

SMALL CONDO BOARD LOSES BIG TIME

by

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Below is a clear example of "Boards Gone Wild", as discussed in a detailed and reasoned opinion issued by an Illinois circuit court judge after extensive litigation between a Board of Directors of a 6 (actually 8) unit Chicago condominium. Please note that I was personally involved in the representation of unit owner Robin Shoffner, who was very ably represented by Jerry Wiener. While we typically do not represent individual unit owners, we will consider situations to assist the unit owner's attorney (as co-counsel) in matters where clear injustice appears to be involved.

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**IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION**

ROBIN SHOFFNER,

Plaintiff,

vs.

**PRAIRIE AVENUE CONDOMINIUM
ASSOCIATION, EUGENE BOLDEN,
ERNESTINE PARKER , and KEITH
McCRAY,**

Defendants.

No. 07 CH 36809

MEMORANDUM OPINION AND ORDER

This court has often observed that condominium associations are, in many instances, "dysfunctional democracies." People from all walks of life, by virtue of the happenstance that they have chosen to live in the same building, are constrained under the Illinois Condominium Act to function as a mini body politic. They form a governing body, elect officers and directors, hold meetings, and tally votes on matters affecting the Association's members. Too often, personal issues creep into the decision-making process with the predictable result that neighbors are pitted against neighbors. This case is a prime example of the democratic process gone awry.

The 3144 Prairie Avenue Condominium Association is comprised of eight units. Six of the units are located in a 3-story building at 3144 S. Prairie Avenue in Chicago. The other two units are in a separate building at 3150 S. Prairie immediately to the south of the six-unit building.

The Association was formed in 1997 upon the filing of a Declaration of Condominium Ownership with the Recorder of Deeds. At the time the Declaration was

filed, only the six-unit building was in existence. On the Plat of Survey attached to the Declaration, the separate building at 3150 S. Prairie is described as "Proposed Building Unit A/B."¹ Exhibit B to the Declaration lists the percentages of ownership for each of the units as follows:

UNIT	%
1-North	13.4
2-North	10.3
3-North	11.0
1-South	13.4
2-South	10.3
3-South	11.0
Townhouse A	15.3
Townhouse B	<u>15.3</u>
	100%

Section 4.05 of the Declaration addresses the responsibility for maintenance, repairs, and replacements. Subsection (c) of Section 4.05 is entitled "Separate Buildings" and provides:

(i) Each Unit Owner, at their own expense, shall be proportionately responsible for the maintenance, repair, and replacement of those portions, if any, of the building in which their unit exists, including any external limited common elements: (i.e., such as patios and stairways assigned to a Unit in a specific building) and which contribute to the support of the Building excluding, however, the surfaces of walls, ceilings, and floors of the Unit itself. In addition, such Unit Owner shall maintain, repair and replace all pipes, wires, conduits, ducts, flues, shafts and other facilities for the furnishing of utility services which may be located within the Unit boundaries and forming a part of the [sic] any system servicing more than one Unit, as specified in Section 2.02 hereof, exclusive of any portions of the foregoing which may be located at or beyond the wall outlets, or which may be the responsibility of an individual Unit Owner under Paragraph (b) below

(ii) BECAUSE THE NORTH BUILDING STRUCTURE CONTAINING SIX ... CONDOMINIUM UNITS AND THE TOWNHOME BUILDING STRUCTURE CONTAINING TWO ... CONDOMINIUM UNITS AND LOCATED ON THE SOUTH PORTION OF THE "PARCEL" ARE TOTALLY SEPARATE

¹ Because the original and amended Plats of Survey illustrate some of the issues discussed in this Opinion, they are attached as an Appendix.

BUILDINGS, THE MAINTENANCE OF THE STRUCTURE OF THE BUILDINGS SHALL SOLELY BE THE RESPONSIBILITY OF THE OWNERS OF THE UNITS IN SAID STRUCTURE. THEY SHALL NOT BE RESPONSIBLE FOR ANY OF THE MAINTENANCE OF THE OTHER BUILDING. MAINTENANCE OF THE STRUCTURE OF EACH BUILDING AND THE LIMITED COMMON ELEMENTS THEREIN SHALL BE VOTED ON SOLELY BY THE OWNERS OF UNITS. THERE SHALL BE TWO SEPARATE CAPITAL (RESERVE FUND) REPLACEMENT ACCOUNTS SET UP ON THE BOOKS OF THE ASSOCIATION, (ONE FOR EACH BUILDING) INTO WHICH A PORTION OF THE MONTHLY DUES SHALL BE ASSIGNED.

(iii) By the Association. Maintenance, repairs, and replacements of the Common Elements outside the buildings in which the Units exist shall be done by the Association acting by and through the board as part of the Common Expenses, subject to the By-laws or rules and regulations of the Association.

(All Caps in the original).

In 1997, plaintiff, Robin Shoffner, purchased Unit 3 South in the six-unit building. Shoffner served as the Association's first President for a one-year term from 1997-98. Defendants, Eugene Bolden, Ernestine Parker, and Keith McCray, have served as the Association's Board during the relevant time period.

In 2000, Shoffner purchased from the developer the vacant land designated as Proposed Building Unit A/B on the Plat of Survey. From 1997 to 2000, the Association never sought to collect from the developer any assessments relating to Unit A/B. Following Shoffner's acquisition of the land and until the present dispute arose, the Association did not seek to collect from Shoffner any assessments relating to Unit A/B.² Shoffner has paid all of the maintenance expenses for Unit A/B since its completion and has insured the building. Shoffner has also paid assessments relating to Unit 3-South's percentage interest since her purchase of the unit. Finally, there is no evidence that the

² Although Bolden, the Association President, testified that he and other members of the Association were not aware that Shoffner had purchased the land, Bolden admitted that the Association, between 2000 and the time it became aware of the purchase, never sought to collect unpaid assessments from the developer.

separate capital reserve fund replacement accounts for the two buildings were ever set up on the Association's books as called for in Section 4.05(c)(ii).

There is a parking lot at the rear of the property with six designated parking spaces, one for each of the units in the six-unit building. It was anticipated that Unit A/B would have its own garage accessed from the parking lot. Although the original Plat of Survey showed the parking spots running parallel to the rear property line, parking in that configuration would have blocked access to the alley as well as to any garage erected as part of Unit A/B. In fact, since 1997, unit owners have parked in spaces as depicted in an amended Plat of Survey filed on July 7, 2000, with five spaces along the property's south lot line and one additional space behind the six-unit building. (*See Appendix, Amended Plat of Survey*).

The Association also installed an electric gate across the edge of the parking lot bordering the public alley. At various times, both before and after this litigation, Shoffner has had difficulty gaining access to the lot through the gate. On at least two occasions, she has had to seek assistance from defendant, Eugene Bolden, to manually open the gate when it was malfunctioning. No evidence was presented that between 2007 and the present the Association has expended any funds to repair or maintain the electric gate.

