

MICHAEL C. KIM

MICHAEL C. KIM & ASSOCIATES

“OPERATION OF AN OFFICE CONDOMINIUM ASSOCIATION”

February 13, 2009

LORMAN EDUCATION SERVICES

“Issues Concerning the Development, Creation and Operation of an Office Condominium Association”

February 13, 2009
Chicago, Illinois

MICHAEL C. KIM TOPICS:

Operation of an Office Condominium Association

A. Governing Procedures – Board of Directors

1. Fiduciary Duty
2. Election
 - a. At Large
 - b. Proxies
 - c. Direct Ballot
3. Meetings
 - a. Open v. Closed Meetings (Sessions)
 - b. Notice Requirement
 - c. Practical Pointers
4. Powers and Duties – Section 18.4

B. Principles of an Office Condominium Association

1. Condominium Concept
2. Regulatory/Enabling Statute

C. Pitfalls and Problems

1. Private Restrictions – Hidden Harbour Estates v. Norman
2. Expansion Issues
3. Tied to Residential Condominium Legislation

D. Budgets and Assessments

1. Budget procedure/requirements – Section 9
2. Assessment procedure – Section 18(a)(8)
3. Limited Common Element/responsibility or chargeback
4. User Charges/Insurance premiums and deductibles
5. Late charges/interest charges

E. Covenants, Rules and Regulations

1. Apple II case/categories of restriction
 - a. Category One: Recorded; Supermajority to change; unconstitutional, against public policy or totally arbitrary; can be a little unreasonable.
 - b. Category Two: Board discretion; must be reasonable.

2. Amendment

- a. Use restriction
- b. Rental restriction
- c. Section 27(a) and (b)
- d. Unit Combination or subdivision
- e. Limited Common Element transfer

3. Enforcement

- a. Fines
- b. Forcible Entry and Detainer (Eviction)
 - (i) Assessment delinquency
 - (ii) Termination of tenant occupancy
- c. Section 9.2 remedies

A. GOVERNING PROCEDURES – BOARD OF DIRECTORS

1. Fiduciary Duty

It is fundamental that directors of a condominium association have a fiduciary duty to the Association. Illinois Condominium Property Act (the “Act” or “ILCPA”) Section 18.4 and Wolinsky v. Kadison, 114 Ill. App.3d 527 (1st Dist. 1983), and that duty requires strict adherence to the governing documents. Wolinsky v. Kadison, *id.* Fiduciary duty is in turn based upon the duty of care (to act as a reasonably prudent person) and the duty of loyalty to the Association (and avoidance or proper handling of conflicts of interest).

In Illinois, the Board’s decisions have been evaluated purportedly in light of the business judgment rule. See Carney v. Donley, 261 Ill. App. 3d 1003 (2d Dist. 1994), Yorkshire Village Association v. Sweasy, 170 Ill. App.3d 155 (2d Dist. 1988). See also, Levandusky v. One Fifth Avenue Apartment Corporation, 553 N.E.2d 1317 (N.Y. Court of Appeals, 1990). However, the Illinois cases have used unfortunately mixed terminology, which does not draw a clear distinction between the business judgment rule and the rule of reasonableness.

Exculpatory clauses in condominium governing documents in favor of the Board members have been upheld. Kelley v. Astor Investors, Inc., 106 Ill. 2d 505 (1985). Such a clause will be strictly construed, and it has been found that, as used in such clauses, the exception for “fraud” could very well be an exception which swallows most of the exculpation. See LaSalle National Trust v. Board of Directors of the 1100 Lake Shore Drive Condominium, 287 Ill. App.3d 449 (1st Dist. 1997).

While claims for breach of fiduciary duty are often covered by and defended under the Association’s directors and officers’ liability insurance, such insurance may not be available for intentional acts, violation of penal statutes and punitive damages. In addition, when an Association makes a switch in type of coverage (esp. “claims made” to “occurrence” coverage), the Board must be careful to avoid creating gaps in its coverage.

Finally, note that if the Board wrongfully fails to take action against a party (e.g. the developer), then the unit owners may have a derivative claim against the board for such failure. See Poulet v. H.F.O., L.L.C., 353 Ill.App.3d. 82, 100 (1st Dist. 2004) (“In addition, we note that our finding in this case does not bar individual unit owners from obtaining relief in the event that the Association fails to take action against third parties. In that event, as noted in Siller, individual unit owners could protect any interest they have in the Association’s funds by bringing a derivative action against the Association.”)

