

**NAVIGATING TROUBLED WATERS:
LEGAL DO'S AND DON'TS FOR THE SELF MANAGED ASSOCIATION**

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In a speech given in Oak Park, Illinois, November 2, 1932, William Pickens said, “living together is an art.” Although Mr. Pickens most certainly was not referring to life within a condominium, homeowner, townhome or other association, nonetheless, I find the quote an apt description of living in such an association. The difficulties of administering an association are perhaps most significantly understood by self managed associations. A good professional management company is like a competent ship captain steering the association on due course, watching to avoid dangers lurking beneath the surface of daily association life. Whereas, a self managed association may at times feel as if it is hopelessly adrift at sea.

In this article we will explore when a self managed association can safely navigate legal issues that the association may encounter and when the association would be best served by consulting with a knowledgeable attorney. However, first let us take a moment to define what it means to be a self managed association.

There are essentially two types of self management. The first occurs when the association hires an individual (or individuals) as a direct employee to run and administer the association on a daily basis under the direction of the board. The second happens when the board itself takes care of all the association’s business. Also, it is important to note that self management is not reserved solely for the small, under ten unit condominium associations. Large, sprawling homeowner associations can also be self managed. For the purposes of this article, we will discuss when an association should seek legal counsel under three general categories of issues: governance, enforcement, and contractual. Aspects of each category may at

times overlap. Last, we will discuss the concept of a legal audit and the benefits of such an audit for a self managed association, particularly for those associations managed by inexperienced individuals.

Before discussing the categories of issues, it is important to keep in mind that time is of the essence. Attempting to address an issue on its own first can create a more drawn out and costly experience for the self managed association than had it consulted an attorney at the onset of any given issue. Consulting with an attorney early can help prevent an issue from growing into a major problem.

GOVERNANCE ISSUES

Issues that may arise related to the governing of the association can include disputed elections, adopting rules and regulations, amending the declaration or bylaws, levying a special assessment, or approving a capital expenditure. The concern is to ensure that any action by the board or by the members of an association is legally proper and enforceable. From a legal standpoint, the question is always whether the association will prevail if challenged.

One example is voting. Generally, voting is a straight forward exercise of the rights one is entitled to as a member of an association. The election of individuals to serve on the board typically takes place at the annual meeting. Notice is given to all association members, the members attend, a vote is taken and those individuals with the most votes are elected to the board. But what happens when things do not go as expected?

An improperly elected board can have a significant impact on the functioning of the association because any decision made by an improperly elected board could potentially be legally unenforceable.

As a hypothetical example, let us consider that for the past several years two of the five board members of Greenacre Condominium Association have been tenants, not unit owners. Both the condominium declaration and the Condominium Property Act expressly provide that only unit owners can serve on the board. The Greenacre board recently determined that expensive maintenance work is required and to fund the work the board decided to obtain a loan that will be paid back through a special assessment. After the board has closed on the loan and levied the special assessment, a small group of unit owners who do not want to pay the special assessment challenge the board's authority to obtain the loan and levy the special assessment on the basis that the board is not a validly elected board. If the unit owners were to prevail, what would this mean for the association as a whole and the board members individually?

It is important for the individual or individuals managing the association to understand the proper procedures to hold a valid election. If those managing an association have never held an election before, then those individuals could benefit from an overview explanation from an attorney regarding the proper procedures. Even when those managing the association have experience with elections, they could benefit from consulting an attorney when any given election presents a situation that is new and unfamiliar, or raises a question in the mind of any of the managing individuals.

Amending the declaration or bylaws can be another area where consulting an attorney can be beneficial; specifically, it could mean the difference between an enforceable amendment and an unenforceable amendment. The self managed association may face a variety of governance issues. An attorney should be consulted on important issues to ensure that action taken by the board or the members is valid.

ENFORCEMENT ISSUES

By enforcement I refer to the association's rights and remedies when an association member or occupant violates or breaches any given provision of the declaration, bylaws, or even the rules and regulations as promulgated by the board. Almost all, if not all, declarations provide for legal remedies for a violation or breach of the association's governing documents. In turn, most association boards understand that filing a lawsuit can be costly and time consuming, even if the association is entitled to recover its legal fees and costs from the breaching member. In order to conserve valuable association funds, the individual or individuals managing the association may look to alternative means to enforce the association's rights and remedies. The ramifications of pursuing an alternative method of enforcement could prove to be more costly to the association, particularly if the alternative method is not lawful and results in a lawsuit against the association or board of managers.