According to the Plat of Survey, there is a gangway between the six-unit building and Unit A/B. From 1997 until 2007, there was a chain link fence across the front of the vacant land comprising Unit A/B, which connected to the southeast corner of the six-unit building. The fence was erected by the developer prior to Shoffner's purchase of the land. There was no gate in the fence permitting access to the gangway. Unit owners in

the six-unit building could only access the parking lot only by 1) exiting through the rear of their units or 2) walking around the block and entering the parking lot through the alley. Until 2007, unit owners were not able to use the gangway to get from the front of the six-unit building to the rear of the property.

Prior to commencing construction on Unit A/B, Shoffner was required to seek certain zoning variances from the City of Chicago. In 2005, Shoffner sought and obtained the Association's support in connection with those zoning applications. Shoffner moved out of Unit 3 South in 2006 and she and her daughter moved in with Shoffner's brother about one block away from the property.

Shoffner began construction of Unit A/B during the spring of 2007. No evidence was presented at trial of any disputes between Shoffner and any of the other Association members prior to construction of Unit A/B.

Shoffner leased Unit 3 South to Unita Sims commencing February 1, 2007, for a term ending January 31, 2008. The lease stated monthly rent of \$1700 and gave Sims the option to extend the lease for an additional year. Between February 1, 2007, and the end of the year, Shoffner received no complaints about her tenant.

Sometime during construction of Unit A/B and prior to September 2007, a dispute arose regarding one of the unit owner's cars parked on a portion of the land underlying Unit A/B. Shoffner testified that due to the manner in which Bolden parked his vehicle in the westernmost parking space - taking up more than its allotted space - all other unit owners parked their cars further to the east, with the result that the car belonging to Harold Parker (husband of defendant Ernestine Parker), assigned to the space closest to Unit A/B, was actually parking on land belonging to Unit A/B. Obviously, for the many

years Unit A/B was vacant land, this was not a problem. However, when excavators arrived to commence work, they informed Shoffner that there was a car parked on a portion of the land to be excavated. Shoffner then asked Parker to move his car, but he refused. Because the excavation could not begin until the car was moved, Shoffner called a towing company to move the car. After the towing company arrived, Parker came out and moved his car. Parker then informed Shoffner that he would sue her.

It is hard to fathom that this incident (which was not contradicted by defendants at trial)³ is the genesis of the ensuing course of conduct. However, no evidence of any other dispute prior or subsequent to this was introduced at trial. What is clear is that shortly after the encounter between Shoffner and Parker, defendants embarked upon a concerted effort (to put it mildly) to make Shoffner's life miserable.

A meeting of the Association was held in September 2007. On the agenda⁴ were two proposed amendments to the Association's Declaration, both aimed at Shoffner. The combined effect of these amendments was to kick Unit A/B out of the Association and prohibit Shoffner from renting her unit in the six-unit building should her current tenant leave.

The first amendment, ultimately filed with the Recorder of Deeds on September 28, 2007, recited that there was a "scrivener's error" in the percentages assigned to units in the Association and that "erroneously included" in the calculation were "two units" (Unit A/B), which were not then in existence and which were not obligated to pay assessments to the Association. The amendment further recited that "[i]t has been the

³ Indeed, in their post-trial brief, the individual defendants admit that the case "began with the Plaintiff requesting that everyone else must move their parking space, and escalated from there...."

⁴ The court assumes that meeting agendas were circulated in advance and that minutes of meetings were kept. However, no such records of the Association were introduced at trial.

practice of the Association to ignore these two listed units and their corresponding percentage interest in calculating assessment liability and voting strength for purposes of board elections and amendments to the Declaration” and that a majority of the owners voted in favor of amending the Declaration to re-calculate the percentages of ownership by eliminating Unit A/B from the Association.

The practical effect of removing Unit A/B from the Association was to cut off ingress and egress from the rear of that unit. The only means to access Unit A/B’s garage was over the Common Element parking lot of the Association. If Unit A/B was no longer a member of the Association, Unit A/B’s owner would have no right to access the garage over the Association’s property.

The second amendment, also recorded on September 28, 2007, addressed the leasing of units. Although Section 8.02 of the original Declaration permitted unit owners to lease their units, amended Section 8.02(1) provided:

Except as otherwise provided in Section 8.02(3), no dwelling unit may be leased by any owner. However, where a hardship arises, any Unit Owner shall have the right to petition the Board of Managers for permission to lease a dwelling unit for a one-year period, approval of which shall not be unreasonably withheld.

Section 8.02(3), in turn, defined the circumstances under which a “hardship” would be deemed to arise to include 1) a Unit Owner’s need to relocate to another city or state, 2) a Unit Owner’s or an immediate family member’s need to relocate to a nursing home for health reasons, or 3) a Unit Owner’s inability, because of market conditions, to sell the unit for a reasonable price, but only if the Unit Owner’s motivation for selling was for “family or non-commercial purposes.” Section 8.03(2)(iv) further expressly disqualified any owner “who has not resided in the unit immediately prior to petitioning the Board, or

who is otherwise attempting to sell the unit for commercial or investment purposes” from filing a hardship petition.

That this second amendment was designed to apply only to Shoffner is obvious. Defendant, Keith McCray, testified that when the second amendment was first proposed, it contained only Section 8.02(1)’s absolute prohibition on leasing. McCray, who was then living in his unit, anticipated that he might want to lease the unit in the near future and so objected to the original proposed amendment. As Shoffner was the only unit owner 1) who was leasing her unit in the six-unit building and 2) who was not residing in the unit at the time the second amendment was passed, Shoffner was the only unit owner expressly disqualified from filing a hardship petition. The practical effect of this amendment was that if Shoffner’s tenant moved out, she either had to sell the unit or let it sit vacant.⁵

A short time later, Shoffner, through counsel, demanded that the amendments be rescinded, citing several provisions of the Condominium Act, which she claimed prohibited their enactment. The Association refused.

Construction of Unit A/B was completed in November 2007. As constructed, the property consists of two units: Shoffner occupies the top unit with her daughter; her parents live in the lower unit. Shoffner replaced the chain link fence running across the front of Unit A/B with a lower, more decorative fence. A gate in the fence leads to the

⁵ It is also interesting to note that the second amendment recited that it received the vote of unit owners holding more than three-fourths of the percentage interest in the Association. As Shoffner, prior to passage of the first amendment, held more than 41% of the interest in the Association, it was necessary to first remove Unit A/B from the Association in order to muster the necessary three-fourths vote to pass the prohibition on leasing.

front of Unit A/B. The gate can be opened from the inside without a key and from the outside by reaching through the gate and turning the handle.⁶

Shoffner was scheduled to move into the property in late November or early December and had scheduled the hook-up for various utilities, which could only be done through the rear of her building. When Shoffner attempted to gain access to the back parking lot to allow utility workers in, the electric gate would not operate. She contacted Bolden, the Association's President, but he failed to respond.