2. Election

One of the mandatory annual events in a condominium is the annual meeting of the members (unit owners), one purpose of which is to elect members to the Board. ICPA Section 18(b)(3). Such a meeting must be noticed in writing to all members not less than 10 nor more than 30 days in advance. ICPA Section 18(b)(6). The quorum for the meeting is statutorily set at 20% for associations having 20 or more units, unless a majority of the owners vote for a higher percentage. ICPA Section 18(b)(1). Voting is to be done on a percentage of ownership interest basis, unless the By-Laws expressly provide for 1 vote per unit. ICPA Section 18(b)(7). If multiple persons own a unit and only one is present, that person may cast all votes allocated to that unit; otherwise, the votes may be cast only in accordance with the agreement of the majority in interest of the multiple owners. ICPA Section 18(b)(8). Unless otherwise provided in the Association’s articles of incorporation or by-laws, an owner may vote by proxy which must bear the date of execution and which will expire after 11 months from the date of execution (unless otherwise provided in the proxy). ICPA Section 18(b)(9). The election may be conducted by secret ballot (whereby the ballot bears only the unit’s percentage interest and the vote itself) if the Board adopts rules for such procedure. ICPA Section 18(b)(10). Each candidate for the Board (or his/her representative) is entitled to be present at the counting of the ballots. ICPA Section 18(b)(10). A resident installment contract purchaser of a unit is entitled to vote for the

unit and run for the Board unless the contract seller reserves such rights in writing. ICPA Section 18(b)(11). If 30% or fewer of the units, by number, possess more than 50% in the aggregate of the votes in the association, any percentage vote will be calculated on the basis of the number of units, provided however, that parking space units and storage space units are to be disregarded in that computation. ICPA Section 18(p). Directors are limited to 2 years terms, but may succeed themselves. ICPA Section 18(a)(11). At least one third of the directors' terms must expire annually, creating a possible confusion (i.e. are 3 year terms permissible?). ICPA Section 18(a)(1). A director must be a unit owner, but only one person can be elected from a unit owned by multiple persons. ICPA Section 18(a)(1). The Board may disseminate the candidates' biographical and background information to the owners, but only if reasonable efforts are made to identify all candidates, all of whom must be afforded the opportunity to submit such information and if the board does not express a preference for any candidate. ICPA Section 18(a)(17). Similarly, any proxy distributed by the Board for an election must give the owner the opportunity to designate any person as a proxy and the opportunity to express a preference for any of the known candidates or to write in a name. ICPA Section 18(a)(18).

ICPA Section 18(b)(9) expressly allows the use of absentee (or direct ballot) voting under certain limited conditions. ICPA Section 18(b)(9) does not eliminate the use of proxies, where absentee voting is available. The procedure is as follows: If a rule is adopted by the ~~Board~~ at least 120 days before the Board election

if the Declaration and By-Laws (either originally or ~~presumably~~ by proper amendment) provide for absentee voting in accordance with ICPA Section 18(b)(9)(B), unit owners may

vote by proxy but may vote only by submitting ~~an~~ Association-issued ballot in person at the election meeting or by submitting an Association-issued ballot to the Association or its designated agent by mail or other means of delivery (specified in the Declaration, By-Laws or rule). The ballots must be mailed or distributed to the unit owners not less than 10 nor more than 30 days before the election meeting. The Board must

give unit owners not less than 21 days prior written notice of the deadline for including a candidate's name on the ballot forms and the deadline for submitting a candidate's name cannot be more than 7 days before the ballots are to be mailed or distributed to the unit owners. The ballot must include the names of all candidates who have given the Board or its agent timely written notice of their candidacy. The ballot must give the unit owner the opportunity to cast votes for candidates whose names do not appear on the ballot (that is, the ballot must allow for a write-in candidate to be written in by the voting unit owner). Any ballot received by the Association or its agent after the close of voting (at the election meeting) cannot be counted. A unit owner who submits his or her ballot by mail or other means of delivery specified in the Declaration, By-Laws or rule may request and cast a ballot in person at the election meeting, thereby voiding any ballot previously submitted by that owner.

If the Board adopts the foregoing absentee voting procedure by a rule, if a written petition is filed by unit owners having at least 20% of the votes in the Association within 14 days of that rule adoption, the Board must call a meeting of the unit owners within the ensuing 30 days. At that meeting, unless a majority of the total votes of all unit owners in the Association are cast to reject the rule, the rule is deemed ratified.

