

RULEMAKING POWER OF THE BOARD

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V. RULEMAKING POWER OF THE BOARD

A. HOW ARE RULES CREATED?

1. Political and Legal Concepts

The Illinois Condominium Property Act (the “Act” or “ICPA”) expressly empowers the condominium Board as the exclusive rulemaking authority within the Association. ICPA Section 18.4(h). In contrast, for homeowners associations, rulemaking is usually conferred by the governing documents on the Board, but may condition that power by requiring the owners’ approval or affording the owners veto rights.

In addition to the legal authority to engage in rulemaking, there are considerations as to the purpose and the politics of a proposed rule.

Typically, the purpose of a rule is to clarify or implement some aspect of the duties and prerogatives of the unit owners as to their conduct affecting the association and the property. Rules may range from presumably mundane and non-controversial (for example, picking up after a pet, use of the common element laundry facilities, and a prohibition against littering) to more sensitive (for example, requiring a copy of the unit key be given to the association, prohibiting distribution of literature under unit doors and banning pets). While some rules are likely necessary to clarify an uncertainty or generality of the declaration or bylaws, the size and culture of the association play a role in the types and numbers of rules. Generally, a larger association with residents in close proximity and sharing walls and utility systems will likely have more rules than a small association with detached units and very few commonly used facilities.

Also, philosophical/cultural viewpoints affect rulemaking. One perspective is that “if it ain’t broke, don’t fix it” which implies that rulemaking may be more reactive to a manifested problem, whereas the opposite perspective is to anticipate likely problems and have a rule which will either preempt the problem or enhance enforcement. Needless to say, if the Board has a different perspective than the ownership at large, there will likely be political and enforcement problems for the rules.

Finally, as rulemaking typically is done by the Board alone, the rules must be reasonable. The burden to establish the reasonableness of a rule rests with the Board of Directors. See Board of Directors of 175 East Delaware Place Homeowners Ass'n v. Hinojosa, 287 Ill.App.3d 886 (1st Dist. 1997); Apple II Condominium Ass'n v. Worth Bank and Trust Co., 277 Ill.App.3d 345 (1st Dist. 1995). Unreasonable rules are not enforceable.

2. Notice to Owners

The Act requires a condominium Board to convene a meeting of the owners to discuss proposed rules and amendments. Written notice of the meeting must be given not less than 10 nor more than 30 days in advance and must contain the complete text of the proposed rule. The purpose of the owners' meeting is to afford them an opportunity to discuss (not approve or adopt) the rules, and no quorum is required for that meeting. After this meeting, the Board may proceed to adopt the rules at a properly noticed and held open Board meeting. For efficiency purposes, the two meetings could be "piggybacked". Thus, the unit owners meeting may be scheduled just before the Board meeting on the same day; bear in mind the different notice requirements for these meetings.

B. CORRECTING AMBIGUITIES IN THE GOVERNING DOCUMENTS

One of the functions of rulemaking is to provide clarity. Often the provisions of the declaration and bylaws are either incomplete or unclear.

For example, an "incomplete" provision may be a by-law that generally provides that the unit owners may vote by proxy. The form (prescribed or not) and method of handling proxies is left open, and rulemaking is helpful in determining whether there is an official or prescribed form, to whom the proxies must be delivered and how the proxies are to be handled by the Board. Similarly, a covenant may provide that proposed alterations to a limited common element must be approved by the Board and the accompanying rule(s) would prescribe the information to be provided, possible forms, the review and approval process, and any requirements for any approved work (such as

insurance, permits). Other situations may involve pets, use of recreational facilities, and rental of units.

An example of an “unclear” provision is a prohibition against “unreasonable disturbances” due to hard surface flooring, for which a Board may adopt noise transmission standards based on acoustical engineering measurements. Similarly, a requirement that trash containers be kept out of sight may be clarified by a rule allowing/requiring containers be placed out for collection no earlier than the night before collection and retrieved the evening thereafter.

Again, the touchstone of rules is “reasonableness”. While there may be a good faith dispute as to which reasonable approach is to be taken, the Board has the right to adopt the “reasonable” approach of its choice in the exercise of its business judgment.

