Fall 2019

COMMON SENSE

CONDO AND HOA NEWS FROM SANDLER, HANSEN & ALEXANDER, LLC COMMUNITY ASSOCIATION LAWYERS

A NEWSLETTER FROM

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LEGAL EAGLE: THE ROLE OF THE ASSOCIATION ATTORNEY

The attorney for the association serves in multiple capacities, including advocate and counselor. Additionally, the nature of the attorney/client relationship with an association may cause confusion among unit owners and board members, who don't fully understand just whom the attorney represents.

The Attorney's Mission

The mission of the association's attorney is simple: protect the interests of the association.

The Attorney as Advisor and Counselor

Associations need to make informed decisions. The attorney must provide the association client with accurate and candid advice and guidance.

- The attorney should provide the association with a summary of available options, including the potential advantages and disadvantages of each option.
- The attorney should inform the association of the potential legal and political ramifications of its decisions.
- The attorney should warn the association, as far in advance as possible, of any potential legal issues that may adversely affect the association.
- The attorney may provide the association with recommendations based on his or her knowledge and experience.

Being an advisor and counselor is not about telling clients what they want to hear. It's about telling them what they need to know.

The Attorney as Advocate

The attorney is a zealous advocate for the association. He or she fulfills this role as follows:

- When the association takes a position on any given matter, the attorney must promote and defend that position.
- The attorney negotiates on behalf of the association with third party vendors.
- The attorney writes or revises contracts as needed to protect the association.
- The attorney proceeds swiftly in the collection of funds owed to the association.

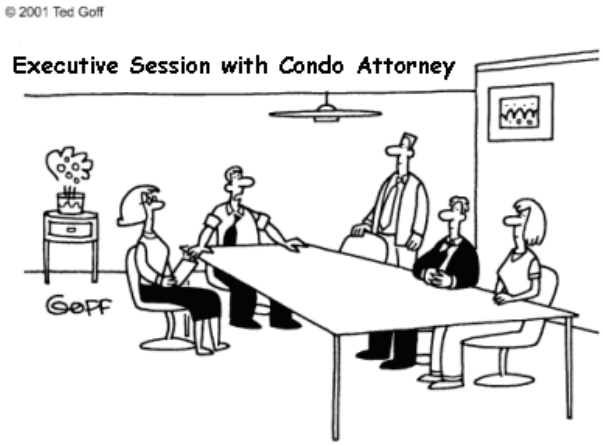
The Attorney/Client Relationship

Who is the client?

- The corporate entity known as the association.

Who is not the client?

- Everyone else, including but not limited to the following.
    - o The officers and directors of the association.
    - o The individual unit owners.
    - o The association's manager.



"Every time we come up with a great idea, you have to bring up the law & prison."

Who is entitled to speak with the attorney and to instruct him or her on the association's position?

- The board of the association is empowered to make decisions for the association.
    - o The board communicates its decisions to the association's attorney, typically through the association's president, manager, or another designated liaison.

Are individual unit owners entitled to direct access to the association's attorney?

- No, because the individual owners are not the client.

Must the association or its attorney share confidential communications with the unit owners?

- No, because the individual owners are not the client.
  In light of the above, the association's attorney must maintain a careful balance between advocate and counselor. Additionally, the attorney must always be mindful of how, and with whom, he or she communicates on behalf of the association.

NO BIRD, NO PLANE, NO SUPERNANNY

When disputes between neighbors arise, unit owners typically expect the association to fight on their behalf. But that's not the purpose of the association.

Can't We All Just Get Along?

Good fences make good neighbors. That's an old adage that essentially means it's good to have a little space and a little privacy. That small amount of separation is healthy.

Unfortunately, most associations prohibit fences. Thus, it's inherent in community association living that neighbors will, on occasion, have a dispute. And when such disputes arise, they look to the association to resolve it.

Should the Association Take Action?

Not every dispute requires the association to intervene. In fact, most don't.

Neighbors have their own rights and their own ability to enforce those rights. If a unit owner is playing his or her music too loud or is causing a disturbance in the middle of the night, his or her neighbors have the right and ability to call the police. They also have the right and ability to sue the offending unit owner for creating a nuisance and for interfering with their right to peacefully enjoy their own units. None of these actions require association involvement.

Additionally, the association has limited resources and enforcement powers. It's fair to ask whether the association should spend the community funds on an issue that impacts only a couple of neighbors who don't like each other. It's also fair to ask what kind of action would remedy the dispute. Fines and lawsuits are the limit of the association's enforcement powers. Will a fine levied by the association fix the problem? If not, then is it worth a lawsuit?

Not every dispute requires the association to intervene.

The kinds of disputes that require association intervention are as follows:

- Disputes that may be based on some form of discrimination. Under federal regulations, the association can be held liable for permitting a "hostile environment" if it doesn't take at least some action against a resident that is discriminating against another resident.

- Disputes involving threats to other people or property. However, the association's action may be limited to contacting the police.

- Disputes that impact the community as a whole and, therefore, justify the association's involvement.

Except as noted above, the association need not assume the role of Supernanny. The association cannot swoop in, save the day, and require all owners to love thy neighbor.

