

Association of Condominium,
Townhouse, and
Homeowners Associations



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Can We Adopt a Rule?

The Scope of Community Association Rulemaking Authority

By: **Scott A. Rosenlund, Attorney**
Fullett Rosenlund Anderson PC
Lake Zurich | Chicago

Community associations seeking to make additions to their governing documents often ask whether the changes may be implemented through revised rules and regulations or whether they must be adopted via an amendment to the declaration or bylaws. Depending on the nature of the contemplated revisions, analysis by association legal counsel may be warranted. But an association in any event should ask itself the following questions before adopting a new rule:

Does the proposed rule directly contradict the declaration and bylaws?

If the answer to this question is “yes,” a declaration or bylaw amendment is most likely required. Limited exceptions to this general principle exist when applicable laws clearly override the declaration or bylaw provision at issue and authorize the rule. For example, Subsection 12(h) of the Illinois Condominium Property Act expressly provides that a condominium board, by rule, may require unit owners to obtain individual liability insurance coverage.

Does the proposed rule indirectly conflict with the declaration and bylaws?

By way of example, until recently, there were differing viewpoints amongst community association professionals regarding an association’s authority to adopt leasing restrictions by rule. Many professionals took the position that leasing restrictions can be adopted via rule only on the very rare occasions when the declaration and bylaws are completely silent as to leasing or when the declaration and bylaws expressly allow such rules. Others employed a more aggressive approach and supported adoption of rules restricting leasing so long as there was not a direct, obvious conflict between the declaration and bylaws versus the rules. The latter, more aggressive approach was rejected in the 2016 court decision *Stobe v. 842-848 West Bradley Place Condominium Association*. In the *Stobe* case, the Illinois Appellate Court (First District) held that a condominium association rule imposing a 30-percent cap on leasing was invalid because the declaration mentioned the leasing of units and did not expressly allow the association to impose further restrictions on leasing by rule.

NEED RESOURCES?

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for info on ORC

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ACTHA Announces 2017-18 Board of Directors

During the Annual Meeting on April 8, it was announced that Myrna Santiago-Martinez was re-elected to a 3-year term on the ACTHA Board of Directors. Also elected to 3-year terms were Tom Bordenkircher and Salvatore Bondi, who replaced the expiring terms for Bob LaMontagne and Mike Mathews. The 2017-18 Board of Directors (in alpha order):

Salvatore Bondi, Edgewater Beach Apartments Corp., Chicago

Tom Bordenkircher, 1720 S Michigan Ave Condo Assn, Chicago

Jacqueline Fanter, Wedgewood Commons Assn, Orland Park

Joe Fong, Westgate Terrace CA, Chicago

Beth Lloyd, Partridge Hill TOA, Hoffman Estates

Nancy Moreno, The Lotus Condo Assn, Morton Grove

Diane Pagoulatos, Whispering Lake TOA, Lake Bluff

Myrna Santiago-Martinez, Flats of Old Irving Condo Assn, Chicago

Ron Sirotzki, Spring Lake Farms HOA, Lake in the Hills

Mark Swets, CAE—Executive Director

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Spring Conference Recap New Ways to Conduct Business, Learn

A season of change was definitely in the air on April 8 as 200 board members, unit owners, managers and vendors convened for our Spring Conference at Drury Lane in Oakbrook Terrace. Nearly a quarter of the participants were first-time attendees!

The opening session featured a panel discussion regarding the importance of assembling a “team” of advisors to guide association boards. An association manager, attorney, insurance agent and restoration expert play roles in critical situations. Don’t wait for an emergency to establish these relationships!



Attendees participated in the newly-formatted Networking Session, which allowed for quality relationship-building in a relaxed environment. Following lunch, attendees immersed themselves in educational sessions covering topics including owner engagement, financial tips, the role of an association attorney and the new legal environment for association meetings & communication.

Left: Ben Rooney and Nick Lange of Keay & Costello share legal expertise.

Below: A woman named Janet walks into a conference...and meets three other Janets! (From L-R) Association members Janet Nelson, Janet Baker, Janet Haisman and Janet Cheverud enjoy each other’s company during lunch.

Some of the few things attendees had to say (Answers courtesy of attendee survey):

- “I love this change to the format!”*
- “Each of my sessions were very interesting.”*
- “My first time; very worthwhile.”*
- “Good contacts with self-managed boards. Good diversity in vendors present.”*
- “Talking one-on-one with presenters to garner specific information; sharing with other associations”*



Join us at an upcoming ACTHA Conference:

Saturday, Sept. 9, Conference Chicago at University Center | Saturday, Oct. 14, NIU Naperville Conference Center

Learn More with ACTHA—Your Trusted Source!

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Do the declaration and bylaws expressly mention the board's authority to adopt rules relating to a particular subject?

If the answer is "yes," then a rule probably will be valid. For example, condominium declarations for multi-story buildings often clearly state that boards may by rule implement guidelines requiring sufficiently sound-absorbent floor coverings. If this type of express language appears in the declaration, a properly-adopted, reasonable rule relating to floor coverings would be enforceable.



What is the scope of the association's rulemaking authority in general?