C. OWNER CONTROL OR CHECK ON BOARD POWER

For condominium associations, there is only one instance in which the unit owners can override the Board’s rule adoption. In particular, ICPA Section 18(b)(9)(C) provides that the unit owners can rescind Board adopted rules for allowing election of directors by absentee ballot. For non-condominium associations, such unit owner rights would be dependent on the governing documents.

Ultimately, if the Board is not sensitive or responsive to unit owner concerns, then the unit owners’ recourse is to not re-elect directors or, in an extreme situation, to remove the directors from office before the normal expiration of their term of office. Director removal typically requires a 2/3 vote of the entire membership.

Over the years, legislative amendments to the Act have increasingly concentrated power in the Board, with condominium unit owners being left with only such reserved rights as are found in the Act itself. This result reflects the prior years’ situation where the Board was perhaps unduly constrained by the requirement to obtain unit owner approval, even in the face of clearly emergent or legally required action. With the added concern to keep volunteer directors on the Board in the face of often misguided (if not frivolous) legal action by unit owners, the evolution of the Act and

caselaw has been to embrace a more corporate style governance, which in turn has cut back on unit owner rights.

D. ANNUAL MEETING CONSIDERATIONS AND VOTING POWER

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). Note that some condominium documents use the “voting member” concept with variations as to who can vote on behalf of a unit and how such status is established and recognized. 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. ICPA Section 18(p). (Note that effective June 1, 2008, parking space units and storage space units are to be disregarded in that computation.) 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 (note that the number of blank lines should be equal to the number of positions to be filled). ICPA Section 18(a)(18). The Board can adopt rules prescribing the form of proxy, the handling of proxies given to the Board and other administrative details of the election. See Adams v. Meyers, 250 Ill.App.3d 477 (1st Dist. 1993).

In contrast to the foregoing detailed election procedures for condominiums, homeowner associations must rely on their own governing documents and relevant corporate statutes.

With regard to condominiums, ICPA Section 18(b)(9) expressly allows the use of absentee voting under certain limited conditions. ICPA Section 18(b)(9) does not eliminate the use of proxies, except 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 or 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 not 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); in that regard, the number of blank lines should be equal to the number of positions to be filled. 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.

Absentee balloting for a homeowner association may be available if the By-Laws expressly so provide. See Section 107.50 of the Illinois General Not for Profit Corporation Act of 1986, 305 ILCS 105/107.50.

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. In homeowner associations, such election must be permitted by the governing documents.

In hotly contested elections, associations often utilize an outside election service (for example, provided by a CPA firm) to avoid (or at least minimize) suspicion of unfair or illegal tactics or biased determination. In such instances, the association's legal

counsel should contact the election service to establish mutually agreeable procedures and guidelines. 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).

E. WHAT CONTROL DO BOARDS HAVE OVER PETS, PARKING, POOLS AND OTHER ISSUES?

1. The First Amendment

The Act prohibits any rule which “may impair any rights guaranteed by the First Amendment to the Constitution of the United States or Section 4 of Article I of the Illinois Constitution or which conflicts with the Act or the condominium instruments [i.e. the declaration, bylaws and plat of survey].” This prohibition is curious in light of established caselaw which generally does not recognize First Amendment “rights” in the context of private regulation of private property. Indeed, attempted enforcement action under Section 1983 has been rebuffed by the U.S. District Court. Goldberg v 400 East Ohio Condominium Association, 12 F. Supp. 2d 820 (N.D. Ill 1998). However, in the wake of local controversy over mezuzahs, the Act was amended to provide that “no rule or regulation shall prohibit any reasonable accommodation for religious practices, including the attachment of religiously mandated objects to the front-door area of a condominium unit.”