On December 3, 2007, the Association, through its counsel, sent five notices to Shoffner charging her with violating certain provisions of the Declaration by 1) spattering the windows and screens of McCray's unit in the six-unit building with cement and mortar (\$1,000 fine), 2) installing a gate in front of her unit that prevented unit owners from accessing the gangway between the buildings (\$5,000 fine), 3) landscaping in front of her unit, including installing a row of bricks around the landscaping (\$5,000 fine), 4) installing an electrical grounding rod above ground along the gangway (\$2,000 fine), and 5) storing lawn furniture on the roof deck of the six-unit building (\$1,000 fine).⁷

Pursuant to these notices, the Association informed Shoffner that if the various violations were not cured within seven days of the notice, fines totaling \$14,000 would be levied against Unit A/B and additional fines of \$50 per day for each violation would accrue thereafter.

⁶ During the course of the litigation, the Association demanded and Shoffner provided keys to the gate for every unit owner.

⁷ The notices did not acknowledge the amendment removing Unit A/B from the Association or explain how the Association could attempt to enforce the Declaration against a non-Association member.

Bolden testified that the fines imposed for these violations were determined based upon the safety hazards the violations posed. For example, Bolden testified that 1) the gate installed by Shoffner could impede access to the gangway by unit owners and others, 2) unit owners and others could trip on either the bricks around the landscaping or the grounding rod, and 3) the lawn furniture stored on the roof deck could catch fire or blow off the deck, injuring someone below. Given that the Association's liability insurance policy had a \$2,500 deductible, Bolden testified that significant fines for these transgressions were appropriate.

The final notice served on Shoffner was a "Thirty Day Notice" advising her that under the Declaration the Board had the right to issue her a 10-day notice to vacate Unit A/B and, failing compliance, the Board could commence an action seeking a judicial sale.

No member of the Association discussed the notices with Shoffner prior to the date they were served on her. Bolden testified that no one attempted to discuss the notices with Shoffner because of the pending litigation. Shoffner's complaint, however, was not filed until 10 days after the notices were served.

Shoffner responded to the notices through an attorney, Michael Kim, who requested a hearing on the various violations. It is undisputed that no hearing was ever held.⁸

The cement and mortar was spattered on the screens and windows of defendant McCray's first floor unit. McCray did not complain about the damage to the Board because he did not notice it; rather, he was informed about it by Bolden and Parker.

⁸ Although the Association has never attempted to levy the fines and late fees against Unit A/B, the Association never informed Shoffner, prior to trial in this case, that it was withdrawing the notices of violation. During trial, the Association's attorney announced that the Association did not intend to pursue the notices of violation.

After receiving the notice, Shoffner replaced the screens and repaired the damage to McCray's windows. Shoffner also had the furniture removed from the roof, paid a contractor to relocate the grounding rod underground, and provided keys to the gate to Association members.

Shoffner filed this action on December 13, 2007. One of the first issues the court was required to address via a motion for temporary restraining order was Shoffner's right to access the rear parking lot so that she could connect utilities. Following entry of the order granting Shoffner's request for injunctive relief on December 18, 2007, Shoffner wrote to the Association demanding access to the parking lot, not just for the installation of utilities, but also so that she could park in her garage. Shoffner observed during this period of time that the gate was operating for other unit owners, but not for her. When she was again unable to access the back parking lot, Shoffner sought further relief from the court. Again, the court was required to order the Association to provide access to the parking lot for Shoffner and her tenant.

During the pendency of this litigation, Shoffner has observed that many of the cars in the parking lot are rarely moved and that many unit owners park on Prairie Avenue. Shoffner, however, uses the lot each day as she drives to work or takes her daughter to school or other activities. Although the electric gate worked for about a year after the case was filed, it has been inoperable except manually for some time. At one point the gate was simply left open all the time, but when young people began to congregate in the parking lot, it was closed again. On more than one occasion, Shoffner has had to seek assistance from Bolden to open the gate. At least twice, Bolden has gone to the utility room in the six-unit building and flipped circuit breakers to cut electricity to

the gate so that it can be opened manually. Bolden testified that he flipped all the circuit breakers since he did not know which one controlled the gate.⁹

By February 2008, Shoffner's tenant had elected to extend the lease for Unit 3 South for an additional year. After the Association served Shoffner with the notices of violation in November, and after the lawsuit was filed, the Association served Shoffner's tenant with an additional notice of violations dated February 28, 2008. In this notice, which again was not discussed with Shoffner prior to the date it was served, the Association claimed that "on numerous occasions during the last month," certain Association members had been bothered by excessive noise emanating from Sims' unit caused by "a child or other person" jumping, making loud banging sounds and dropping something on the floor "causing the rattling of pictures on the walls of neighboring units." The notice further recited that defendant Parker had informed Sims that if the noise did not stop he would call the police. The notice advised Sims that the Association was levying a \$50 fine against her for this violation.

The notice also recited a second violation involving lawn furniture stored on the roof of the six-unit building (the same violation previously served on Shoffner). The notice informed Sims that another \$50 fine was levied for this violation.

The notice asserted that Sims had committed a third violation in that in addition to Sims, two other persons were living in the unit, namely, her daughter and granddaughter. Another \$50 fine was levied for this violation and the notice also informed Sims that under the Declaration, the Association could seek to evict her.

⁹ During trial, counsel for the individual defendants criticized Shoffner for not learning how to flip the circuit breakers so that she could operate the gate manually. The court can only imagine what sanctions would have been imposed had Shoffner, like Bolden, routinely tripped all the circuit breakers in the six-unit building's utility room.

The notice advised Sims that if she wished to contest these violations, she could request a hearing within seven days. Shoffner asked her attorney, Kim, to request a hearing, which he did by letter dated March 5, 2008. Kim also requested that the Association provide him certain information regarding the alleged violations, including the identity of witnesses to the violations, and that a mutually convenient date for the hearing be set on not less than 30 days' notice. On March 9, 2008, the Association, without providing any of the information requested, notified Kim that the hearing would be held in connection with a Board meeting scheduled nine days later on March 18, 2008. When Kim informed the Association that he could not attend on that date, the Association went ahead with the hearing anyway, ultimately determining that the violations had been established and the fines should be levied. Shoffner's tenant vacated the unit in June 2008 prior to the expiration of the lease.

Following her tenant's departure, Shoffner attempted to sell Unit 3 South. Her real estate broker asked that she get certain information from the Association, including a disclosure statement. The Association failed to respond to Shoffner's requests. On March 31, 2009, Shoffner's counsel advised the Association by letter that Shoffner had a potential purchaser for Unit 3 South and enclosed a disclosure statement for the Association to complete. No response was forthcoming.¹⁰ Shoffner thereafter abandoned her effort to sell the unit because she could not provide the information her broker needed. Shoffner did not attempt to re-let the unit because she feared the Association would harass any new tenant.

