

Legally Speaking...



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Condo Law REVOLUTION

Will Your Community be Ready for the Most Sweeping Statutory Changes in a Quarter-Century?

By Adam J. Cohen, Esq.

On July 8, 2009, Governor Rell signed into law, “An Act Concerning Amendments to the Common Interest Ownership Act.” This Act represents the most comprehensive overhaul of the laws governing condominiums in Connecticut in over twenty-five years. Boards and managers, brace yourselves for some major changes.

The amendments were drafted by a blue-ribbon panel which included condominium officers, managers, lawyers, and developers as well as representatives from state agencies and the banking and insurance industries. Their goals were to provide new rights to unit owners, grant associations additional powers, help resolve conflicts with developers, and clarify ambiguities under the existing statutes. After months of study and revision, the panel unanimously proposed, and the legislature unanimously approved, the Act on June 3, 2009.

Two important provisions take effect immediately for all communities. First, Section 15 of the Act removes a major impediment to proposed declaration and bylaw amendments which, by their terms, require the consent of banks and others that hold unit mortgages. Since those mortgage holders are often unresponsive, the Act provides that their consent is deemed granted unless they affirmatively object within 45 days after being notified of most types of amendments. Second, Section 20 of the Act reverses the old rule that says an association cannot pledge future income (usually the right to receive monthly assessments as collateral for a loan) unless its declaration specifically so allows; this will now be permitted unless the declaration specifically so prohibits. Section 20 also authorizes the Board to invest the association’s funds and deny privileges to unit owners who are delinquent in their assessments other than access to their own units, rights to vote and hold office, and certain critical services.

The other major provisions of the Act were given a delayed effective date of July 1, 2010 in order to allow association leaders and managers the time they will need to get ready for them. Importantly, some of these changes will apply to all communities while others will apply only to those created on or after January 1, 1984. This is because Connecticut’s 1976 Condominium Act is still on the books, and these newest amendments are only being made to the Common Interest Ownership Act, which supplements the Condominium Act as of that date.

Changes Applicable to All Communities

The following changes in the law will apply to every condominium, cooperative, and planned community in the state, regardless of when it was created, beginning on July 1, 2010.

Modernization

Several changes made throughout the Act will allow various types of notices to be sent and files to be kept in an electronic rather than paper format. Similarly, Section 21 of the Act will allow Board meetings to be conducted by telephonic or video conferencing so long as the unit owners are notified in advance and able to participate. Meetings of the unit owners can also be conducted in the same manner as long as the declaration or bylaws specifically so allow.

Enforcement Actions

Section 21 of the Act will give the Board wide discretion to determine when, and when not, to enforce the association’s rules against owners. As long as the Board does not act arbitrarily, it will be free to consider whether to act on a case-by-case basis without being accused of selective enforcement. This provision will also require the Board to notify the unit owners of legal proceedings in which the association is involved other than rule enforcement, collection, and foreclosure proceedings.

Section 32 will require that, before the association forecloses a delinquency lien on a unit, the owner must owe the equivalent of at least two months of assessments and the Board must have both demanded payment and authorized the lawsuit in a vote or applicable uniform policy. The association’s “inchoate” (automatic and paperless) lien will be extended from two to three years, which means the Board can wait longer before resorting to foreclosure.

Meetings

Section 25 will significantly change the procedures for meetings of the Board, its committees, and the unit owners. The Board and its committees must hold regular meetings at least twice annually, and a majority of the Board or 20% of the unit owners will share the president’s power to call special meetings. The Board must give the unit owners meeting notices and agendas at least 10 days in advance, and make extra copies of any materials to be considered by the Board available to them as well. Robert’s Rules of Order will control unless the declaration, bylaws, or two-thirds of the unit owners say otherwise.

All owners will have the right to attend and speak at all meetings, with narrow “executive session” exceptions such as to allow the Board to confer with the association’s attorney. The Board can act without a meeting so long as they do so unanimously, document the action, and notify the owners afterward. The Act excuses violations of these new meeting procedures unless challenged in court within 60 days after the minutes are approved or notices are distributed.