REGULATING AND LIMITING RENTALS

The issues of limiting and regulating rentals are typically sensitive topics for associations. The available options vary in terms of adoption requirements. Additionally, some options, which may appear reasonable and appropriate, can lead to unexpected and unfavorable results.

The Difficult Questions

Should the association limit rentals? Reasonable restrictions, such as a cap that complies with mortgage underwriting requirements or prohibiting short-term leases, are useful in protecting the nature and character of the community.

Are tenants more careless than resident owners? As a general rule, yes. On a specific basis, not necessarily.

Will a high concentration of rentals make it more difficult to buy and sell units? It may. From a buyer's perspective, a high concentration of rentals may be unappealing. As discussed below, the impact on mortgage availability may depend on the lender.

Will a high concentration of rentals result in higher insurance premiums or mortgage rates? Maybe, but like mortgage availability, this will depend on the insurance carrier or lender.

What if an owner must relocate for his or her job, and cannot quickly sell the unit for an acceptable price? How will a limitation on rentals affect this owner? Flexibility for dealing with this situation should be included in any thoughtful limitations imposed by the association.

What if the tenants are members of the owner's family? There may be any number of reasons, such as estate and financial planning, for putting the title to the unit into the name of a family member or a trust. In these situations, it may not be appropriate to consider the unit to be leased to a tenant.

How does the association administer and enforce the limitations that it adopts? Administering and enforcing any restriction is a challenge. It takes time, effort, and often, expense. When it comes to rentals, the association must maintain adequate records to administer the restrictions. When faced with a violation, the association must proceed with the notice and hearing process before levying fines or taking legal action. If the owner refuses to comply, then the association must decide whether legal action is worth the time and expense.

Rules Regulating and Limiting Rentals

Under Subsection 47-261b(f) of the Connecticut Common Interest Ownership Act ("CIOA"), the association may adopt rules that regulate and limit rentals, but only to the extent that those rules are designed to comply with mortgage underwriting requirements. Section 47-216f of CIOA applies to all common interest communities in Connecticut, regardless of when they were created.

- If mortgage companies will offer mortgages to owners at favorable rates, only if the total number of rentals do not exceed X% of the units, then the association may adopt a rule that caps the number of rentals at X%. This rule must be recorded on the land records.

    - At present, Fannie Mae and Freddie Mac allow for rentals of up to 50% of the total number of units in the community.

    - FHA also imposes a 50% cap, but it will consider exceptions of up to 65% of the total number of units. FHA also allows for a minimum rental term of 30 days.

    - Many conventional lenders adhere to the same underwriting guidelines as Fannie Mae and Freddie Mac. Nonetheless, if conventional lenders are requiring a lower maximum rental percentage, then the association can adopt a lower cap that complies with that lower requirement.

Document Amendments Regulating and Limiting Rentals

There are other restrictions or limitations that the association may wish to adopt to minimize rentals. For example:

- A cap on rentals that is much lower than the 50% imposed by Fannie Mae or Freddie Mac.

- A requirement that an owner reside in his or her unit for at least one year, prior to renting the unit to a tenant.

- A limit on the number of units that any one owner may own, either him or herself or through an affiliate.

Because these restrictions go beyond most mortgage underwriting requirements, the association cannot adopt them as a rule. Instead, the association may adopt them as an amendment to the association's governing documents, which requires unit owner approval. The number of owners that must approve these amendments varies, depending on when the community was created.

Communities Created Since January 1, 1984.

Under Subsection 47-236(f) of CIOA, which applies only to communities created since 1984, the association may adopt these restrictions as amendments to the declaration. Adoption of these amendments requires the approval of owners having at least 80% of the total voting power in the association. The declaration may require a higher level of approval, but not a lower one.

Communities Created Between January 1, 1977, and December 31, 1983.

Condominiums created between 1977 and 1983 are governed by the Connecticut Condominium Act of 1976 ("Condo Act"). Under Section 47-70a of the Condo Act, the association may adopt these restrictions as amendments to its bylaws. These amendments require the approval of owners having a majority of the total voting power in the association.

Planned communities and cooperatives created between 1977 and 1983 are not governed by the Condo Act. The requirements and procedures for amending their documents is not regulated by statute. Therefore, we have to review the documents to determine the steps that the association must follow to amend them.

Communities Created Prior to 1977.

The requirements and procedures for amending the governing documents of any community (condo or otherwise) created prior to 1977 is not regulated by statute. Therefore, we have to review the documents to determine the steps that the association must follow to amend them.

Potential Pitfalls

One might think that limiting rentals and keeping the total number of rented units low as possible would make the community more attractive to lenders in the mortgage industry. However, as counterintuitive as it may sound, this may actually have the opposite effect.

The mortgage industry generally looks unfavorably on restrictions on units. A restriction that interferes with the ability of an owner to freely transfer the unit, including a transfer of possession through a lease, may make it more difficult to obtain a mortgage. Therefore, an association that imposes a very low cap on rentals, or which requires owners to live in their units for a set period before renting them, may actually make it more difficult to buy or sell a unit.