2. The Flag

ICPA Section 18.6 and Section 103.30 of the Illinois General Not For Profit Corporation Act of 1986 provide that regardless of any provision in the declaration, by-laws, rules, regulations, agreements or other instruments of a condominium, master or common interest community association (including the interpretation of those documents by the Board of Directors), the Board may not prohibit the display of either the American flag or a military flag “on or within the limited common areas and facilities of a unit

owner or on the immediately adjacent exterior of the building in which the unit of a unit owner is located”. However, a Board may adopt “reasonable rules and regulations, consistent with Sections 4 through 10 of Chapter 1 of Title 4 of the United States Code regarding the placement and manner of display” of the American flag or military flag. The Board cannot prohibit the installation of a flag pole for the display of the American or military flag but the Board may adopt reasonable rules and regulations “regarding the location and size of flag poles”.

Thus, the unit owner would be entitled to display the American or military flag on or from his/her limited common elements (areas), such as a balcony, patio, window, etc.; and the unit owner may also attach a flag or flag pole on the building exterior immediately adjacent to his/her unit (such as wall or roof areas). Arguably, the unit owner could have multiple flag poles - - for the American flag and a military flag for each of the armed services and the Illinois National Guard. The Board has some authority to regulate placement and manner of display of a flag, as well as location and size of flag poles. Of course, there are potential ambiguities which may result in disputes between an individual unit owner and the Board. For example, if the building exterior is covered by a contractor's warranty which will be invalidated by any penetration of the surface, the Board may wish to adopt a rule prohibiting flag pole installation involving penetration of building exteriors; however, if there is no practical way to accomplish such installation, the unit owner may have a right to insist upon installation which would invalidate the warranty. In that instance, could the unit owner be held responsible for invalidating a warranty, because of exercising his/her rights under this statutory provision?

ICPA Section 18.6 (and Section 103.30 of the Not For Profit Act) defines the “American flag” as the flag of the United States (as defined in Section 1 of Chapter 1 of Title 4 of the United States Code and Executive Orders as entered in connection with that section) made of fabric, cloth or paper, which is displayed from a staff or flag pole or in a window. However, “American flag” does not include “a depiction or emblem of the American flag made of lights, paint, roofing, siding, paving materials, flora (that is,

plants) or balloons or any similar building, landscaping or decorative component”. Similarly, a “military flag” is defined as a flag of any branch of the United States Armed Forces or the Illinois National Guard, subject to the same component restrictions applicable to the American flag.

Section 103.30 of the Not For Profit Act would be applicable to any homeowners association (which is defined to include a property owners association, townhome association or any similar entity) which is incorporated as a not-for-profit corporation. It is unclear whether a residential cooperative association is included in that definition and, therefore, subject to the requirements of that Section.

Rules and regulations adopted by the Board must be consistent with the cited provisions of the United States Code, which contain a number of specifications for display of the flag. Note that the United States Code sections are supplemented by Presidential Executive Orders (in particular, Executive Order 10834). By way of example, Section 5 of Chapter 1 of Title 4 of the Code incorporates the design specifications for the United States flag, including constituent elements and dimensions. Section 6 states that the flag customarily is to be displayed only from sunrise to sunset; however, the flag may be displayed 24-hours a day “if properly illuminated during the hours of darkness”. The flag should not be displayed in inclement weather except when “an all-weather flag” is utilized. The flag may be displayed on all days. Section 7 provides detailed requirements as to the position and manner of display of the flag (for example, how the flag should be displayed in connection with another flag - - for example, possibly a military flag). Section 8 sets forth detailed restrictions regarding respect for the flag (for example, the flag should not be displayed with the union portion down; the flag should never touch anything beneath it such as the ground or floor; the flag should never be drawn back or up in folds, but allowed to fall free; the flag should never be fastened, displayed or used in a manner to permit it to be easily torn, soiled or damaged in any way; the flag should never have placed on it any mark, insignia, letter, word, figure, design, picture or drawing of any nature; the flag should never be utilized for advertising purposes in any manner; the flag is to be destroyed in a dignified way

when no longer fit for display). Section 9 prescribes the proper conduct during any ceremony of hoisting or lowering the flag. Finally, Section 10 provides that rules and customs as to flag display are subject to modification by the President. Needless to say, prior to adopting any rules and regulations, the provisions of the United States Codes and related Executive Orders must be reviewed for compliance. If and when changes are made to the United States Code and the Executive Orders, the rules and regulations will have to be amended accordingly.

