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Association of Condominium, Townhouse, and Homeowners Associations

ACTHANEWS

11 E. Adams, Ste. 1107 • Chicago, IL 60603 • 312-987-1906 • actha@actha.org • www.actha.org

April 2014

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ACTION REQUIRED

NOW!

SB 2664

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Noise Disturbances: One Man's Floor is Another Man's Ceiling

By: Howard Dakoff and Jennifer O'Reilly of Levenfeld Pearlstein, LLC

Noise between neighbors is a common complaint among those living in community associations. Yet, resolving such problems can prove to be complex.

Boards receive complaints from owners and occupants complaining that their neighbor's dog barks throughout the night, that the stereo is being played too loud or that their neighbors are constantly yelling and fighting with other occupants in the unit. No matter what type of noise complaint is received, a Board must know how to properly handle the problem.

There are three general steps that every Board should follow in order to effectively and efficiently address noise complaints.

Receiving and Verifying the Noise Complaint:

The first important step in handling any noise complaint is that the Board should require the complaint be in writing.

If the declaration, by-laws or rules and regulations do not already require that all noise complaints be in writing, Boards should consider amending their governing documents to require that noise complaints be in writing and should also set out a specific procedure for how complaints will be handled. Without a written complaint, levying a fine or taking legal action against an owner or occupant who has allegedly violated the governing documents is ill advised.

The Board should verify the noise before levying a fine or taking legal action. The Board should ask the complaining owner if they made any audio recordings of the noise. Not only should the Board find out details about the complaint, but should also find out if these owners have a history of tension or disagreement. Depending on the circumstances, the Board

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IMMEDIATE ACTION IS NEEDED NOW! TODAY! Senate Bill 2664 changes the collection amounts an association may receive in a foreclosure action. While the bill extends to nine months from six months, the collection of assessments, it eliminates an association from collecting special assessments, late charges, court costs, cost of damages to a foreclosed unit (i.e. damage from a burst water pipe). Language was added to make the collection of attorney fees PERMISSIVE, NOT MANDATORY. Contact your State Representative TODAY and tell them to VOTE "NO" on S. B. 2664.

LEGAL UPDATE

Court Ruling to Affect Board Meetings

David Hartwell of Penland and Hartwell
One N. LaSalle, Chicago 60602 / 312-578-5610 / dhartwell@penhart.com / www.penhart.com

On March 21, 2014, the Illinois Appellate Court issued an order/opinion in *Palm v. 2800 Lake Shore Drive Condominium Association ("Palm II")*, which may dramatically affect how boards conduct business, including doing away with board "workshop" or "executive sessions", eliminating polling or canvassing board members by email, and limiting authority delegated to management. Notably, the opinion was issued pursuant to Illinois Supreme Court Rule 23 and therefore unpublished (may not be used as precedent); however it should be considered a new road map for boards.

No more closed "Workshops" or "executive sessions"

Section 2(w) of the Illinois Condominium Property Act ("Act") provides that a "meeting of the board" occurs when a quorum of the board meets for the "purpose of conducting board business". This language was amended by the Illinois Legislature in 1994, changing the text from "discussing" to "conducting." As such, this new language has widely been construed to mean that boards could informally meet to have preliminary discussions on association issues as long as final decisions were not reached, votes were not taken and the business of the association was not actually conducted.

The court in *Palm II* looked at Section 2(w) of the Act together with Section 18(a)(9) and concluded that "not only must all board voting occur at meetings open to unit owners, so must all board discussion or consideration of association matters, except for discussion or consideration of the three specified exceptions (litigation, employment, rule violations and unpaid assessments)." This ruling judicially expands the customary definition and understanding of "conducting business" and will compel many boards to review and likely alter how they do business. The impact of the ruling, by way of example, now precludes a quorum board members (typically 3 or more) from gathering to have preliminary discussions regarding potential contractors for capital improvement projects, meeting in various areas of the property to discuss renovation, or any other matter related to the association.

No more Decision Canvassing by Email

In *Palm II,* the court looked at the practice of email canvassing the board to approve certain action. Specifically, email voting on a salary increase for an employee and for waiving the right of first refusal on the sale of property were determined to violation Section 18(a)(9) of the Act because the board was conducting business outside of an open meeting with the owners.