Note absentee voting does not constitute presence at a meeting; thus, the association must still obtain a quorum (and can use proxies for that purpose or for voting on matters other than Board elections) for that meeting.

A special election to fill a director vacancy on a condominium Board is possible by petition of the owners under Section 18(a)(3) of the Act.

Ideally, rules and guidelines for recount rights should be established before the election, and all election materials (esp. the ballots, proxies and registration documents) should be secured in the event that a recount is properly obtained. Typically, the right to challenge an election expires upon the next election. See Adams v. Meyer, 250 Ill. App. 3d 477 (1st Dist. 1993).

3. Meetings

Modeled after the concept of “open meetings” related to governmental bodies, the Act requires that, in general, a Board of Directors meeting must be open to observation by the unit owners. ICPA Section 18(a)(9). Note that “observation” is not equivalent to “participation”, and only the directors are entitled to participate in the Board meeting. It is very common for a Board to have a “unit owners forum” or similar opportunity of limited time (typically 15-30 minutes in total) afforded to owners present at its meeting to raise questions and/or address comments or matters of concern to the Board; in that regard, the Board should be judicious in dealing with such items (e.g. answer questions which can be fully answered immediately, and refer any other items to appropriate persons for follow up and subsequent response). Beyond that, it is usually unwise to allow unit owners to interject themselves into the conduct of business at the Board meeting.

Initially, it is essential to address the fundamental issue of what constitutes a “meeting”. The Act presently defines a meeting as “any gathering of a quorum of the members of the Board...held for the purpose of conducting Board business.” Importantly, the prior definition was a gathering of a majority of a quorum of the Board to discuss Board business. Impliedly, “conducting” business is not the same as “discussing” business, with the former indicating some kind of action being taken by the Board. It is very common for Boards to conduct “workshops” or “pre-meeting” sessions among the directors only for purposes of organizing and preparing for the actual Board meeting itself. Such gatherings are not prohibited by the Act and are likely not “meetings” subject to the open meetings requirements. However, caution must be taken to avoid the evolution of such a gathering into a de facto meeting (for example, the making of decisions, the taking of minutes).

Written notice of a meeting of the Board must be given to “the person or persons entitled to such notice pursuant to the declaration, bylaws, other condominium instrument, or provision

of law other than this subsection [18(a)(9) of the Act]” at least 48 hours before the meeting is convened; typically, this notice requirement only applies to the directors, although on rare occasion, the condominium documents require such notice must be given to all the owners. Often the Board establishes and publishes to all owners a schedule of its regular meetings (for example, the Third Tuesday of each calendar month) or includes such notice with the monthly assessment invoices. In addition the Board must post notice of its meeting “in entranceways, elevators, or other conspicuous places” at least 48 hours prior to the meeting; if there is no common entranceway for 7 or more units, the Board may designate one or more locations in the proximity of these units where meeting notices shall be posted. Note that Board meetings to consider a budget or assessment (which must be noticed in writing to all owners not less than 10 nor more than 30 days in advance) must also be posted 48 hours in advance.

Open portions of the Board meeting may be observed by any unit owner, who may also record such proceedings by tape, film or otherwise; however, the right to record is subject to reasonable rules prescribed by the Board (for example, to prevent unnecessary interference with the conduct of the meeting by specifying where video cameras and related lighting may be positioned). Usually, an owner will record the meeting only if that owner has some grievance or suspicion of the Board and its handling of a particular matter. It should be noted that in general, such recordings do not constitute the minutes of the Board meeting, although they may be used to refute the official account of what transpired at a meeting.

Most “open meeting” disputes relate to the Board’s prerogative to conduct “closed” or “executive” sessions, which are not open to the owners and not subject to the owners’ recording of those proceedings. The Act identifies only three situations in which the Board may (

“shall”) conduct a closed session, namely “(i) to discuss litigation when an action against or on not behalf of the particular association has been filed and is pending in a court or administrative tribunal, or when the board... finds that such action is probable or imminent, (ii) to consider

information regarding appointment, employment or dismissal of an employee, or (iii) to discuss violations of rules and regulations of the association or a unit owner's unpaid share of common expenses [assessments]." Note that the closed session is limited to "discuss" and "consider",

to

not

on such matters; indeed, the Act expressly states that "any vote on these [closed session] matters shall be taken at a meeting or portion thereof open to any unit owner [i.e. a open meeting]." ICPA Section 18(a)(9).

