

NEW LAWS HELP ASSOCIATION OPERATIONS

Some new State laws making changes to the Condominium Property Act and the Common Interest Community Association Act have taken effect, in part to address the practical difficulties that Association Boards had faced in the wake of the *Palm II* ruling. There have also been some recent Appellate Court rulings that impact Condominium Associations.

NEW STATUTES

1. Closed Meetings.

That's right, we said "closed meetings." You will recall that the *Palm II* ruling held, among other things, that all business conducted by the board must be done at an open board meeting with notice to owners. *Palm II* also stated that a quorum of board members merely discussing association matters was conducting business and was improper without first giving notice to the owners. While the holding in *Palm II* is still good law and should still be followed, the Condo Act (Section 18(a)(9)(A)) and CICAA (Section 1-40(b)(5)) were both amended to expand the number of topics which may be *discussed* by the board members at a closed meeting or even without notice of a meeting.

The new laws allow the board to do the following at a closed portion of a noticed board meeting, *or to "meet separately from a noticed meeting"*:

- 1) discuss litigation that is pending or the board finds that an action is probable or imminent
- 2) discuss the appointment, employment, engagement, or dismissal of an employee, *independent contractor, agent or other provider of goods and services*
- 3) *interview a potential employee, independent contractor, agent, or other provider of goods and services*
- 4) discuss violations of rules and regulations of the association
- 5) discuss a unit owner's unpaid assessments
- 6) *consult with the association's legal counsel*

The major changes are found in Numbers 2 and 3. Previously the statutes only allowed discussion of hiring and firing of employees to take place in the closed session. The new laws open the door to allow the board to interview vendors, and to discuss hiring and terminating vendors,

at closed meetings and even at separate meetings. So, you no longer have to interview or discuss hiring new contractors, landscapers, swimming pool management etc. at the open board meeting.

PLEASE NOTE that the new statutes still provide that ANY VOTE on any of these matters must take place at a meeting of the board open to the owners. So, while you may discuss hiring or firing that contractor outside of an open meeting, the board must still vote on hiring or firing the contractor at the open board meeting.

Also keep in mind that other parts of *Palm II* still apply and should still be followed. So, for example, all voting must be at an open board meeting and not by “polling” board members. Notice of meetings must still comply with the respective statutes, or bylaws where appropriate, although electronic noticing is available if procedures are followed.

2. Condo Board - Ratify Emergency Actions

The Condominium Property Act was also amended to allow action to address an emergency without calling a board meeting. If there is an emergency that must be addressed, members of the board may take action in response to an emergency. The board must then give notice to the unit owners of (1) the occurrence of the emergency event within 7 business days after the emergency event; and (2) the general description of the actions taken to address the event within 7 days after the emergency event. The board may then ratify and confirm the actions of the members of the board at any open meeting of the board. For these purposes, an emergency means an immediate danger to the structural integrity of the common elements or to the life, health, safety or property of the unit owners.

3. Condo Board - Authority to Pledge Association Assessments and Assets

Another slight change to the Condo Act also gives more authority to the condominium board. The Act now provides that the board, by a majority vote of the entire board, may assign the right to future assessments and other income, and may mortgage or pledge substantially all of the remaining assets of the Association. This is usually done in connection with loans, where the assessments and assets are pledged as collateral for the loan. Previously the Act provided that the association bylaws could restrict the board from taking these actions. Now, the Act allows the board to take these actions in any case without approval of unit owners.

4. Community Associations - Board Authority To Correct Errors In Documents

The Common Interest Community Association Act was modified to clarify that the board, by a vote of two-thirds of the board of directors, may amend the declaration or bylaws to correct any error, omission, or inconsistency to conform to CICAA or another applicable law.

RECENT CASES

1. Condominium - Amending Declaration

This past month the First District Appellate Court issued another ruling holding that the Condo Act provisions regarding amending declarations strictly apply, and that provisions in the declaration that impose restrictions to amend that are inconsistent with the Condo Act will not be valid. In the case, the condominium association amended the declaration to delete a provision affecting the developer's rights to arbitrate disputes. The developer argued that the amendment was not valid because the declaration required the developer's approval of such an amendment. The Appellate Court ruled that the provision requiring developer approval was not valid because it imposed a requirement to amend the declaration that was more restrictive than the amendment procedures provided in the Act. Section 27 of the Act states that the "only" manner of amending the declaration is by approval of unit owners (and mortgagees where the declaration provides), so that a provision requiring approval of the developer is not valid or enforceable and the developer's approval is not necessary.

This ruling can have significant implications to the extent that condominium associations may take away or modify certain rights reserved to the developer. This might include things such as the developer's rights to have a sales office or to maintain signs on the property during development, or provisions that might allow the developer to lease units it owns.

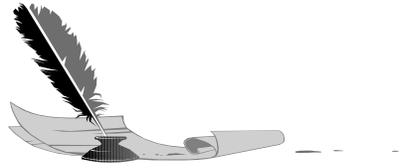
2. Condominium - Attorneys Fee in Collection

The First District Appellate Court recently issued two rulings favorable to condominium associations in connection with attorneys fees expended by the condominium association in eviction cases seeking to collect unpaid assessments and other lawful amounts.

In one case, the Appellate Court reiterated that the Condo Act provides that *any* attorneys' fees incurred by the condominium association arising out of a default by the owner in performance of the owner's obligations under the Condo Act, declaration, by laws or rules and regulations or any statute or ordinance shall be added to and deemed a part of the owner's share of common expenses. In that case, the association filed an eviction suit to collect past due assessments. The defendant unit owners filed a countersuit against the association. The association was successful, and the court awarded the association its attorneys fees it incurred to defend the countersuit, rejecting an argument that the association was only entitled to attorneys fees incurred in pursuing its claim to collect assessments. The Court ruled that the defense of the countersuit arose out of the unit owner's breach by failing to pay assessments.

Similarly, in another case, the Appellate Court held that a unit owner is required to pay all additional legal fees incurred by the condominium association which had obtained an order for possession before the unit owner was entitled to recover possession of the unit. In that case the association obtained a judgment and possession of a unit based upon non-payment of assessments. The unit owner made a number of unsuccessful attempts to have that ruling reversed. The Association

incurred attorneys fees challenging the unit owner's attempts. The unit owner eventually paid the judgment amount, but did not pay the additional attorneys fees the association incurred after judgment. The owner argued that he was entitled to possession of the unit because he paid the judgment amount, and that the association had to file a new lawsuit to collect the additional attorneys fees it incurred. The Court rejected that argument and ruled that the Condo Act provided that any attorneys fees arising out of the owner's default were added to the owners share of common expenses, and that the eviction statute required that they be paid before the unit owner was entitled to return of possession of the unit.



Please contact Dickler, Kahn, Slowikowski & Zavell, Ltd., if you would like to discuss these matters or to assist your association to implement new procedures consistent with the new laws. Phone (847) 593-5595, or info@dicklerlaw.com.

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