Authority Delegated to Managers Limited

For many associations, professional managers are hired for the purpose of running the day-to-day operations; certain authority is typically delegated to a manger to alleviate constant board member involvement in perfunctory or ministerial matters (e.g. executing contracts, signing waivers of right of refusal, etc.). In *Palm II*, the board entered into a management contract that authorized the manager to enter into contracts on behalf of the association with concurrence by three board members. This practice was found by the court to be unlawful because it was contingent on board member concurrence, which was seen by the court as the board conducting business outside of an open meeting. The court held that a board's delegation of authority to its manager is lawful only if such delegation is authorized in the declaration. Again, the board should review its management contract, declaration and current practices.

Palm II is one of the most significant court rulings for condominium associations in the past 10 years. Board and their management companies need to review how business is conducted and may need to significantly change the way they do their day-to-day business. This case will certainly give ammunition to those unit owners that believe that their board is not acting consistent with the law. Lastly, if all board discussions are deemed to be the "conducting of business" and thus must be done at an open meeting, actually performing the business has just gotten a lot harder.

In other legal news, if you are not already aware, the Illinois Supreme Court overturned an Appellate Court opinion in the case of Spanish Court Two Condominium Association. The Supreme Court ruling held that a unit owner's claim that her association's failure to repair and maintain the common elements is not a "germane", or viable, defense in a forcible entry and detainer proceeding. In so ruling, the Supreme Court made a number of observations that should serve to protect the functioning of associations, namely collection of assessments from owners.

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may want to recommend that the owner discuss the noise issue with the offending owner to see if the owners can amicably resolve the issue without Board intervention. If possible, a Board member should verify reoccurring noise complaints.

Determining Whether a Violation Has Occurred

Once the Board verifies the noise complaint, or accepts the existence of the noise complaint, the Board should analyze whether the noise is unreasonable for community living. It is important to remember that the noise that may be unreasonable in a single dwelling home is different than the noise that is unreasonable in a community association where walls and ceilings are directly connected to other units. The Board should review the complaint from an objective standpoint. The noise must be unreasonable to a reasonable person similarly situated.

If the Board decides that the noise complaint rises to a level of an interference with an owner's enjoyment of their property, most declarations provide that such an interference is a prohibited nuisance. If the Board determines that a violation has occurred, the Board should send written notice of violation to the offending owner.

Board Remedies for Noise Violations

When the Board sends notice of the violation to the offending owner, the notice should list all the actions the Board may take if the noise is not ceased. The Illinois Condominium Property Act and the Common Interest Community Association Act provide that a Board may fine an owner for violating the governing documents. Under most community association declarations, and the Condominium Act, the Board may also levy the legal fees and costs incurred to enforce the governing documents. If the Board decides that it is going to fine an owner, the Board must provide the owner notice and an opportunity for a hearing prior to assessing the fine.

Other remedies that a Board possesses are to file an injunction lawsuit to prevent the owner or occupant from causing the noise disturbance or to prevent that owner or occupant from occupying the unit (i.e., obtaining possession of the unit).

Levenfeld Pearlstein
2 N. LaSalle, Ste. 1300, Chicago 60602
312-944-2611
hdakoff@lplegal.com • joreilly@lplegal.com
Www.lplegal.com

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association to avail itself of the Forcible Entry and Detainer Act because it is the strongest mechanism available to an association for collecting unpaid common expenses.

However, if the association does not wish to take possession of the property, filing a small claims suit for the unpaid assessments (as long as the total assessment arrearage is under $10,000) would also put the association in position to collect six months of unpaid common expenses. Since the amount the association is entitled to collect from a subsequent purchaser is limited to the six month window prior to initiating collection, the association should consider the timing of its lawsuit in order to maximize the potential six months provided by statue (another reason foreclosure monitoring is important). For example, if any owner is only three months in arrears at the time the foreclosure complaint is filed, the association may wish to wait a few months until the owner is the full six months in arrears before filing its collection suit. However, please keep in mind the suit must be filed before the sale takes place. Of course, the board should also consider the expense of a lawsuit when making the decision of whether to initiate collection. If the guarantee of the six months outweighs the potential expense, the board should strongly consider filing suit.