The rationale underpinning situations (i) and (ii) are obvious, although it is unclear whether situation (ii) can be used to shield discussion related to selection of a managing agent or contractor, who is typically an independent contractor. Situation (iii) is valuable to avoid premature and potentially damaging (in terms of personal reputation) disclosure of alleged misconduct by an owner; usually, a Board will conduct its own internal hearing on an allegation in closed session, with the determination or finding being made in open session.

Also, it is not unusual for the Board to take action without a meeting by way of a telephone or e-mail poll of its members due to an emergent situation requiring immediate action (for example, to respond to an emergency injunction lawsuit set for hearing within 24 hours; to obtain contractor services to secure the condominium property in a natural disaster), subject to such action being ratified by a vote at the next opportune open meeting. Technically, although a Board decision made without an open meeting is arguably void, such deficiency is readily correctable by ratification. However, the Board should avoid the practice of making non-emergency decisions by such informal Board action, as it circumvents the spirit of the open meetings provisions.

4. Powers of Duties – Section 18.4

~~ICPA Section 18.4 with the statutory language and the Board of Directors powers~~ the Board with and limited role for the unit owners. In fact, the unit owners are only vested with such "powers,

~~financial authority and the condominium instruments) to them.~~

ICPA Section 18.4(a) makes it clear that replacement or restoration of the common elements could be characterized either as “identical replacement” or with the “functional equivalent” of the item being replaced. If there is identical replacement, there is no limit on the Board’s expenditure authority. If there is replacement with “functional equivalent” and an improvement over original quality, then if the added costs of the improvement is greater than 5% of the annual budget, the Board’s authority is subject to petition and referendum rights of the unit owners. There is no expenditure limitation on expenditures required by law or necessitated by an emergency situation.

ICPA Section 18.4(h) expressly empowers the Board to adopted and enforce rules and regulations. Proposed rules must be subject to unit owners’ discussion before adoption and cannot impair any rights guaranteed by the First Amendment of the Federal Constitution or Section 4 of Article I of the Illinois Constitution. Such First Amendment “protection” may be at odds with the typical commercial or retail setting. Fines can be imposed for rules violations but only after notice and opportunity for a hearing. See Section 18.4(l).

ICPA Section 18.4(j) authorizes the Board to have access to units for maintenance, repair or replacement of any common elements.

ICPA Section 18.4(l) allows the Board to impose late charges with respect to assessments.

ICPA Section 18.4(m) allows the Board to pledge assessment receivables to secure a loan but only if there is no contrary or other provision in the condominium instruments.

ICPA Section 18.4(p) allows the Board to get involved in challenging real estate tax valuations.

B. PRINCIPLES OF AN OFFICE CONDOMINIUM ASSOCIATION

1. Condominium Concept

There are two basic types of property in a condominium: the individual units (must be at least 2 units), which are owned individually, and the common elements, which are owned by all the unit owners in accordance with their respective percentages of interest. Typically, a unit is the airspace (and contents thereof) enclosed by horizontal boundaries (that is, ceiling and floor) and vertical boundaries (that is, the four walls), as depicted on a drawing (that is, a plat of survey). Common elements in turn are subdivided into limited common elements (that is, reserved for the exclusive use of one or more but less than all unit owners), which are often parking spaces, storage areas, doors, windows and perimeter walls, and other such items, and general common elements which are theoretically available and accessible to all unit owners.

2. Regulatory/Enabling Statute

The Illinois Condominium Property Act, which was first enacted in 1963, governs all types of condominium (both residential and commercial) and all sizes of condominiums. Many of the Act's provisions may be better suited to residential developments and frankly, commercial condominiums have not been the focus of legislative activity. Note that ICPA Section 12(j) states that the insurance requirements of that Section "may be varied or waived in the case of a condominium community in which all units are restricted to nonresidential use." Thus, to the extent that the Act does expressly or possibly impliedly allows variation, the commercial condominium declaration and bylaws should try to take advantage of those opportunities, such as insurance customization, limited common element classification and chargeback, unit subdivision and combination provisions, rights/options of first refusal, and use of more sophisticated dispute resolution mechanisms.

C. PITFALLS AND PROBLEMS

1. Private Restrictions

In 1975, the Florida Appellate Court characterized the condominium arrangement in language which has been repeated over the decades. In its case of Hidden Harbour Estates v. Norman, 309 So. 2d 180, 181-82 (Dist. Ct of Appeal, 1975), the Florida Court of Appeal proclaimed: “It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to the use of condominium property than may be existent outside the condominium organization.” That quoted language reflects the underpinning of condominium regulation and restrictions. Consequently, in an office condominium, regulatory power is concentrated in the hands of the Board of Directors and the Board and the condominium instruments can affect a wide range of issues and concerns such as hours of operation, signage, parking regulations, exterior appearance, types of permitted use, and use of common facilities.