Subsection 18.4(h) of the Illinois Condominium Property Act provides that the purpose of condominium rules and regulations is to cover the details of the operation and use of the property. Meanwhile, non-condominium common interest community associations and master associations must consider the scope of rulemaking authority conferred by their governing documents. Some governing documents for non-condominium associations expressly empower boards to adopt rules regulating the use and operation of individually-owned lots, while other governing documents only discuss the adoption of rules relating to the common areas. In the 2013 court decision *Ripsch v. Goose Lake Association*, the Illinois Appellate Court (Third District) held that a common interest community association had the implied, inherent authority to adopt rules regulating the use of common areas, even though the covenants did not expressly grant such rulemaking authority.

Does the proposed rule restrict basic use and occupancy rights?

As a general matter, restrictions upon the use and occupancy of, or behavior within, individually-owned units or lots are best implemented by amending an association's declaration and bylaws, rather than through the rulemaking process. Under a well-established body of case law in Illinois and other states, such restrictions contained in recorded covenants will be granted greater deference by a court and generally should not be subject to a judicial inquiry as to their reasonableness, but a restriction established by rule can be invalidated if a court deems the restriction to be unreasonable.

WELCOME! **New ACTHA Members** **(March 2017)**

Association Members

849 Lakeside Place, Chicago

The Courtyards at the Woodlands, Buffalo Grove

Hickory Bend Condo Phase 5, Glenwood

Oak Creek Club HOA, Burr Ridge

Park Blvd Master HOA, Chicago

Ravenswood Place Condo Assn, Chicago

Commercial Members

Green Effects Landscaping – South suburban landscape maintenance and construction company focused on complete customer satisfaction through customized programs and constant communication.

Contact: Kyle Rea, 708-675-7309

kylerea@grneffects.com

GreenLine Environmental Solutions– Based in Gary, IN, and specializing in sewer and drainage system cleaning, industrial cleaning, and the removal, transportation and disposal of hazardous and non-hazardous waste.

Contact: Tom Wolfe, 219-886-1940

twolfe@greenlinees.com

Safeguard Construction Company – is a leading edge general contractor specializing in replacement of roofing, siding and gutters resulting from damaging hail and wind storms. Located in Aurora.

Contact: Marina Schultz, 630-898-2090

marina.schultz@safegc.com

Congratulations....

...to the following members for recently completing ACTHA's Learn & Lead certificate program!

Ron Colwell, Wellington Court HOA, Lynwood

Karen Heidkamp, Courtyards of Hinsdale, Hinsdale

Nancy Moreno, The Lotus Condo Assn, Morton Grove

Jean Shamo, Park Tower Condo Assn, Chicago

The Learn & Lead series is ACTHA's signature educational offering for those living in community associations. Visit www.actha.org for information on upcoming sessions.

Question of the Month: Should a ballot box only be opened during an election?

By: David Bendoff, Attorney
Kovitz Shifrin Nesbit
Mundelein | Chicago | Naperville

Question: Our association utilizes mail in ballots for elections to the board. The association's accounting firm (which also tallies our election results) opened the ballot box before last year's election with only their personnel present in order to ensure a quorum before the annual meeting. Shouldn't that ballot box be sealed until, and only opened at, the election?

Answer: One of the purposes of having an independent third party act as an election inspector is to ensure a fair election; this involves maintaining the security of the ballots and ballot box. The practice of opening the ballot box, and the actual ballots prior to the annual meeting, can jeopardize that purpose and may give rise to an appearance of impropriety.



And even the most unintended of consequences can result when ballots are removed from the ballot box prior to the election. For example, a ballot can be inadvertently lost or misplaced.

The Condominium Property Act (Section 18(e)) does provide that “a candidate for election to the board of managers or such candidate's representative shall have the right to be present at the counting of ballots at such election.” The Illinois General Not for Profit Corporation Act (Section 107.35) authorizes the appointment of election inspectors, and provides in relevant part:

“.....the chairman of the meeting may, or upon the request of any members shall, appoint one or more persons as inspectors for such meeting.....” Such inspectors shall ascertain and report the number of votes represented at the meeting, based upon their determination of the validity and effect of proxies; count all votes and report the results; and do such other acts as are proper to conduct the election and voting with impartiality and fairness to all the members.”

I infer from these statutes that the ballots are to be opened, for all purposes, at the annual meeting, and not before.

Other states do have regulations in place that expressly provide that no person shall open or otherwise review any ballot prior to the time and place at which the ballots are counted and tabulated.

Many associations adopt, or their governing documents expressly require them to follow, Robert's Rules of Order. The 11th Edition provides that “(t)he person designated as addressee for the returned ballots should hold them in the outer envelopes for delivery, unopened, at the meeting of the tellers where the votes are to be counted.”

Moreover, a quorum is determined at the annual meeting, not prior to the annual meeting. There may be some administrative convenience of having the election inspector review ballots before the annual meeting. However, I don't believe it is the best practice, and may open the door to attacks on the election procedure by those that might claim that this practice involves a nefarious purpose. It just doesn't seem like a practice whose benefit is outweighed by the risk. The inspector could certainly keep a count of the ballots received as they are placed in the ballot box, and this would give a general sense of whether there is quorum. However, I would not suggest opening the ballot box and reviewing any ballots prior to the annual meeting.



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ACTHA Launches Online Resource Center

ACTHA recently unveiled its Online Resource Center (ORC), a members-only area on the ACTHA website containing accessible content from past conferences, seminars and webinars. The content is organized to easily obtain information on a variety of association-related topics including governance, administration, financial and more. And best of all, it's free for ACTHA members!

Members can easily access the ORC by logging in with their username and password.

Don't have a password? Visit www.actha.org to request or reset your password, or call 312-987-1906 to gain access.

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