¹⁰ Although Shoffner later filed a motion to compel the Association to provide a paid assessment letter so that she could pursue the sale, the court declined to intervene because it would have entailed litigating the case piecemeal.

Shoffner's unit remained vacant for 27 months, until November 2010, when she entered into a lease with Frank and Bertonya Brown for a term commencing November 1, 2010, through December 31, 2012. Prior to renting to the Browns and despite the fact that she was "ineligible" under the 2007 amendment to apply, Shoffner sought a hardship exception to the prohibition against renting her unit. On September 13, 2010, Shoffner wrote to Bolden and advised that she understood that another unit owner had recently been granted a hardship exception and that she was facing similar circumstances given that her unit had been vacant while she was paying the mortgage and assessments. Shoffner also stated that she was paying for day care for her daughter and, as a City of Chicago employee, was required to take unpaid furlough days, thus increasing the financial burden of her empty unit. The request was sent to Bolden via certified mail, but Bolden never claimed the item.

On September 30, 2010, Shoffner again sent a letter via certified mail to Bolden advising that she had obtained a tenant who wished to move in to the unit on November 1st. Shoffner enclosed a copy of the lease with the Browns and informed Bolden that Frank Brown was a 19-year employee with the U.S. Postal Service. Bolden again failed to claim the certified letter.

The Browns moved in on November 1, 2008. It did not take long for the Association to realize Shoffner's fear that any new tenant would be harassed. On November 11, 2010, the Association sent a notice of violation to the Browns and Shoffner alleging that the Browns had caused "substantial" damage to the hallway and stairs requiring the Association to expend \$310 to repair these surfaces, "which had just recently been repaired and painted." In addition to demanding reimbursement for the

repair expense, the Association determined to impose a \$750 fine against the Browns, advised them that they had the right to request a hearing, and that failure to demand a hearing within seven days could result in the Board levying the fine "and related legal fees" against the unit.

A second notice, dated November 12, 2010, advised the Browns that as a result of Shoffner's "failure to comply" with the requirements for leasing Unit 3 South, as well as the damage to the hallway, the Board had elected to terminate their lease and demanded that they vacate the premises within 10 days.

As in the case of the other violations sent to Shoffner by the Association, no one discussed the damage to the hallway with Shoffner prior to sending the notice of violation. Shoffner paid the \$310 on November 17, 2010, but has, to date, refused to pay the \$750. Although Shoffner has demanded a hearing on this violation, none has been held.

Also on November 12, 2010, after the case had been set for trial, the Association recorded yet another amendment to the Declaration. According to the preamble to the most recent amendment, it was enacted because the Association wanted to "avoid the further expense and time of going to trial on the validity of [the 2007] amendments" and had determined to repeal them "nunc pro tunc" to the date of their enactment. The Association now takes the position that this "nunc pro tunc" amendment means that even though Unit A/B was removed from the Association from September 2007 through November 2010, it is still liable for its proportionate share of Association assessments during that time.

Shoffner's complaint contains two counts: Count I seeks a declaratory judgment regarding the 2007 amendments and an injunction prohibiting defendants from continuing to harass Shoffner and interfere with Shoffner's and her tenant's access to the Association's Common Elements; Count II alleges that the individuals defendants are guilty of breaches of their fiduciary duty owed to Shoffner and requests compensatory and punitive damages.

The Association filed a counterclaim containing five counts. The court granted summary judgment to Shoffner prior to trial on three counts. The remaining counts seek to recover unpaid assessments for Unit A/B from January 1998 to the present, Unit A/B's proportionate share of the cost the Association incurred in hiring an appraiser in this litigation, and the fines assessed by the Board against Shoffner's tenant.

DISCUSSION

Shoffner's Complaint

With respect to Count I of Shoffner's complaint, it is clear that notwithstanding the Association's belated attempt to repeal them, the 2007 amendments were void *ab initio*. There was no "scrivener's error" in the original Declaration; Unit A/B was always part of the Association as reflected on the original and amended Plats of Survey.

Consequently, under Section 13.01 of the Declaration, the consent of all unit owners (including Shoffner) was required in order to effect the removal of Unit A/B from the Association. Because that unanimous consent was never obtained, the first amendment removing Unit A/B from the Association was invalid and ineffective.

It follows, therefore, that the second amendment imposing restrictions on the leasing of units was likewise invalid as it failed to obtain the required vote of three-

fourths of the unit owners. Without the affirmative votes of Shoffner's 41.6% ownership interests, no amendment to the Declaration could pass.

The Association contends that Shoffner's request for relief is moot given the repeal of the 2007 amendments.¹¹ The court disagrees. As detailed above, the amendments were the beginning of the long campaign of harassment by the Association against Shoffner. Those amendments had a real and calculable negative impact upon Shoffner and her interests in the Association. Without the declaratory relief requested by Shoffner, there would be nothing to discourage the Association from implementing similar tactics in the future. The court determines that Shoffner is entitled to a declaratory judgment regarding the invalidity of the 2007 amendments.

Shoffner also seeks an injunction prohibiting the Association from proceeding against her or her tenants based upon any of the previously issued notices discussed above. As noted, the Association announced during trial that it would not pursue the November 2007 Notices of Violation against Shoffner and, therefore, that aspect of Shoffner's request for relief is moot.

The court concludes that the Association should be enjoined from enforcing the fines and penalties imposed with respect to Shoffner's previous tenant. The Association was required to provide minimal due process in connection with its effort to impose sanctions for the tenant's alleged violations. *See* 765 ILCS 605/18.4(l) (requiring notice and an opportunity to be heard). Notwithstanding a reasonable request from the tenant's attorney to re-schedule the hearing on the violations to a date upon which he could attend, the Association determined to go forward in the absence of the tenant or her attorney.

¹¹ Defendants' mootness argument misses the point. Because Unit A/B's interest was not included for purposes of the vote on the repeal of the invalid amendments, the repeal vote is as invalid and ineffective as the vote enacting the amendments in the first place.

This decision was both unreasonable and unfair, particularly given the Association's refusal to provide any information regarding the alleged violations. Further, in the absence of injunctive relief, the Association could record a lien against Unit 3 South and Shoffner would be forced to pursue yet more litigation concerning the validity of the lien.

