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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

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## THE OMBUDSPERSON: ANY CLOSER TO REALITY?

By: Douglas J. Sury, Attorney and member of ACTHA Legislative Committee
Keay & Costello, P.C.
Wheaton, IL

For many members of ACTHA, Pat Quinn's signing of the Condominium and Common Interest Community Ombudsperson Act in December 2014 was a pleasant surprise. While different versions of ombudsperson legislation had been introduced in several previous legislative sessions, there wasn't much hope that the concept of an ombudsperson would ever become a reality. That, however, has changed...somewhat.

The dynamic in Springfield between the executive and legislative branches is obviously different than when the bill originally passed. At the time the bill was passed, both houses of the legislature and the governor's office were under the leadership of the democrats. That is no longer the case. Discussions with the new executive branch leaders continue over the true role of the ombudsperson and the office. Should it be solely educational and a resource for owners and boards? Should it take a more active role in assisting in resolving disputes? Should the office do both? Representatives from ACTHA were involved in meetings during the current 99th General Assembly with legislative leaders, the Department of Financial and Professional Regulation (which is the department under which the ombudsperson will operate), and other stakeholders in an attempt to reach consensus as to what the ombudsperson office should be. As of the authoring of this article, House Bill 4658, which makes several changes to the original Act, has passed both houses of the General Assembly. Since the bill was a bipartisan effort, there is expectation that it will ultimately be signed by Governor Rauner. This article will therefore attempt to highlight certain portions of the Act and the current state of the ombudsperson, in light of the changes contained in House Bill 4658:

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# VACATION RENTALS: What to Know

By: David C. Hartwell, Attorney
Penland & Hartwell, LLC
Chicago, IL

This US economy is changing rapidly and one segment that is growing faster than most is the relatively new concept of a shared economy where individuals can engage in informal business opportunities without having to succumb to the formal business model. Popular examples of these shared services are UBER, LIFT, AirBNB, VRBO. Because these services have become so popular and dynamic in their explosive growth, it is often difficult to identify and assess their impact and effect. In regard to services such as AirBNB or VRBO, a person can easily and efficiently utilize an internet based platform to engage in the short term rental of their apartment, condominium or house, which are commonly referred to "vacation rentals". However, such uses often times violate provisions of a lease or the covenants and rules and regulations of a condominium or homeowners association. This article shall examine the proliferation of vacation rentals in the Chicagoland area and how associations are addressing them.

Recent news of the proliferation of vacation rentals in Chicago has illuminated the fact that for certain neighborhoods or buildings, vacation rentals are significant and are having a substantial impact. The Chicago City Council has sought to address these types of rentals because of the negative impact on hotel room rental and hotel tax to the City. While legislation is still pending, how effective it will be remains to be seen because identification of rentals and enforcement of code provisions will be difficult at best. Boards of directors for condominium associations have also sought to address vacation rentals because such rentals frequently violate the covenants, the declaration and rules & regulations; and many have argued that these types of rentals downgrade the livability of the building. Readers should note however that some high rise condominium buildings allow for such vacation rentals and have adopted strategies to embrace it.

Typically, declaration covenants for a condominium association prohibit short term leasing of a unit in several ways. The declaration may ban unit leasing altogether, or if leasing is allowed, may prohibit short-term leasing, requiring units be leased for a minimum of six or twelve months. Secondly, most all declarations include a covenant that disallows an owner from utilizing his/her unit for business purposes. Despite creative arguments to the contrary, it is indefensible that use of a unit for vacation rental is not a business purpose. Additionally, many associations have enacted rules & regulations prohibiting short term rentals and prohibiting subleasing of units. Therefore, boards are generally equipped with remedies to address vacation rentals.

If a board does not consider the association's governing documents to be sufficient, it can seek to amend the declaration or alternatively enact additional rules prohibiting such rentals. Amendments are often challenging because to successfully pass one, a super majority of either two-thirds or 75% of the unit ownership is required. Enactment of rules is a more streamlined process, requiring only a vote of the board; however the Illinois Appellate Court has recently created a new wrinkle in the February 3, 2016 decision of *Stobe v. 842-828 West Bradley Place C. A.* The Court invalidated a percentage leasing restriction rule on the basis that the covenant allowing for leasing did not also specifically authorize the Board to enact additional rules to restrict leasing. Therefore, boards will need to carefully review the leasing covenant in the declaration to determine if it can successfully enact rules to curtail or eliminate vacation rentals of units.