2. Expansion Issues

For some business, the ability to expand or contract is a major consideration. In an office condominium, the adjacent unit may be owned by another party who has no interest in surrendering or selling his unit and the Board of Directors has no power to mandate relocation. Rights of first refusal to an adjacent unit are only effective if that unit is being sold. Alternatively, an individually negotiated option to purchase a unit may be available only if the owner of the optioned unit is open to relocation. Conversely, there is no realistic contraction or “go dark” alternative to avoid ownership obligations, especially the condominium assessment. Thus, the office condominium unit owner should be very aware of this issue and its possible solutions (such as purchasing additional units to bank expansion space which could be rented out in the interim, as well as rights of first refusal for even additional contiguous space).

Unless and until office/commercial condominiums can make their distinct concerns and needs known to legislators, it is likely that condominium legislation will be oriented to residential condominiums even though such legislation may be irrelevant or ill suited to an office condominium. Perhaps a separate non-residential condominium statute or subpart of the existing statute may be the best method to fully address the situation. Until such a time, the challenge remains to adapt the residential oriented Act to a commercial setting, and that effort requires careful planning and possibly avoidance of the dominant document forms and provisions which have a residential flavor/bias.

D. BUDGETS AND ASSESSMENTS

1. Budget Procedures/Requirements – Section 9

Assessments are the financial lifeblood of the Association. Assessments fall into two categories: “regular” or “annual” assessments which are calculated on the basis of the annual budget and are typically a fixed amount payable in advance on the first day of the calendar month; and “special” assessments which are levied due to a particular need for additional funds for unforeseen or emergency events.

As indicated above, regular assessments are based on the annual budget. Section 9(c) of the Act requires the condominium association’s Board of Directors to prepare and distribute to all owners “a detailed proposed annual budget setting forth with particularity all anticipated common expenses by category as well as all anticipated assessments and other income”. In addition, the proposed budget must set forth “each unit owner’s proposed common expense assessment”, which share is based in turn upon the owner’s percentage of ownership interest in the common elements (see ICPA Section 9(a)). The distribution of the budget must be made at least 30 days prior to the adoption of that budget by the Board. ICPA Section 18(a)(6). There must be strict adherence to the adoption procedure or else the budget may not be valid.

Beginning in 1990, condominium associations are required by the Act (in addition to any requirements in the governing documents) to maintain “reasonable reserves for capital expenditures and deferred maintenance, repair and replacement of the common elements.” ICPA Section 9(c)(2). In determining the amount of such “reasonable reserves,” the Board must consider “(i) the repair and replacement cost, and the estimated useful life, of the property which the association is obligated to maintain, including but not limited to structural and mechanical components, surfaces of the buildings and common elements, and energy systems and equipment; (ii) the current and anticipated return on investment of association funds; (iii) any independent professional reserve study which the association may obtain; (iv) the financial impact on unit owners, and the market value of the condominium units, of any assessment increase needed to fund reserves; and (v) the ability of the association to obtain financing or refinancing.” With respect to these five factors, items (i) and (iii) are essentially the same. Usually, item (ii) is offset in part or in whole by inflation. Item (iv) is intended to allow an Association to avoid full funding of reserves if the owners have limited financial means or to prevent extreme negative impact on unit market values (since assessments are considered a part of housing cost, similar condominiums may be differentiated in the market by assessment rates). As for item (v), in the last decade, financing of major capital projects by condominium associations has been a growth industry, with no signs of abatement; indeed, such financing has become a necessity for many associations.

The obligation to provide reasonable capital reserves is not only mandated by the Act but often in the governing documents of the condominium association. Furthermore, recent caselaw has found a common law duty to fund reserves. Maercker Point Villas Condominium Association v Szymski, 215 Ill. App.3d 481 (2d Dist. 1995).

A condominium association may waive its statutory reserve requirements in whole or in part by a 2/3 vote of the total ownership, as well as to opt back into them by a similar vote. ICPA Section 9(c)(3). However, if there is a reserve requirement in the governing documents, the statutory waiver will not negate that requirement which can only be modified by an amendment to the documents. Furthermore, waiver of the statutory reserve requirements must be accompanied by full, prominent disclosure in the association's financial statements and will immunize the Board and the association's managing agent against liability for any shortfall in reserves. ICPA Section 9(c)(4).