Insurance

Section 29 of the Act will clarify and expand the association's insurance responsibilities. It will be mandatory for all communities to purchase "fidelity insurance," which covers losses from criminal activity such as burglary, embezzlement, forgery, and computer fraud. For virtually all communities, this and the other types of insurance currently required (property, flood, and liability) will have to cover not just the common areas and original unit components, but all improvements and betterments of the owners as well. The declaration or Board can opt out of this latter requirement, but the unit owners must then be given a detailed inventory of the original unit components every year and in all resale certificates so that they can determine what they should insure themselves.

Section 31 of the Act gives the Board more power to shift the cost of repairing damage from the association to the person responsible for causing it. Although such losses not covered by insurance (such as the deductible) are common expenses, the Board can hold a hearing to allocate those losses to the owner, tenant, or guest whose "wilful misconduct," "gross negligence," or violation of written maintenance rules caused the damage.

Recordkeeping

The Act will dramatically expand the recordkeeping obligations of every association. In Section 33, the Act will require that detailed records be kept of:

- financial records including all expenditures and receipts, budget and reserve funds, assessment delinquencies and collection actions, and the last three years of financial statements and tax returns;
- contact information such as the names and addresses of all unit owners, Board members, and directors as well as each unit's vote allocation;
- governing documents including the association's declaration, bylaws, rules, third-party contracts in effect, and last annual report filed with the Secretary of State; and
- records of the minutes and votes at all Board, committee, and owner meetings, decisions on unit owners' architectural and design applications, and all ballots and proxies going back one year.

This provision will also expand the unit owners' rights to inspect and copy the association's records. Except for a few litigation, employment, and other confidential documents, any unit owner can ask to inspect the information or that specific records be provided to him or her within five days. The Board need not compile or synthesize documents to comply with these requests, and can charge a "reasonable fee" for photocopying and supervising the inspection.

Resale Certificates

The contents of the resale certificates which associations issue to new purchasers have been expanded in Section 41 of the Act. They will need to identify all court and administrative proceedings in which the association is a party other than non-foreclosure collections, the number of units which are over 60 days' delinquent in their assessments, how many foreclosures the association has brought against unit owners in the last year, and how many of those foreclosures were pending at a particular time. The certificates must also identify any original unit components to which insurance coverage will be limited

as provided in Section 29 and any maintenance standards which the owner can be held financially responsible for violating as provided in Section 31.

Section 41 also changes the fees which can be charged for the resale certificate. A 2005 law had replaced a flat \$75 fee with the association's actual out-of-pocket preparation costs capped at \$125. The Act adopts the full \$125 as a maximum flat fee plus either five cents per page for photocopying or \$10 for an electronic format.

Additional Changes for Newer Communities

In addition to all of the new requirements outlined above, communities established in 1984 or later will also have to abide by the following changes in the law starting on July 1, 2010.

Declarant Relations

Section 16 of the Act clarifies that the "declarant's rights," which are the powers of the original developer to control the association and market units, can be deleted from the declaration after they legally expire. Section 23 will expand the Board's right to terminate the declarant's contracts from management services to maintenance, operations, and employment contracts and leases of recreational, parking, and other facilities. Section 39 will allow unit owners to sue the declarant for misleading public offering statements even if they had been delegated to others to prepare.

In response to the call from some developers for a "cooling off" period before they can be sued for construction defects, Section 38 of the Act will require that the association give them a 45-day opportunity to propose a repair plan before litigation can be filed. Statutes of limitation are suspended for so long as the plan is diligently implemented. Individual owners remain free to sue individually.