3. Pets

Pets can be a very controversial and emotional subject matter for rules and regulations, and the Board should avoid occasions for unnecessary conflict. Generally, a Board has the authority to impose limitations on pets as to type, size, number and conduct, but cannot override the recorded governing documents (for example, if the declaration expressly allows dogs, the Board cannot adopt a rule prohibiting dogs). Moreover, even the Association were adopt an amendment banning certain types of existing pets (usually dogs or dogs above a certain size), it is usually advisable to provide a pet “amortization” provision which allows existing proscribed pets to remain until death or permanent removal with no replacement allowed. Otherwise, enforcement to remove an existing pet may be costly and ultimately unrewarding (especially if the judge has a fondness for pets).

4. Parking

The nature of the facility is a key factor. If the parking facility is a general common element, the Board usually has the right to make parking assignments, charge a license fee, regulate use of the facility and establish any necessary waiting list. If parking is either by limited common element assignment or by deeded parking space units, the Board may not have the right to exclude the owner from the facility, but still has the right to regulate the owner’s use of the facility. Occasionally there is a hybrid “parking rights” situation which entitles an owner to have a vehicle parked in the facility but without the right to a particular space. With regard to handicap parking accommodation, the Board

has the power to reassign parking spaces in a general common element or even limited common element situations.

5. Pool and Recreational Facilities

The Board generally has the right to regulate use of recreational facilities to promote safety, allow fair opportunity to use, and avoid property damage. Most such rules are commonsensical (for example, no glass containers in the pool/pool area, no misuse of equipment, no intoxication, a reservation system). Occasionally, a misbehaving owner may have his/her use rights suspended. Rules which prohibit use by children (unless justified by safety considerations) are not permissible.

6. Construction and Remodeling

The Board may adopt rules governing the construction or remodeling activities of an owner if that activity involves the common areas/elements, affects other unit owners, or may adversely affect the exterior appearance of one property. Such rules usually differentiate between types of activity (for example decorating vs. structural work v. reconfiguration or impact on utility systems). Note that such regulation ties into the Board's disclosure obligations under ICPA Section 22.1(a)(8) and 18.5(g)(8).

7. Smoking

Over recent years, state and local governments have enacted prohibitions on smoking in certain commercial and public areas. Typically, office buildings do not permit smoking indoors and smoking is banned in most public areas, including the "public areas" of private establishments. For example, the Smoke Free Illinois Act (Public Act 95-0017, effective January 1, 2008) and its predecessor the Illinois Clean Indoor Air Act, 410 ILCS 80 prohibits smoking in "public places" which includes places of work, offices, restaurants, and meeting rooms, and the Chicago Clean Indoor Air Ordinance of 2005. (Chapter 7-32-010 et seq of the Chicago Municipal Code) prohibits smoking in lobbies, hallways and other common areas in apartment buildings and condominiums.

The regulation of smoking in condominium and other forms of homeowner's associations has received greater interest in recent years, particularly due to the growing

belief in society that smoking is not only bad for the smoker but for bystanders who are exposed to the “second-hand” smoke or even the particulate residue of the smoke (“third-hand” smoke). While it is unquestioned that an association can prohibit smoking in the common areas and common elements, remains the question as to whether such jurisdiction can extend to the smoker’s conduct in his/her individual unit. In other words, can an association adopt a rule to prohibit a unit owner from smoking in his or her own individual unit? For the reasons stated below, it appears that such a rule would be legally enforceable.

To begin with, it should be noted that an individual does not have a “right” to smoke. Unlike certain fundamental rights, the act of smoking (which is potentially harmful but not illegal) is not protected by constitutional principles or public policy which extend to other forms of societally sacred behavior (for example, free speech, free exercise of religion, due process of law). Clearly, the places and times and circumstances under which a person is allowed to smoke may be and has been regulated by both public and private entities without any intervention of the Courts.