Finally, the Association has not sought to proceed on the November 2010 notices directed to Shoffner's current tenants, but has not disclaimed the intent to do so. The court determines that the Association should be enjoined from further pursuing fines and/or penalties relating to the claimed damage to the hallway. Shoffner promptly paid the amount sought by the Association for the damage. There was no evidence introduced at trial that any other Association member had been the subject of fines and penalties, although there was evidence that another unit owner had caused damage to the common elements, which was resolved informally, as it should be. There is simply no basis in the record to justify the Association's pursuit of this matter further.¹²

In Count II, Shoffner seeks damages against the Association and the individual defendants alleging breaches of defendants' fiduciary duties. The Illinois Condominium Act provides: "In the performance of their duties, the officers and members of the board ... shall exercise the care required of a fiduciary of the unit owners." 765 ILCS 605/18.4. "This fiduciary duty requires that [b]oard members act in a manner reasonably related to the exercise of that duty, and the failure to do so results in liability for the Board and its individual members." *Carney v. Donley*, 261 Ill. App. 3d 1002, 1011 (2d Dist. 1994). A condominium board's fiduciary duty requires strict compliance with the condominium declaration and bylaws. *Wolinsky v. Kadison*, 114 Ill. App. 3d 527, 534 (1st Dist. 1983).

¹² Given the court's determination regarding the invalidity of the amendment to the Declaration regarding the leasing of units, it follows that the Association may not pursue the aspect of the notice based upon a violation of that invalid amendment.

As fiduciaries, board members must “act in good faith with due regard to the interests of the other.” *Id.*

In response to Shoffner’s request to hold them individually liable, the board members invoke Section 5.09 of the Declaration, which provides:

Neither the members of the Board, nor the Officers of the Association, shall be liable to the Unit Owners for any mistake of judgment or for any other acts or omissions of any nature whatsoever as such Board members and officers except for any acts or omissions found by a court to constitute gross negligence or fraud.

Seeking the protection of the business judgment rule, the individual defendants characterize their decisions on the various amendments to the Declaration and the notices issued to Shoffner and her tenant as discretionary. Defendants further characterize certain of their actions as “ministerial,” *e.g.*, Bolden merely signing the 2007 amendments passed by a “proper vote” of the Association members, and Parker notarizing Bolden’s signature. According to defendants’ rationale, if the members of the Association wanted to pass measures to harass Shoffner, they had no choice but to implement them.

The findings of fact detailed above make clear that defendants are not immunized from individual liability in this case. The business judgment rule shields a condominium board from liability for discretionary decisions “absent evidence of bad faith, fraud, illegality or gross overreaching.” *Davis v. Dyson*, 387 Ill. App. 3d 676, 694 (1st Dist. 2008). However, “[i]n a fiduciary relationship, where there is a breach of a legal or equitable duty, a presumption of fraud arises.” *LaSalle Nat’l Trust, N.A. v. Board of Dirs. of the 1100 Lake Shore Drive Condominium*, 287 Ill. App. 3d 449, 455 (1st Dist. 1997).

In *1100 Lake Shore*, the court held that, despite the fact that the plaintiff neither brought a “constructive fraud” count against the Board of Directors of her Lake Shore Drive condominium nor used those words in her complaint, her detailed allegations that the Board breached its fiduciary duty were sufficient to raise such a claim. *1100 Lake Shore*, 287 Ill. App. 3d at 456. The court found that the Board had needlessly obstructed the plaintiff’s renovation of her penthouse unit by imposing conditions on approval for the project on her that it did not place on other unit owners. *Id.* at 452-53. As such, the court upheld the trial court’s determination that the Board’s conduct constituted “fraud” as set forth in the Declaration’s exculpatory clause. *Id.* at 457.

Here, the course of conduct adopted by the Board from 2007 through late 2010 was designed to and did harass Shoffner. No valid interest of the Association was served by the 2007 amendment removing Unit A/B from the Association. While the Association could have decided to prohibit leasing of units, *see Apple II Condo. Ass’n v. Worth Bank & Trust*, 227 Ill. App. 3d 345,352 (1st Dist. 1995), the manner in which it chose to accomplish this end was both contrary to the Declaration and clearly intended to negatively impact Shoffner, in particular.

The 2007 notices of violation imposed plainly exorbitant fines: 1) McCray did not even notice the cement spattered on his windows until Bolden and Parker told him about it (\$1,000); 2) prior to the construction of Unit A/B in 2007, Association members had never been able to use the gangway to access the rear of the six-unit building; the fence installed by Shoffner gave them access for the first time (\$5,000); 3) Shoffner was entitled to landscape in front of Unit A/B and a row of bricks surrounding the landscaping would only pose a “danger” to anyone not paying attention (\$2,000); 4)

while the above-ground electrical grounding rod next to Unit A/B may have been unsightly, there was no evidence that it encroached on the gangway or otherwise impeded access to the gangway (\$2,000); and 5) the Association charged Shoffner \$1,000 for the furniture (which belonged to her tenant) stored on the roof of the six-unit building, while it determined that her tenant should be fined only \$50 for the same violation. Bolden's testimony attempting to justify \$14,000 in fines for these alleged violations was unconvincing and unpersuasive.

The manner in which the defendants handled the notices of violation against Shoffner's tenant was similarly unreasonable: 1) requiring a demand for hearing within seven days although no provision of the Declaration provides for such an abbreviated time period; 2) refusing to accommodate a request to reschedule the hearing from the tenant's attorney; 3) failing to provide any information regarding the complaints against the tenant; and 4) conducting the hearing in the absence of the tenant and her attorney.

Finally, defendants again acted unreasonably in addressing Shoffner's request to lease Unit 3-South in 2010. Bolden's refusal to claim certified mail letters addressed to him seeking permission to rent the unit and defendants' later notice to Shoffner's new tenants demanding that they vacate in 30 days because Shoffner had not "complied with the leasing requirements" is a prime example of bad faith. Given the history of this case, the court has no difficulty finding defendants guilty of "constructive fraud" and "gross negligence" in the fulfillment of their duties to Shoffner.

Shoffner has been damaged by defendants' conduct. Following her tenant's decision to break the lease mid-term, Shoffner, under the 2007 amendment regarding leasing, was ineligible to lease her unit or apply for a hardship exception. Consequently,

she made efforts to sell the unit. The evidence at trial demonstrated that the Association wholly failed to cooperate in those efforts, refusing to provide Shoffner with necessary information. When in 2009 Shoffner had a potential buyer for her unit, the Association failed and refused to provide information regarding outstanding assessments so that required disclosures could be made.

Shoffner's unit was vacant for 27 months. When Shoffner finally leased the unit in November 2009, the Association promptly threatened her new tenants with eviction. Given the Association's pattern of interfering with Shoffner's ability to realize value from her unit, the court finds appropriate to assess the amount of lost rent as the measure of Shoffner's damages.¹³

Shoffner's prior tenant was paying \$1700 per month resulting in lost rental income of \$47,600. Shoffner requests and the court will award this amount as a reasonable measure of the damages she suffered as a result of defendants' breaches of fiduciary duty. The amount of damages is payable by the Association and the three individual defendants. To the extent that a special assessment is required to satisfy the judgment, neither Unit 3 South nor Unit A/B may be assessed for any portion of these damages.