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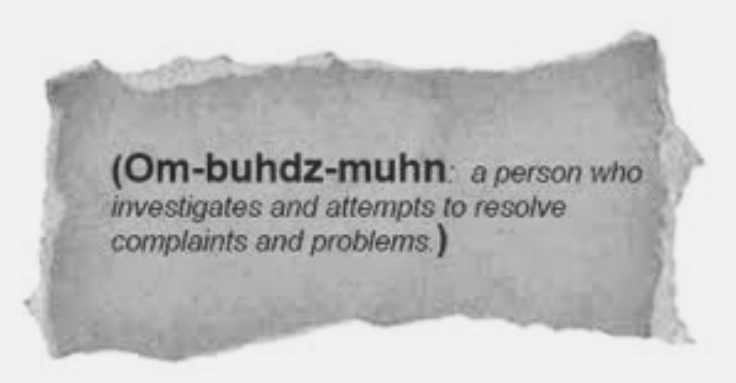
## ***The Current Role of the Ombudsperson***

No later than July 1, 2017, the ombudsperson is to be offering training, outreach and educational materials to the public and it may also offer courses related to the management and operation of community associations, the Condominium Property Act and the Common Interest Community Association Act. The ombudsperson is to also offer a toll-free number for contact and inquiry purposes in addition to providing information regarding alternative dispute resolution providers (arbitrators, mediators) and methods available to communities and their members. The ombudsperson does not have authority to consider any matters involving claims under the Illinois Human Rights Act or that are properly brought before the Department of Human Rights or the Illinois Human Rights Commission.




## ***Reporting to the General Assembly***

The Department of Financial and Professional Regulation is required to provide its first written report of the ombudsperson's activities to the General Assembly no later than July 1, 2018 and beginning in 2019, annual reports of the office's activity are to be filed no later than October 1st.

It is expected that the General Assembly and administration will use these reports to evaluate the proper, future role of the ombudsperson.

## ***Registration of Community Associations***

The requirement that all community associations register with the Department has been removed.

## ***Association Internal Dispute Resolution Policies***

All associations subject to the Condominium Property Act and the Common Interest Community Association Act must adopt their own policies for resolving complaints made by owners no later than January 1, 2019. The original bill required the policies to be in place by January 1, 2017 so associations have been afforded two additional years to develop these policies. The Act currently provides that these policies must include a form on which an owner may make the complaint, a description of the process by which the complaint must be submitted, the timeline in which the Association will resolve the complaint, and the requirement that the Association make its "final" decision within 180 days.

While House Bill 4658 still offers opportunities for the ombudsperson to directly assist owners and boards in resolving disputes, the funds for such services have yet to be provided. ACTHA leaders stressed to legislative leaders that education should be a primary responsibility of the ombudsperson. House Bill 4658 is a step in that direction, but the final complexion and role of the office has still not been determined. Stay tuned…

# SO WHOSE CASTLE IS IT ANWAY?

By: Stephen Daday, Attorney
Klein, Daday, Aretos & O'Donoghue, LLC
Rolling Meadows, IL

We have all heard the old adage that "a man's home is his castle." But whose castle is it in the context of community living and condominium ownership? The competing interests of individual privacy collide with the association's interest in security on an almost daily basis. Where do those interests compete and where do they intersect?

The individual's right to privacy is time-honored and engraved in principles that the United States Supreme Court has articulated in many cases and is codified in the Illinois Constitution.

Section 6 of the Illinois Constitution guarantees the right to privacy. "'The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means."

Two Illinois statutes have particular importance in the context of condominium living and governance. The Illinois Eavesdropping Act 720 ILCS 5/14-1 et seq. prohibits the recording of "private conversations." The statute defines private conversations as "oral conversations transmitted under circumstances reasonably justifying the expectation that the conversation would remain private" and further prohibits surreptitious recording of conversations without all parties to the conversation consenting to recording.

The legislature has also enacted the Video Recording Act 720 ILCS 5/26-4. The law protects the intrusion against video recording where an individual has a reasonable expectation of privacy, without that person's consent.

What if the association has an issue with criminal activity on the premises? Do those circumstances permit the association to act to protect members by videotaping activity?

Despite the existence of various statutes, the prohibition against intruding on an individual's expectation of privacy does not extend to the common areas of the association where an expectation of privacy simply does not exist.

By its very definition all owners have an interest in the common areas of the association like parking lots, hallways, laundry areas, pools, and similar areas which do not intrude on the individual unit owner's areas of seclusion such as his own unit.

The association has the right to record by video common areas of the property. It does not have the right to record by video any part of an individual owner's unit or record audio conversations or audio transmissions even in the common areas without all parties' consent.