2. Assessment Procedure – Section 18(a)(8)

The budget adoption procedure in condominiums is also addressed in Section 18 of the Act. The Board must give all owners individual written notice of any of its meetings concerning the establishment of a budget or assessment; such notice must be given not less than 10 nor more than 30 days prior to the meeting. ICPA Sections 18(a)(8)(i) and 18(b)(6).

One area of possible confusion to condominium associations is what limits on assessments apply to what circumstances. In general, the Act address three possible situations: (1) a separate/special assessment for an emergency or legally mandated situation, (2) a separate/special assessment for addition or alteration of common elements (or association-owned property) that is not provided in the current budget, and (3) everything else. The statutory treatment is as follows:

(1) If a separate/special assessment is required for expenditures related to an emergency or mandated by law, the Board may adopt an assessment of any amount without any approval by the unit owners. "Mandated by law" generally refers to building code or other statutory/regulatory requirements and commonsensically, such items should not be frustrated by refusal of the unit owners to pay. "Emergency" is specially defined in the Act as "an immediate danger to the structural integrity of the common elements or the life, health, safety or property of

of this situation' need not be sudden cause expected but rather the

must be immediate. Thus, window deterioration may have accrued over 20 to 30 years, but when the windows no longer keep out the elements or even fall to the street below, such a situation constitutes an "emergency". Of course, these may be a grey area as to when the emergent situation arises. Often, it is very useful to obtain substantiation by means of an architect or engineer's professional opinion. Note that the "mandated by law" and "emergency" situations often overlap. Finally, there may be sub-issues as to responsibility for the situation (for example, construction defect caused by developer; failure to properly maintain the property by prior Boards of Directors, and the like).

(2) If the assessment relates to additions or alterations of the common elements or to association-owned property which are not emergencies/mandated by law and were not included in the adopted annual budget, the assessment must be separately adopted by a 2/3 vote of all unit owners. As indicated, this situation does not involve an emergency or legally mandated work; otherwise such additions or alterations would be covered under scenario #1, above. The ideal way to deal with this situation is to not let it occur; in other words, if at all possible, defer such work until it can be included in an annual budget, which then only becomes subject to the constraints of the next scenario #3, below.

(3) For all other situations and generally, if the budget or separate/special assessment adopted by the Board of Directors would result in the sum of all regular and separate/special assessments payable (note "payable",

"paid") in the current fiscal year to exceed 115% of the sum of all regular and separate/special assessments payable during the preceding fiscal year, then if unit owners having 20% of the total votes in the association deliver a written petition to the Board within 14 days after the adoption of the budget or assessment, then the Board within the ensuing 30 days must call (QUERY: "call" meaning to conduct/hold or notice up?) a meeting of the owners to consider the budget or assessment; however, unless a

majority of all votes in the association are cast at the meeting to reject the budget or assessment, it shall be deemed ratified. Essentially, the Board can adopt up to a 15% increase over the prior year's budget and special assessments without any unit owner involvement or interference. If the Board exceeds the 15% threshold, the ultimate issue is whether a majority of all the votes will support the Board's action; if so, even assuming a properly and timely filed petition by owners challenging the Board's action, that attempt will fail at the meeting called thereby. ICPA Section 18(a)(8).

Condominium associations are expressly authorized to levy multi-year special assessments (that is, an assessment which extends beyond one budget/fiscal year). For purposes of determining the applicability of scenario #3 above, the entire amount of the multi-year assessment shall be deemed to have been considered and authorized in the first fiscal year in which it is approved. ICPA Section 18(a)(8).

Lastly, a condominium association is statutorily required to provide the owners with an annual itemized accounting for the preceding year, "with a tabulation of the amounts collected pursuant to the budget or assessment, and showing the net excess or deficit of income over expenditures plus reserves" ICPA Section 18(a)(7). The Act does not specify how a surplus or deficit is to be handled. It is common that the governing documents will provide that a surplus is to be credited to the owners' individual accounts against the ensuing year's assessments. Alternatively, some associations vote to place the surplus into the capital reserve account (to both bolster such funds and avoid adverse income tax implications). It would be extremely rare for an association to actually refund excess assessment payments to the owners. As for deficits, such amounts are typically folded into the ensuing year's budget, although some governing documents require that the deficit be paid within a set period of months at the beginning of the ensuing fiscal year.

The proper adoption of budgets and special assessments is critical. Not only is compliance with statutory requirements mandatory, but an improperly adopted budget or special assessment is vulnerable to an owner's refusal to pay.