Shoffner also seeks punitive damages against defendants, requesting an award of \$150,000. Given the court's factual findings regarding defendants' relentless course of conduct, Shoffner's request for punitive damages is not without merit. However, under the circumstances of this case, the court believes that the relatively substantial award of

¹³ Contrary to the individual defendants' argument, Shoffner sustained these damages as a proximate result of defendants' breaches of their fiduciary duties to her, *i.e.*, her damages sound in tort. Shoffner's claims do not "sound in contract" because they relate to the sale or rental of her unit. Further, there was no evidence presented at trial that Shoffner's hardship application or her request to lease to the Browns were "accepted by the Board." In fact, they were not.

compensatory damages coupled with the declaratory and injunctive relief awarded is sufficient to discourage defendants from any future conduct similar to that at issue here. The court is mindful of the fact that this is a small condominium association and that the imposition of a punitive damage award would likely cripple the Association financially. No good would come from such a result. Therefore, the court declines to assess punitive damages.

The Associations's Counterclaims

Count VI of the Association's counterclaim seeks to recover 13 years of back assessments from Unit A/B. While Shoffner argues in her post-trial brief that laches bars the Association's claims (and while the court might otherwise be inclined to agree that the doctrine applies), Shoffner has not raised this affirmative defense in her answer to this aspect of the Association's counterclaim.¹⁴

The fundamental problem with the Association's claim for back assessments for Unit A/B, apart from the lack of any demand for payment prior to this litigation, is the method the Association uses to calculate the assessments. The Association has simply taken its monthly dues assessments and factored in an amount related to Unit A/B's 30.6% ownership interest. But under the Declaration, that is clearly not the manner of calculating Unit A/B assessments. Because, under the Declaration, the owners of Unit A/B are responsible for maintenance and repair of the building in which those units are located and they are expressly not responsible, and thus may not be assessed, for the maintenance and repair of the six-unit building, the Association's calculation of past due assessments clearly overcharges Unit A/B. Given that the only amounts that Unit A/B can be assessed under the Declaration are its proportionate share of premiums for

¹⁴ Shoffner did raise laches as an affirmative defense to Count I of the counterclaim, but not to Count VI.

insurance under Section 5.08 of the Declaration and sums relating to the maintenance and repair of the Common Elements outside the two buildings, such as the parking lot or the electric gate, a calculation that simply takes the Association's total budget and assesses 30.6% of that amount to Unit A/B is not in conformance with the Declaration. No evidence of insurance premiums or any Common Elements maintenance or repair expenses was introduced at trial and, therefore, the Association has failed to prove any amount due and owing from Unit A/B.

While, as noted above, the Declaration contemplates payment by Unit A/B of a monthly sum to be held in a capital reserve account to be used solely for the repair and maintenance of Unit A/B as voted on by the owners of those two units, it is undisputed that the Association has never set up this account since its formation. Given that Shoffner has, in fact, paid all of the expenses of insuring, maintaining and repairing Unit A/B since its construction, there is no basis to impose any further liability on Unit A/B for past amounts.

In Count VII of its counterclaim, the Association seeks to recover from Shoffner the tenant fines imposed against her former tenant as well as Unit 3 South's proportionate share of the fee of an appraiser hired by the Association in connection with this litigation. Based upon the court's findings above regarding the procedural deficiencies in the Association's assessment of fines against Shoffner's tenant, the court concludes that the Association may not collect those amounts from Shoffner. The court further declines to force Shoffner, through her ownership of Unit 3 South, to bear a portion of the appraisal fees incurred in the Association's litigation against her.

Unresolved Issues

Resolution of the foregoing issues does not end this controversy. Because of the failure of the Association to set up the separate capital reserve account called for in Section 4.05(c)(ii) of the Declaration, Unit A/B, since its completion, has essentially functioned as a separate condominium association, paying all of its own maintenance and repair expenses. While this has not been problematic given that Shoffner owns both units and has been paying all of the associated expenses, this clearly will not always be the case. If and when Shoffner sells one or both units and two separate owners are involved, this informal arrangement will be unworkable. More importantly, the Declaration simply does not contemplate that Unit A/B will operate autonomously; rather, both buildings are to operate under the umbrella of the Association.

Further complicating matters is the fact that the court was advised during trial that the Association's Board of Managers has resigned and delegated the responsibility for the Association's affairs to a management company. The court was also informed that when matters requiring a vote arise, the Association members function as a committee of the whole. This, too, is contrary to the Declaration, which vests in the Board of Managers the authority and responsibility to conduct the affairs of the Association. While Section 5.07 (a) of the Declaration authorizes the Board to engage an agent to manage the property, nothing in the Declaration authorizes the Board to abdicate its duty to function as a governing body. This arrangement likewise cannot continue.

The parties must address these issues before a final order can be entered. Otherwise, further controversy will necessarily ensue. Perhaps, given the history of this

litigation, it is too much to hope that the parties can agree on a mechanism to resolve these issues. However, the court directs them, in good faith, to try.

WHEREFORE, for the foregoing reasons, IT IS HEREBY ORDERED:

1) judgment is entered in favor of plaintiff and against defendants on Count I of plaintiff's complaint, the court declaring that the September 28, 2007 Amendments to the Declaration of Prairie Avenue Condominium Association are null and void and of no force and effect; the court further enjoins the Association from taking any further steps to collect on the fines and penalties imposed on the tenants of Unit 3 South pursuant to the notices dated February 28, 2008 and November 10 & 12, 2010; based upon the Association's representation that it does not intend to further pursue the fines and penalties arising from the November 2007 notices directed to Shoffner, the court finds that Shoffner's request for injunctive relief in this respect is moot;

2) judgment is entered in favor of plaintiff and against defendants on Count II of plaintiff's complaint, the court awarding \$47,600 in compensatory damages as a result of defendants' breaches of fiduciary duties and further ordering that no portion of the foregoing award is payable via a special assessment on either Unit A/B or Unit 3 South; plaintiff's request for an award of punitive damages is denied;

3) judgment is entered in favor of plaintiff and against the Association on Count VI and VII of the Association's counterclaims; and

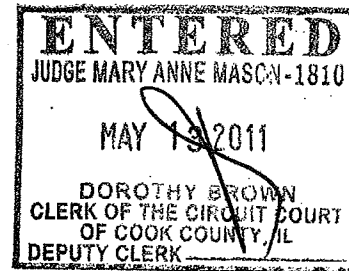
4) this matter is set for status on the remaining issues identified above on May 26, 2011, at 10:00 a.m., without further notice,

21

May 13, 2011

ENTER:

JUDGE MARY ANNE MASON



1-Exhibit

CHICAGOLAND SURVEY CO. 00665850

6501 W. 65TH STREET, CHICAGO, ILLINOIS 60638
773-271-9447 708-594-8600

PLAT OF SURVEY OF

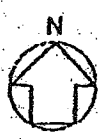
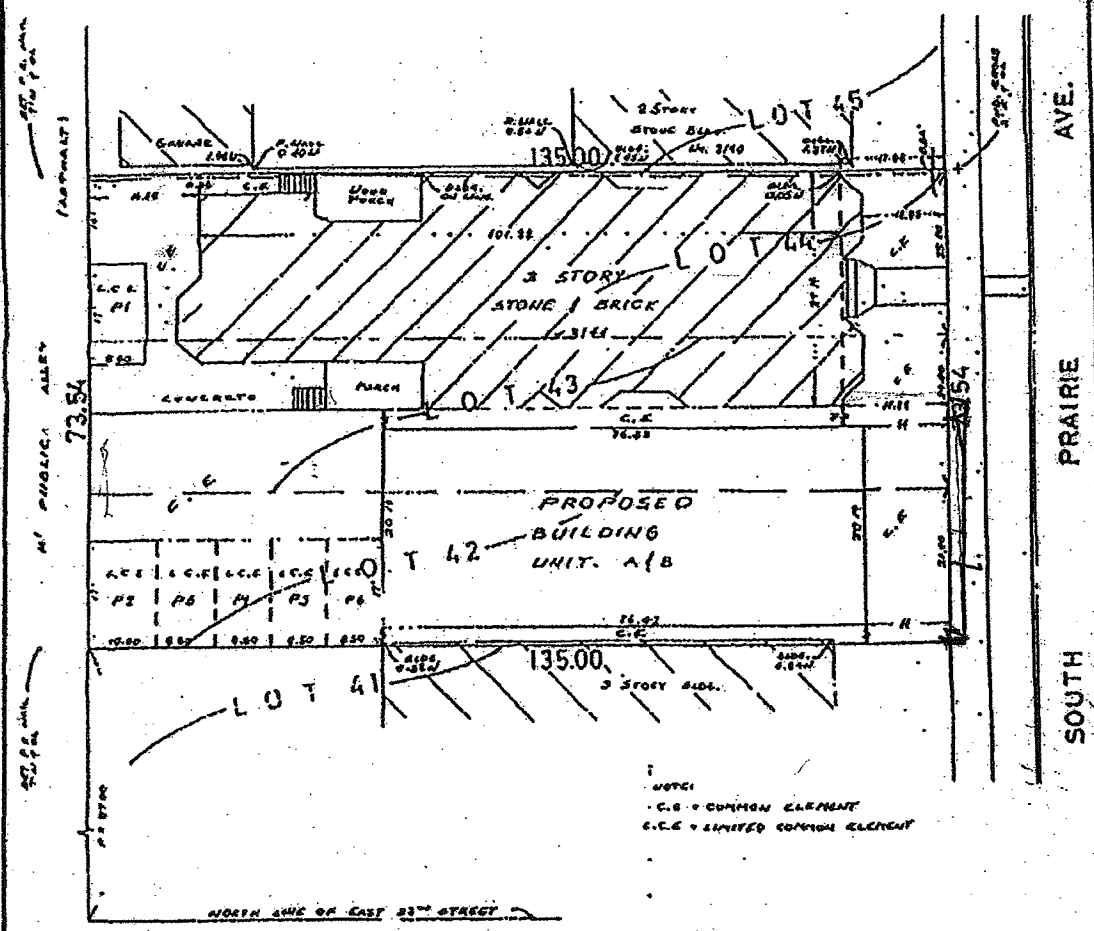
PRAIRIE AVENUE CONDOMINIUM

UNIT A/B

IN THE PRAIRIE AVENUE CONDOMINIUM, AS DELINEATED ON THE PLAT OF SURVEY OF THE FOLLOWING REAL ESTATE LOT 42, 43, 44 AND THE SOUTH 6 1/2 INCHES OF LOT 45 IN HAYWOOD'S SUBDIVISION OF THE WEST 4/5 OF THE NORTHWEST 1/4 OF THE NORTHEAST 1/4 OF THE NORTHWEST 1/4 OF SECTION 34, TOWNSHIP 39 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS, WHICH SURVEY IS ATTACHED AS EXHIBIT "C" TO THE DECLARATION OF CONDOMINIUM, WHICH DECLARATION WAS RECORDED AS DOCUMENT NO. 87-650657, TOGETHER WITH ITS UNDIVIDED PERCENTAGE INTEREST IN THE COMMON ELEMENTS, IN COOK COUNTY, ILLINOIS.

DOCUMENT WITH THIS EXHIBIT

AMENDED EXHIBIT C



DISTANCES ARE SHOWN IN FEET AND DECIMAL PART THEREOF AND CORRECTED TO 1/16"

FOR BUILDING LINE AND OTHER RESTRICTIONS NOT SHOWN ON THE SURVEY PLAT, REFER TO YOUR ABSTRACT, DECL. AND LOCAL BUILDING REGULATIONS

UTILITY DATA OTHER THAN PHYSICAL EVIDENCE VISIBLE ON THE GROUND IS SHOWN AS PROVIDED BY THE PRIVATE AND PUBLIC SOURCES AND SHOULD BE ASSUMED AS APPROPRIATE



STATE OF ILLINOIS
COUNTY OF COOK

MADE UPON THE ABOVE RECORDED DECLARATION WE, CHICAGOLAND SURVEY COMPANY, DO HEREBY CERTIFY THAT WE HAVE EXAMINED THE ABOVE DESCRIBED PROPERTY AND THAT THE PLAT HEREON DRAWN IS A CORRECT REPRESENTATION OF SAID SURVEY.

DATED AT CHICAGO, ILLINOIS, JULY 7, 2009

BY: *Donald R. Smith*
REGISTERED ILLINOIS LAND SURVEYOR NO. 2162

SCALE: 1" = 15'

