maintain master metered public utility services, subject to the Tenant Utility Payment Disclosure Act.

COMMENT: These provisions generally reflect various portions of ICPA Sections 18 and 18.5. Most importantly, budgeting and special assessment adoption procedures are now "condo-like", and any restrictions in the governing documents are statutorily

overridden by this new procedure. Under the CICA Act, the board has greater flexibility and authority in financial matters.

Section 1-50 (Administration of property prior to election of initial board of directors) (For common interest community associations whose declaration is recorded on or after July 29, 2010)

- (a) Prior to turnover, the developer has the rights and obligations of the board.
- (b) Turnover must occur not later than 60 days after conveyance by the developer of 75% of the units or 3 years after recordation of the declaration, whichever occurs first. The developer must give at least 21 days' notice of the election meeting and provide the names, addresses and weighted vote of each unit owner within 3 working days after request; also, unit owners must be provided with the same information within 10 days after request with regard to subsequent election meetings.
- (c) If a turnover is not effectuated as set forth in Subsection (b) above, the developer must resign 30 days thereafter.
- (d) Within 60 days after turnover, the developer must provide various documentation, information and funds to the board and, upon failure to do so after written demand, the developer may be liable for the board's attorney's fees incurred to compel compliance with this provision.
- (e) The unit owners have the right to cancel certain types of contracts, leases or agreements made by the developer prior to turnover and which extend for a period of time of more than 2 years from the recordation of the declaration.
- (f) The statute of limitations for any legal action that the board may bring does not begin to run until turnover.

COMMENT: These provisions generally follow ICPA Sections 18.2 and 18.5. However, the contract cancellation provision of Subsection (e) is garbled.

Section 1-55 (Fidelity Insurance)

Common interest community associations with 30 or more units must obtain fidelity insurance "covering persons who control or disburse funds of the association for the maximum amount of coverage available to protect funds in the custody or control of the association plus the association reserve funds." Management companies which are responsible for association funds must have "a fidelity bond for the maximum amount of coverage available to protect funds in the custody of the management company at any time." The association is to

bear the cost of such insurance and bond, unless the association and management company agree otherwise.

COMMENT: This provision generally reflects the provisions of ICPA Sections 12, 18 and 18.7. There may be some ambiguity as to what actual dollar amount of coverage is required of the association and the management company.

Section 1-60 (Errors and omissions)

- (a) Errors and omissions in the declaration or “other instrument” may be corrected by a vote of 2/3 of the members of the board or by a simple majority vote of the unit owners.
- (b) A “scrivener’s error” regarding “undivided share of the common areas” or of “common expenses” may be corrected by a vote of 2/3 of the members of the board or by a simple majority vote of the unit owners, unless the declaration “specifically provides for a different procedure or different percentage of vote.”
- (c) If the board adopts the corrective amendment, the unit owners can call for a referendum vote on that board action.
- (d) This provision does not invalidate the developer’s reserved right (prior to the deadline for turnover) to make an amendment to comply with secondary mortgage market requirements.

COMMENT: This provision tracks ICPA Sections 18.5 and 27(b). However, Subsection (b) really doesn’t make sense in the common interest community context, since with extremely rare exceptions, common interest community associations do not use percentages of ownership interest but instead use equal shares.

Section 1-65 (Management company)

A management company which holds an association’s reserve fund must maintain a separate account for each association, unless the association authorizes commingling for investment purposes. Similarly, if consented by the association, the management company can commingle the operating funds of different associations but must maintain records identifying each association’s monies. In any event, the management company may not commingle its own funds with the association’s funds.

COMMENT: This Section generally follows the provisions of ICPA Sections 18 and 18.7. There is some contradictory language in this Section regarding segregation of funds.

Section 1-70 (Display of American or military flag)

Generally, a unit owner must be permitted to display the American flag and military flags within the owner's limited common area or on the immediately adjacent building exterior. The board may regulate the display of the American flag in accordance with the United States Code. The board may also adopt reasonable rules regarding display of a military flag as well as the location and size of flagpoles.

COMMENT: This Section essentially adopts ICPA Section 18.6 with minor deviations.

Section 1-75 (Exemptions for small community interest communities [sic])

- (a) A common interest community association which is an Illinois not for profit corporation and has either (1) 10 units or less OR (2) annual budgeted assessments of \$100,000 or less is exempt from the CICA Act, unless it affirmatively elects to be covered by a majority vote of its directors and unit owners.
- (b) A common interest community association whose declaration, bylaws or other governing documents provide that the association may not use the courts or arbitration to collect/enforce assessments, fines or similar levies AND a common interest community association which has (1) 10 units or less or (2) has annual budgeted assessments of \$50,000 or less are exempt from Section 1-30(a), Section 1-40(a) and (b), and Section 1-55 BUT shall be required "to provide notice of meetings to unit owners in a manner and at a time that will allow unit owners to participate in those meetings."

COMMENT: Subsection (a) seems to make sense, but Subsection (b) is confusing and convoluted and smacks of very narrow special interest legislation.

FINAL THOUGHTS

The CICA Act will make all non-condominium associations even more similar to (BUT not the same as) condominium associations. Note that a number of these statutory requirements already applied to common interest community associations via ICPA Sections 18.5, 18.6 and 18.7. As noted above, a substantial portion of the CICA Act simply mimics existing provisions of the ICPA Sections 18, 18.5, 18.6 and 18.7. With such borrowing of ICPA Sections, it is likely that those CICA Act sections will be interpreted by the courts in the same manner as for condominium associations.

Perhaps the biggest "breakthrough" is the imposition of condo-style budgeting and assessment procedures, which does away with the budget/assessment limitations often seen in "older" common interest community association declarations and bylaws.

Similarly, the biggest possibly unintended consequence is the disruption of master association governance by the CICA Act. Many master association boards are comprised of delegates/members, who are appointed or elected to represent a specific underlying association; the CICA Act forces at large election of directors which would shatter that balanced arrangement. To further complicate the situation, the CICA Act did not repeal Sections 18.5, 18.6 and 18.7 of the ICPA. Indeed, ICPA Section 18.5 is specifically titled “Master Associations” and only incidentally included common interest community associations. Thus, a strong argument can be made that master associations should remain under ICPA Section 18.5 and that the CICA Act should be amended to exclude master associations. ICPA Section 18.5 already provides key essential elements (such as budget distribution and annual accounting, open board meetings, developer turnover provisions, unit owner access to books and records, installment contract purchaser rights, notice and opportunity for hearing before fines can be imposed, resale disclosures, correction of declaration/bylaws errors and omissions, and board of directors’ legal standing) which have been in place for over 20 years. Also, the CICA Act would create confusion as to assessment procedures to be used in master associations, since some master associations assess the underlying associations and not the unit owners directly.

Lastly, the irony of the CICA Act is that those constituents who originally lobbied for a “homeowner’s bill of rights” have now been handed a whole new animal, reminding us to be careful what you wish for.

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