In condominium associations, there is a necessary balancing of private rights and common interests. Most notably, in the often quoted Florida Appellate decision of Hidden Harbour Estates vs. Norman, 309 So.2d 180 (Fla.App. 1975), the condominium is described as a democratic subset in our society in which “to promote the health, happiness and peace of mind of the majority of the unit owners since they are living in such a close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice he might otherwise enjoy in separate, privately owned property.” In accordance with the foregoing principle, it is indisputable that the rights of an individual in a condominium or common interest community may have to be limited. In general, the common denominator of such regulation is that the conduct of the individual in the unit has adverse or harmful consequences extending beyond the unit itself, into the common elements and other units and affecting other occupants.

Smoke is composed of gases and particles which are airborne and readily travel. It can be and often is treated as a form of pollution. Thus, the smoke generated by a

smoker will leave his/her presence and migrate as the airflow takes it. In most multi-family attached housing, the ventilation system is shared and the units are not airtight but instead allow for air movement into and between them. Inevitably, the smoke from one unit will travel into the common elements (walls, ventilation systems) and then migrate into other units' air space. In this way, the activity of the smoker in his/her individual unit does in fact impact the air quality of the common elements and other units. Indeed, it is unlikely that the ventilation system in an attached multi-family residential building could effectively and properly operate if each unit/apartment were a self-contained airtight compartment. It is fairly typical in many high-rises that air from the common hallway corridors will (and must) circulate into the units and then be taken out of the building through exhaust vents. However, that ventilation arrangement is not perfect in that the air may still migrate into other units or other areas of the common elements even though being generally exhausted to the outside.

The basis for prohibiting or regulating a unit owner's smoking in his/her own unit can be founded upon two possible situations:

First, the covenants and restrictions of most associations contain provisions which prohibit nuisances or unreasonable disturbances to other occupants. The flow of smoke from one unit to another, with both its unpleasant odor and adverse health consequences, would clearly be a basis for prohibition. Essentially, the smoker has no "right" to pollute the environment of the common elements or adjacent units. Note that, if the smoker were able to capture the smoke and retain it totally within his/her unit by means of sophisticated ventilation devices and without adversely interfering with the building's ventilation system, it is arguable that his/her smoking should be permitted.

Second, if an occupant of an adjacent unit is sensitive to smoke due to various conditions or ailments to the extent that such sensitivity can be deemed a disability, it is arguable that the disabled occupant must be protected by reasonable accommodation (such as the prohibition of smoking by rule or regulation). Otherwise, failure to make such a reasonable accommodation may give the adversely affected disabled occupant a

claim against the association (as well as against the smoker) for disability discrimination under the Fair Housing Act Amendments to the Civil Rights Laws.

If a unit owner cannot smoke on the condominium property, he or she can still theoretically smoke somewhere else (although “somewhere else” is becoming less and less certain). Thus, the effect of prohibition would not be to prohibit conduct in its entirety (that is, forcing a smoker to quit smoking) but only in the location under the jurisdiction of the association.

8. Unit Owner Insurance

ICPA Section 12(h) allows the condominium board of directors to mandate that the individual unit owners obtain insurance to cover their personal liability for compensatory (but not consequential) damages to another unit, due to their own negligence or the negligence of their guests, residents or invitees and also regardless of negligence if originating from the owner’s unit. The coverage must include the deductible of the owner whose unit is damaged and “any damage not covered by insurance covered by this subsection” (which meaning is unclear) “as well as the decorating, painting, wall and floor coverings, trim, appliances, equipment and other furnishings” of that other owner. As a practical matter, the provision is vague and possibly contradictory. In any event, increasing number of associations are adopting these rules. However, the insurance market (or mentality) does not seem to be in synch with this statutory concept, whatever it is; for example, a homeowner’s insurance carrier often will not accept any claim unless its insured is negligent. Also, it is unclear as to how one calculates the proper amounts of coverage for the enumerated items to be covered (for example, is the 5th floor unit owner supposed to determine the insurable value of all his lower floor neighbors’ possessions?) The overworn phrase “there are more questions than answers” seems appropriate.

There is no parallel statutory provision as to homeowners associations.

In conclusion, rules and regulations cover a wide range of matters – from everyday minor items to the occasional major event. The Board must act within the scope of its authority and with a reasonable approach to the issue. Otherwise, negative legal and political consequences may be expected.

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