DRAWN BY: RICHARD JOSEPH

FIELD NO. 53

END-OF-RECORDED-EXHIBIT

OFFICE:
8714 S. HONORE ST.
CHICAGO, ILLINOIS 60620
TEL: (773) 233-8510
FAX: (773) 233-0849
P.O. BOX 208561

PLAT OF SURVEY

L.R. Pass & Associates P.C.
Professional Land Surveyors

SOIL
TOPG
LOG
CON
LANC
LEGA

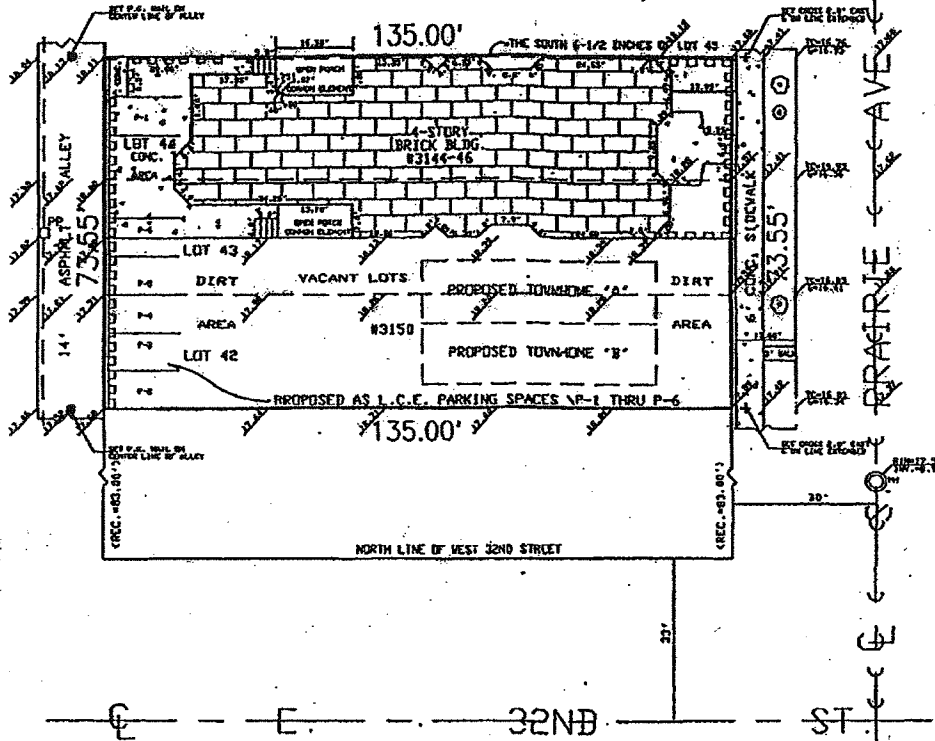
LOTS 42, 43, 44 AND THE SOUTH 6-1/2 INCHES OF LOT 45 IN HAYWOOD'S SUBDIVISION OF THE WEST 4/3 OF THE NORTHWEST 1/4 OF THE NORTHEAST 1/4 OF THE NORTHWEST 1/4 OF SECTION 34, TOWNSHIP 39 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

PRAIRIE AVENUE CONDOMINIUM EXHIBIT "C"

97850657

P.L.S. #15
17-34-183-233-0000
17-34-183-233-0100
17-34-183-233-0000

RECEIVED IN BAD CONDITION



MAIL TO: RICHARD D. JOSEPH
33 WEST JACKSON ROOM 1750
CHICAGO, IL 60604

LEGEND

- UNGRADE
- OPEN BASH
- POWER POLE
- TACE
- G.C.

ELEVATION SHOWN HEREON ARE WITH REFERENCE TO THE CITY OF CHICAGO DATUM, USED CITY BENCHMARK NUMBER 1440

HORIZONTAL AND VERTICAL PLANES FORMING BOUNDARIES OF LOTS COINCIDE WITH THE TOP OF FINISHED FLOOR, BOTTOM OF FINISHED CEILING, AND INTERIOR FACE OF PERMANENT FINISHED WALLS.

DIMENSIONS ARE IN FEET AND DECIMAL PARTS THEREOF.

THIS IS TO CERTIFY THAT THIS MAP OF PLAT AND THE SURVEY ON WHICH IT IS BASED WERE MADE (1) IN ACCORDANCE WITH "MINIMUM STANDARD DETAIL REQUIREMENT FOR ALTA/ACSM LAND TITLE SURVEYS" JOINTLY ESTABLISHED AND ADOPTED BY ALTA AND ACSM IN 1992, AND INCLUDES ITEMS OF TABLE 3 THEREOF, AND (2) PURSUANT TO THE ACCURACY STANDARDS (AS ADOPTED BY ALTA AND ACSM AND IN EFFECT ON THE DATE OF THIS CERTIFICATION) OF AN "URBAN" SURVEY.

DATE: NOVEMBER 2, 1997

(SIGNED) *L.R. Pass*
PROFESSIONAL ILLINOIS LAND SURVEYOR NO. 3063

97850657

FLOOD CERTIFICATE

ACCORDING TO FLOOD INSURANCE RATE MAP OF COOK COUNTY, ILLINOIS OF JUNE 9, 1991, THIS PROPERTY IS IN A MINIMUM FLOODING AREA AS DESIGNATED AS "C" ZONE 170074-0075 S.

LEGEND:

- T/C = TOP OF CURB ELEVATION
- GUTTER ELEVATION
- F.F.L. = FINISHED FLOOR ELEVATION
- C.C.L. = CEILING ELEVATION
- C.C.E. = COMMON ELEMENT
- L.C.E. = LIMITED COMMON ELEMENT

BUILDING LINES AND EASEMENTS ARE SHOWN ONLY WHERE THEY ARE SO RECORDED IN THE MAPS, OTHERWISE REFER TO DEED OR ABSTRACT.

COMPARE ALL POINTS BEFORE BUILDING BY SAME AND AT ONCE REPORT ANY DIFFERENCES.

DIMENSIONS ARE NOT TO BE SCALED.

ORDER NO. 97111763

SCALE: 1 INCH = 15' FEET

ORDERED BY: CITY, TONYA HIRD

MEMBER: I.P.L.S.A.

E.L.T. ACSM

CHECK IN BOX MEANS THAT SURVEY HAS BEEN MADE FOR USE IN CONNECTION WITH A REAL ESTATE OR MORTGAGE LEND TRANSACTION AND IS NOT TO BE USED FOR CONSTRUCTION.

BENCH MARK

CITY OF CHICAGO BENCHMARK

32ND STREET & CALUMET AND ON SOUTH SIDE OF EAST 32ND STREET 2 WESTLINE OF ALLEY TO BE NORTH (PER WESTLINE OF SOUTH CHUMET MARK CURB AND OF UTTER SIDE OF AT DISTANCE 101)

ELEVATION 1021

STATE OF ILLINOIS } SS.
COUNTY OF COOK }

WE, L.R. PASS & ASSOCIATES, P.C. DO HEREBY CERTIFY THAT WE HAVE SURVEYED THE ABOVE DESCRIBED PROPERTY AND TO KNOWLEDGE, INFORMATION AND BELIEF, THE PLAT HEREOF IS A TRUE AND CORRECT REPRESENTATION OF SAID SURVEY.

GIVEN UNDER MY HAND AND SEAL THIS 7TH DAY OF NOVEMBER 1997

(SIGNED) *L.R. Pass*
PROFESSIONAL ILLINOIS LAND SURVEYOR NO. 3063
TO INSURE AN AUTHENTIC COPY SURVEYOR'S SEAL MUST BE IMPRESSED.