A restriction that interferes with the ability of an owner to freely transfer the unit, including a transfer of possession through a lease, may make it more difficult to obtain a mortgage.

Charging Back Costs Due to Rented Units

As a general rule, expenses incurred by the association, including the cost of the master insurance policy, are shared by owners in accordance with their allocated interests. However, the declaration may identify certain types of expenses that the association must assess against one or more, but less than all, of the units. For example:

- If the premium paid by the association for the master insurance policy increases because of the number of rented units, the declaration may require the association to assess that increase solely against the rented units.

- If the association is charged a sales tax on goods and services due to the rented units, the declaration may require the association to assess that tax solely against the rented units.

If the declaration of your community does not contain these provisions, the association may wish to add them as an amendment. Typically, this amendment requires the approval of owners having 67% of the total voting power in the association.

Please contact us if your association requires assistance in adopting and enforcing restrictions or limitations on rentals.

MINUTES: WHAT GOES IN; WHAT'S LEFT OUT

Keeping proper minutes is vital to the association. The minutes serve as a record of corporate actions. If a decision made by an association is ever challenged, a review of the minutes should confirm that the decision had been properly approved.

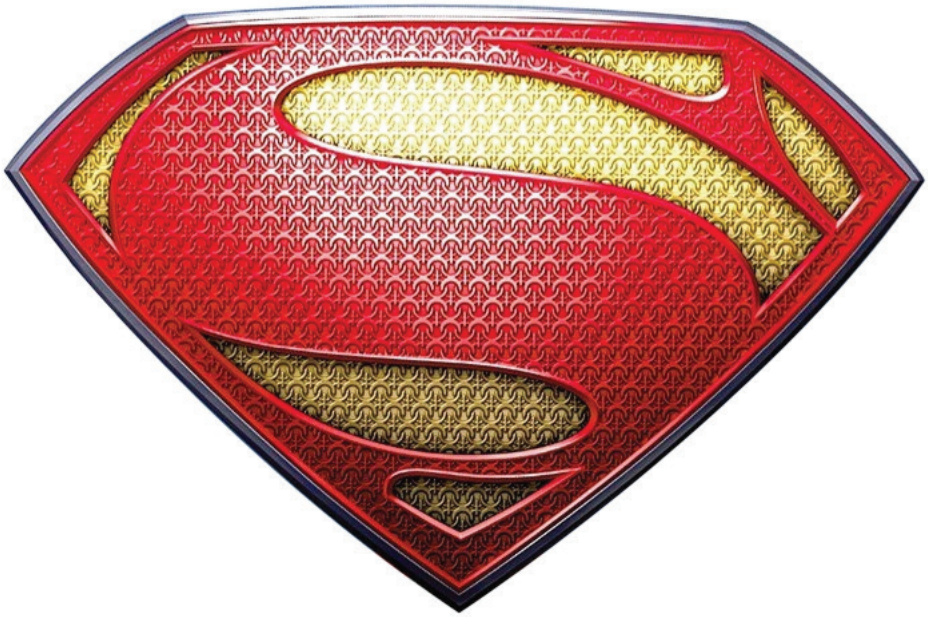
Unfortunately, people often mistake minutes for transcripts. A transcript is a record of everything said during a meeting. Minutes, however, are a record of actions taken. They need not restate, or even summarize, what everyone says at the meeting. Instead, the minutes should contain the following information:

- The date of the meeting and at what time it was called to order.
- A list of the people present at the meeting, either in person or by proxy. This can be addressed through the use of a sign-in sheet that is kept in the association's records with the meeting minutes.
- A list of topics discussed at the meeting. This can be addressed by attaching the agenda to the meeting minutes. Any changes in the agenda, including changing the order of the discussion items, should be noted in the minutes.
- The exact language of any motions made during the meeting, together with the name of the person who made the motion.
- The name of the person who seconded the motion.
- The outcome of the vote. In the case of a board meeting, the minutes must record how each board member voted, unless the vote was unanimous. In the case of a meeting of the owners, the association must keep the ballots and proxies for at least one year.

Once a motion is made and seconded, there is no need to write into the minutes what each person said during the discussion of the motion. A brief summary may be appropriate, though it is not legally required.

Once a motion is made and seconded, there is no need to write into the minutes what each person said during the discussion of the motion.

If the unit owners demand an actual transcript, then the association should hire a transcriptionist or stenographer to record and transcribe the meeting. Typically, however, most associations do not consider that to be a worthwhile expense.



It's Official: Scott J. Sandler is a Super Lawyer!

Super Lawyers is a rating service of outstanding attorneys throughout the country, from all firm sizes and over 70 practice areas. The Super Lawyer designation is an honor reserved for those lawyers who exhibit excellence in practice, and who have attained certain honors, results or credentials, which indicate a high degree of peer recognition or professional competence. Only 5% of attorneys in Connecticut receive this distinction.

HOW TO CONTACT US

If you should call our office and the automated answering system answers, you may use the following extensions to reach us if we are in the office or to leave a message in our individual voice mailboxes. You may also contact us at the following e-mail addresses:

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