3. Limited Common Element/Responsibility or Chargeback

ICPA Section 9(e) states that "the condominium instruments may provide for the assessment, in connection with expenditures for the limited common elements, of only those units to which the limited common elements are assigned."

Note that limited common elements ("LCEs") may be parking spaces, perimeter walls, windows, doors, ceilings, HVAC systems, plumbing and electrical lines and other improvements. Such LCEs may be shared by some (but less than all unit owners); thus, an LCE roof could be shared by only the owners of units in a certain building of a multi-building complex or an LCE common hallway could be shared only by the owners of units on that floor of a multi-story building. Generally, to create a new LCE out of general common elements will require unanimous approval of all unit owners. See Carney v. Donley, 261 Ill.App.3d 1002 (2d Dist. 1994).

The LCE chargeback provision often takes one of two forms: (a) The unit owner must cause the work to be done at his own expense or (b) The Board has the option to have the work performed but the unit owner is financially responsible. Often "b" is selected as it allows the Board to control the timing and quality of the work. A third variant allows the Board to exercise its discretion in charging or not charging back for a particular expense or under certain circumstances. If discretion is to be exercised, the Board must do so in a reasonable, fair and uniform manner.

4. User Charges/Insurance Premiums and Deductibles

The Act does not expressly allow for "user charges" but in ICPA Section 12, a unit owner may be directly charged for improvements and betterments-related premiums (Section 12(b)) and

for deductibles (Section 12(c)). Nonetheless, it is commonplace for an association to charge for use of certain facilities (for example, conference room use) and services on a “user fee” basis. Unless and until there is a judicial resolution of the issue, the practice will likely continue even though not supported by any statutory provision.

5. Late Charges/Interest Charges

ICPA 18.4(l) permits the Board to impose a late charge for tardy payment of assessments. Such a late charge must be reasonably related to the harm caused by late payment and cannot be imposed more than once for the same late assessment installment. See Hidden Grove Condominium v. Crooks, 318 Ill.App.3d 945 (3d Dist. 2001). Interest is not provided in the Act but can be provided in the condominium declaration/bylaws and presumably assessments for a commercial condominium will not be subject to any usury restrictions.

E. COVENANTS, RULES AND REGULATIONS

1. Apple II Case

277 Ill.App.3d 345 (Ill. App. 3d Dist. 1995), Apple II Condominium Association v. Worth Bank and Trust Co.,

Dist. 1995), the Illinois Appellate Court addressed the two types of restrictions on the use of property in a condominium setting. In borrowing from Florida caselaw, the Appellate Court distinguished between restrictions which are found in the declaration which is recorded against the condominium property and require a super majority of unit owners to amend (Category One) versus those restrictions imposed by rules adopted by the Board alone or result from the exercise of the Board’s discretion (Category Two). With respect to Category One restrictions, if challenged by a unit owner, the burden is on the unit owner to prove that the restriction is “wholly arbitrary, against public policy or in violation of some fundamental constitutional right,” and that restriction can even be a little unreasonable yet still be enforced. However, as to a Category Two restriction, if challenged by a unit owner, the Board has the burden to prove the restriction “to be reasonably related to the promotion of the health, happiness or peace of mind of

the unit owners” or else it will be invalid. These guiding principles must be kept in mind in evaluation any property restriction in the condominium.

2. Amendments

a. Use Restrictions

Use restrictions are a critical aspect of the condominium governing documents. Private restrictions on property use may be stricter or more narrow than public zoning. Although society generally favors the free use and alienability of private property, restrictive covenants will be strictly enforced by the Courts. It is important that the office condominium unit owner identify the permitted uses for his unit and the safeguards against any future restriction or charge therein, whether by specific veto rights or by mandatory time delay or grandfather or other device. This situation should be addressed with the developer at the outset of the project if the project is still nascent but will be more challenging if the project has been long established. Similarly, “exclusive use” rights should be considered if there is a need to have exclusivity of a certain service being provided to the public.

b. Rental Restrictions

While permitted under Illinois case law, a rental restriction could be financially fatal to an office condominium unit owner and thus should be made difficult (if not impossible) to achieve or else have sufficient safeguards built into the existing declaration (for example, requiring delayed effective dates, verifying whether there is sufficient voting power for the unit to block any unwanted amendments, or requiring consent of leased units mortgagees).

c. Section 27(a) and (b)

Governing documents typically include the declaration, by-laws, rules and regulations, plats of survey, and, if incorporated, the articles of incorporation. In general, changes to the declaration, by-laws, plats of survey and articles of incorporation require approval by a majority (if not supermajority) of the association members. Older documents sometimes specify a very

high supermajority, sometimes 80% or even unanimity. Condominium rules and regulations are amendable by Board action alone.