For example, some declarations provide that the board has the right to enter a unit to eliminate a continuing violation or breach of the declaration, bylaws, or rules and regulations. However, Illinois law does not favor self-help remedies if it involves a possible breach of the peace. In other words, in the event that an owner fails to stop or rectify the violating conduct, activity or situation, the board must first obtain a court order to enter the unit to address the violation.

Another example is imposing a fine on an owner for a violation or breach of the declaration, bylaws, or rules and regulations. The concept of basic due process applies to associations. Therefore, an association typically must first provide notice and the opportunity for a hearing before the board can levy a reasonable fine against a member. It is important to ensure

that a fine is properly levied, otherwise the ultimate collectability of the fine may be in question; especially when the member refuses to pay the fine.

When addressing a violation or breach of the association's governing documents, consultation with a knowledgeable attorney can assist a self managed association in appropriately addressing the situation without opening itself up to potential liability.

CONTRACTUAL ISSUES

The category of contractual issues encompasses any situation in which the association enters a contract, including but not limited to, management, cable TV, construction, or financing. It can be beneficial to have any contract reviewed by an attorney prior to signing. However, recognizing that associations are cost conscious, it is recommended at a minimum that all contracts that involve a significant dollar amount or risk of liability be reviewed by an attorney.

For example, substantial exterior repair work to an association building may involve multiple areas of construction. In such a situation the association may hire a general contractor who will in turn hire subcontractors to perform certain aspects of the repair work. Construction work involves risk and liability concerns for all parties involved, and the use of subcontractors can raise additional risk and liability concerns. The association should ensure that the contract provides the fullest amount of protection possible.

Often related to expensive building repair or maintenance is financing. Collateralization issues can be one of the most significant issues that arise when an association obtains a loan. Also, there may be procedural requirements pursuant to the law or to the association's governing documents that the board must follow to properly obtain financing. A self managed association would serve itself well to have an attorney not only review the loan documents, but also provide guidance regarding any procedural requirements.

LEGAL AUDIT

Last, a legal audit can be a useful tool in setting a course for effective self management, particularly for those associations whose board members perform all management duties. On a basic level, a legal audit takes place when an attorney performs a general review of the associations governing documents and operating procedures to ensure compliance with the law. The scope of the legal audit can depend on the association's needs.

A board whose members perform the management duties but have no experience could benefit from a "how to" overview. A legal audit can also determine whether any provisions of the association's governing documents are out of date with regard to the law. For example, the Illinois Condominium Property Act continues to change. Generally, any provisions found in the association's governing documents contradictory to the provisions of the Act are not applicable. The Act controls in such circumstances. The attorney performing the legal audit can inform the self managed association whether any provisions of the governing documents are no longer valid.

A legal audit can be used to prepare a basic operating manual for the manager or managers to follow. Specifically, such manual may set forth the proper procedures for noticing and holding a meeting, adopting a budget or special assessment, conducting hearings on violations, and the like. It can also clarify which provisions of the governing documents have been changed by the Illinois Condominium Property Act. Overall, a legal audit and drafting of a basic operating manual can be helpful in ensuring correctness and regularity in the management of the association, especially as the board members change.

CONCLUSION

In summary, although it can be daunting and challenging, self management is not impossible and in some cases, a practical necessity. Those in charge of managing the association (whether a direct employee or employees or the board itself) need to recognize when governance, enforcement, or contractual issues involve a legal issue beyond the capability of the manager or managers, requiring the assistance of knowledgeable legal counsel. Remember, it is best to consult an attorney before an issue grows into a major problem. Retaining an attorney to perform a legal audit can go a long way toward ensuring the functionality of the association and easing the uncertainty of routine aspects of management. A self managed association will be able to safely navigate the troubled waters of legal issues by teaming up with and turning to a trusted attorney for assistance at critical times.

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