ACTHA NEWS

- **Aurelio Carmona** of Riverview C. A. (Lyons)
- **Julie Cramer** of Oakwood HOA (Westmont)
- **Jackie Fanter** of Wedgewood Commons (Orland Park)
- **Bob LaMontagne** of Lake Hinsdale Village (Willowbrook), and
- **Beth Lloyd** of Partridge Hill T. A. (Hoffman Estates)

were elected to ACTHA's Board at the April 12 annual meeting.

Aurelio is a new addition to ACTHA's board and replaces **Jeff Schmitt** of Liberty Grove HOA (Plainfield) who did not run for re-election.

Elected to continue as officers were: **Beth Lloyd,** President; **Diane Pagoulatos**, Vice-President; **Bob LaMontagne**, Treasurer; and **Jackie Fanter**, Secretary.

Many thanks to long-time board member, Bill Meyer of Walnut Creek T. A. (Frankfort). Bill resigned from ACTHA's board and will be moving to Arizona. We all wish him the very best.

LEARN and LEAD

Congratulations to:

- **Nancy Felbinger**, Grand Haven HOA (Romeoville)
- **Rick Issen**, Tahoe Village (Wheeling)
- **Mike Kohen**, Tahoe Village (Wheeling)
- **Ed Korman**, Tahoe Village (Wheeling)
- **Kenneth Kramer**, Tahoe Village (Wheeling)
- **George Radcliffe**, Oak Ridge HOA (Lisle)
- **Diane Salvato**, Colony Country on Old Orchard (Mt. Prospect)
- **Larry Schneyr**, Tahoe Village (Wheeling)
- **Mary Smyrniotis**, Merrimac Square C.A. (Chicago)

These individuals recently completed ACTHA's certification program: **Learn and Lead**.

This specifically designed course for those living in community associations is currently being offered in Chicago and also available online: www.actha.org

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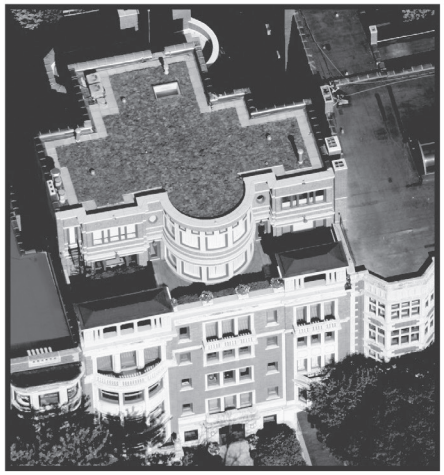

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11 E. Adams, Ste. 1107
Chicago, IL 60603

Question of the Month

By: Jim Webb of Keay and Costello, PC / 128 S. County Farm Rd., Wheaton 60187 / 630-690-6446 / jwebb@keaycostello.com / www.keaycostello.com

Q. What should an association do when a notice is received that an owner is going to foreclosure—both when an owner is current on their assessment as well as when an owner is delinquent in their assessments? The association does not want to use the powers of the Forcible Entry and Detainer Act.

A. When an association receives a notice that a unit is going into mortgage foreclosure, the association's objectives should be two-fold: 1) remaining apprised of any changes in ownership and 2) ensuring the collection of as much of the assessment delinquency, if any, as possible. Fortunately, the association has tools on both fronts. Even if an owner is current on his/her assessments at the time the foreclosure is filed, the association or its attorney, should monitor the foreclosure court file in order to keep the board aware of the status of the case. The party that purchases a unit at a foreclosure sale is responsible for assessments beginning the month following the sale so it is important for the association to keep accurate records reflecting any ownership changes.

If an owner is in arrears in assessments at the time the foreclosure complaint is filed, or if the owner falls behind while the foreclosure is till pending, the association should consider initiating collection against that owner. If the property involved is a condominium or within a common interest community, in the event an association initiates a collection action against an owner prior to the foreclosure sale, a subsequent purchaser of the property, other than the mortgagee (e.g. the foreclosing bank), is responsible for paying six months of unpaid common expenses that accrued prior to the association's action to enforce collection. Common expenses includes all assessments, late fees, attorney's fees, court costs, fines and charge-backs levied against the unit during this six month window. If the mortgagee purchases the property, the six months of unpaid expenses is due when the mortgagee sells the property to a third-party. While the Act and case law are unclear as to what constitutes "initiating an action," filing a lawsuit would certainly qualify. I would strongly urge an

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