Although somewhat convoluted, by a recent amendment to ICPA Section 27(a), the maximum vote to amend a condominium declaration or by-laws is capped at 75%, but in general, the Act states that amendment of the “condominium instruments” (that is declaration, by-laws and plat) must obtain “the affirmative vote of 2/3 of those voting or upon the majority specified by the condominium instruments,” together “with the approval of any mortgagees required under the provisions of the condominium instruments.” ICPA Section 27(a). Note that the Act does specify unanimous consent to change percentages of ownership interest (ICPA Section 4(e)) and certain other types of changes (ICPA Section 6), with exceptions for unit subdivision and combination (ICPA Section 31), add-on amendments reserved by the developer (ICPA Section 25), and transfer of limited common elements (ICPA Section 26). Mortgagee consent (either by action or inaction) is often included in the condominium instruments. Amendments must be recorded to become effective. The amendatory procedure must be followed faithfully. See Streams Sports Club v. Richmond, 99 Ill. 2d 182 (1983).

Finally, under Section 27(b) of the Act, the Board of a condominium association may adopt certain types of amendments on its own authority, without approval by the owners. Such amendments are limited to scrivener’s errors or to correct an error or omission in order to conform the document to the requirements of the Act or other statute. This procedure does require notification to the owners who may petition to consider the Board’s action. The Section 27(b) procedure cannot be utilized if such amendment “would materially or adversely affect property rights of the unit owners unless the affected unit owners consent in writing.” ICPA Section 27(b)(4). See Schaffner v. 514 West Grant Place Condominium Ass’n, Inc., 324 Ill.App.3d 1033 (1st Dist. 2001) and Husky v. Board of Managers of Edelweiss, Inc., 297 Ill. App. 3d 457 (1st Dist. 1998).

d. Unit Combination or Subdivision

The Declaration should permit unit combination or subdivision in accordance with ICPA Section 31.

e. Limited Common Element Transfer

The Declaration should permit the transfer of limited common elements in accordance with ICPA Section 26.

3. Enforcement

a. Fines

Enforcement of rules by way of monetary fines is a recognized power of a condominium association. ICPA Section 18.4(1). Such internal disciplinary proceedings must afford notice and opportunity for a hearing to the accused violator. Fundamental due process should be followed, including such components as the right to be apprised of the alleged violation, the right to confront adverse witnesses, the right to produce evidence in defense against the charges, and the right to an unbiased hearing panel. Importantly, monetary fines must be “reasonable”, especially in the context of the seriousness of the offense and the overall circumstances. Some associations have a set schedule of fines, while others decide on a ad hoc basis. Similarly, some associations have a detailed written enforcement policy and related forms, while others use very general guidelines. Often, the parties (that is, the accuser and the accused) are allowed to have their personal legal counsel present as advocates although there is no requirement under the law.

b. Forcible Entry and Detainer (Eviction)

(i) Assessment Delinquency

Unique among the States, Illinois permits the eviction of a unit owner for failure to pay assessments, fines or other monetary obligations. The process is commenced with a 30 day demand letter. The case is prosecuted similar to a landlord-tenant matter. However, if the Association obtains a judgment against the unit owner, enforcement of the possession order must

be stayed for a minimum 60 days (and maximum 180 days) within which time the owner can pay the judgment and come current with assessment BUT the collection of the money judgment is not stayed. If the eviction is ultimately effectuated, the Board can either get a turnover order to have the unit's tenant pay rent directly to the Board or evict the tenant and put in a tenant of its choice until the delinquency is resolved.

(ii) Termination of tenant occupancy

If a unit owner fails to abide by the leasing provisions of the Association or if a tenant violates the governing documents of the Association, pursuant to ICPA Section 18(n) and the eviction statute, the Board can evict that tenant at the landlord/unit owner's expense.

c. Section 9.2 Remedies

ICPA Section 9.2 is a broad remedial provision which allows the Association to take enforcement action against the unit owner for violations caused by the owner, his tenant, invitee or guest, whether such action is violative of the condominium governing documents or any applicable law. Remedies include eviction. Also, the Association's enforcement expenses, including attorney's fees, are chargeable back to the unit owner.