The association has the obligation to protect all of unit owners and provide a safe and secure environment for those owners. The association's obligation does not trump the individual's right to be secure and free from intrusion within their own units, the association clearly has the right and the obligation to secure the common areas of the property, which may include video recording.

It's very clear that although a man's home is his castle, it doesn't extend beyond the walls of his unit.

# 2016 Legislative Update

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HB 4658 (Nekritz-Breen. Passed the General Assembly on 5/31/2016). This bill amended the Condominium Ombudsman Act. The proponent of the legislation was the IL. Department of Professional and Financial Regulation version of the Act because existing law would have become effective on July 1, 2016, without any funding sources from the State. The bill requires the Ombudsman to engage in primarily a consumer education role that promotes methods of alternative dispute resolution for solving association disputes. ACTHA was engaged in amending the law based upon suggestions obtained during the February Legislative Meeting.

SB 2354 (Haine-Passed the General Assembly on 5/18/2016). The Illinois Lake Communities Association was the chief proponent of this legislation. ACTHA also supported the measure in House and Senate committee hearings. The bill makes a technical change to CICCA regarding association board meetings and closed sessions.

SB 2358, 2359 (Mulroe-Passed the General Assembly on 5/18 and 5/30, 2016. CAI was the chief proponent of both bills. 2358 was a technical change to CICCA regarding developer assignment responsibilities. 2359 amends the Condominium Act to allow a board to assign income by a simple majority vote. ACTHA was neutral on both measures.

# VACATION RENTALS: What to Know

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Most associations already have sufficient prohibitions and remedies to address vacation rentals; but identification of such rentals is difficult. Typically, rental websites do not state the address of building on the initial advertisement. To obtain this information, a person would need to sign up with the service and pay a fee. Undertaking this level of investigation would be burdensome for most associations. Usually identification of vacation rentals arises form vigilance. A random traveler entering a building with luggage is indicative of a vacation renter and doorpersons should be able identify these people and make a simply inquiry of the nature of their stay. Often times, vacation travelers make inquiries with doorpersons and property managers as if they were a concierge, again another good sign of a vacationer. For those buildings which do not have a doorperson or security, the vigilance must come from fellow unit owners.

Once a vacation rental operation is suspected, the board should undertake reasonable investigation to ascertain a likelihood of its occurrence and engage in the rule enforcement process. Gathering evidence is important, such as a screen shot of an advertisement, a statement of a neighboring unit owner, or a statement of a doorperson or property manager. In my experience, once a unit owner has experienced the rule violation process and been assessed a fine (which is often significant) the practice stops.

Lastly, it is important for boards to understand why this is a critical issue. While livability in a building is always important for boards to address, there are more significant considerations. Unit owners renting to vacationers almost never inform door staff, property management or security of an incoming vacationer, thus raising security concerns of unidentified people entering the building. Second, general liability insurance policies may not cover losses occurring from vacation rentals, which would open the association to uncovered liability. Third, an argument could be made that the short-term rental of unit or rooms to vacationers could cause the building to be viewed by officials more as a public accommodation instead of a private residence, which could implicate the association to follow provisions of the Americans With Disabilities Act, additional building code and fire safety provisions, and other codes and regulations.

Vacation rentals are not likely to disappear and therefore boards need to understand their impact on the building and owners, how to identify the rental, and how address them. Boards should work in conjunction with property management and their legal counsel to have a protocol for attending to vacation rentals and being prepared should vacationers begin showing up in your building.

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

# 2016 Legislative Update

By: John Carr, ACTHA Lobbyist and Legislative Committee Member

2016 will be remembered as one of the most challenging legislative sessions since the Governor Blagojevich impeachment proceedings from 2008-2009. In addition, the General Assembly had far fewer session days in 2016, an election year, which substantially limited the number of measures legislators could consider during the year. Overall though, ACTHA opposed several bills that could have harmed condominium associations statewide (HBs 4489, 4490 and 4491) and was instrumental in amending HB 4658, a bill lessening the powers and duties of the Illinois Condominium Ombudsman.

The ACTHA bill tracker follows:

HB 2642 (Cassidy-Passed the General Assembly on 5/31/2016.) ACTHA supported this bill as championed by the Chicago Bar Association. It requires written notice procedures for storage fees in a lien situation. The bill amends the Illinois Labor and Lien Act.

HBs 4489, 4490, 4491 (Drury). These bills sough to overturn the Illinois Supreme Court ruling in the *Spanish Court* case. ACTHA opposed the bill, offending both the sponsor and another member of the House Judiciary Committee. The sponsor held these bills for the remainder of the session. Note the defendant for the Supreme Court case resides in Drury's district.

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