Governing Documents

Section 16 of the Act will revise the procedures for amending the declaration, including that only those owners affected by a proposal may be permitted to vote on it and that the 67% approval threshold can be reduced to a simple majority. Section 22 will allow the declaration to entitle a governmental or charitable organization to appoint Board members, which may be useful in assisted living, subsidized housing, and other non-traditional communities. Section 36 of the Act will allow a majority vote of the unit owners to remove any Board member or officer, with or without cause, at a properly-noticed meeting after allowing him or her the opportunity to be heard, and will override any clause of the declaration or bylaws to the contrary.

Under Section 24, the bylaws must contain all provisions necessary to satisfy the requirements relating to meetings, voting, quorums, and anything else mandated by the Act, other laws, or the declaration. Note that a new definition in Section 1 of the Act makes clear that "bylaws" include any document containing the procedures for conducting the association's affairs, no matter what that document is called.

Section 34 of the Act will obligate the Board to give at least 10 days' notice to the unit owners before, and prompt notice after, the Board adopts or changes any rule governing personal conduct or the use or appearance of property. This provision will also authorize the Board to regulate – but not ban – state flags, political signs, and unit owner meetings to discuss community issues in common areas. Finally, Section 34 will also require that all rules adopted by the Board must be "reasonable." (The fact that this portion of the Act only applies to

communities created since 1984 probably should not be interpreted as authorization for “unreasonable” rules by older communities!)

Voting

Several provisions in the Act will impose new regulations on voting procedures. Section 26 will clarify that a quorum established at the beginning of a Board meeting can be lost if members leave afterward. Section 27 will prohibit any one person from casting more than 15% of all of the association’s votes with undirected proxies unless the declaration or bylaws allow it. This section will also abolish the prohibition against the Board casting the votes of units owned by the association, which in the past has prevented some communities from reaching quorum and minimum vote requirements. Finally, unless the declaration or bylaws say otherwise, this section will allow unit owners to vote on issues by referendum – that is, without a meeting – if paper or electronic ballots are distributed, they are given at least three days to respond, and at least a quorum do so.

Budgets and Assessments

Section 37 of the Act will clarify certain budget and assessment procedures. At least 30 days before adopting the annual budget, the Board will need to give the unit owners a summary that includes an explanation of how any reserves would be calculated and funded, and set a date between 10 and 60 days out for its consideration. The budget is deemed approved unless the unit owners to which a majority of the association’s votes are allocated (not just those who attend the meeting) reject it. Special assessments will follow the same procedures except that no approval meeting is required unless it would exceed 15% of the prior year’s budget. Emergency assessments can be implemented upon a two-thirds vote of the Board alone so long as the owners are notified promptly afterwards.

Section 37 of the Act will also prohibit the Board from pledging the association’s future income as collateral for a loan without a unit owner majority vote, unless the declaration provides otherwise.

Develop an Action Plan

The changes mandated in the Act are significant, and every association in Connecticut has under eleven months to prepare to implement

them. Your community will not be ready without an action plan. Here are the major issues to consider:

- Scrutinize your declaration, bylaws, rules, management contracts and policies for provisions that contradict or ignore the Act’s new requirements, and amend them as appropriate.
- Research what equipment, procedures, and amendments you would need for electronic notification and recordkeeping, telephonic or video conferencing, and referendum voting.
- Get a copy of Robert’s Rules of Order, and read it. Develop plans for promptly and efficiently scheduling meetings, approving minutes, and distributing notices.
- Update your forms, including resale certificates, proxies, maintenance rules, delinquency policies, and fee schedules.
- Update your lists, including past and pending legal proceedings, unit vote allocations, mailing (and e-mail) addresses, and outside vendors.
- Talk to your insurance advisor about fidelity insurance and any coverage changes needed for unit owner improvements. To opt out of the latter, start to inventory the units’ original features.
- Track down any missing association records and the several new types which will need to be kept. Determine where and how all of this information will be stored, organized, and made available for inspection.

Most importantly, educate yourself on the details of the Act and the other laws which govern your community. They are available at www.cga.ct.gov and will be the subject of a series of seminars for Board members and property managers organized by CAI over the next several months. Details about these seminars can be found at www.caict.org. ■

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