Winter 2024

COMMON SENSE

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

A NEWSLETTER FROM

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CONTENTS

GOOD FAITH V. BAD ADVICE

Lawyers disagree with one another. If that was not the case, we would not need courts and judges. But when one of our colleagues publicly gives advice that we believe will cause problems for our clients, we feel that it is our duty to explain why we disagree with that advice.

Statutory Requirements and Court Rulings

The Connecticut Common Interest Ownership Act ("CIOA") contains comprehensive requirements for the creation and operation of community associations. Section 47-203 states that the rights, duties, and obligations provided under CIOA may not be waived or varied, except where expressly permitted by CIOA. Section 47-211 imposes an obligation on the use of good faith for every duty governed by CIOA. And Section 47-212 states that any remedy provided by CIOA shall be administered liberally. These provisions illustrate that when CIOA creates a right or imposes a duty, those rights and duties are to be enforced faithfully and thoroughly.

In 2007, one Connecticut court issued a ruling that shows just how seriously it views the obligation of good faith. In the case of *Patricia Fisher, et al. v. Terrace Heights Condominium Association, Inc.*, the condominium association issued a resale certificate in connection with plaintiff's anticipated purchase of a unit. While the certificate included a copy of the association's budget, as is required by CIOA, it did not disclose the significant amount of delinquent common charges owed by some unit owners, referred to as "aged payables." These aged payables would ultimately be uncollectible.

Sixty days after the plaintiffs closed on the purchase of their unit, the association levied a sizeable special assessment against all units to offset the aged payables. The plaintiffs filed suit challenging the assessment.

The association filed a motion for summary judgment claiming that its resale certificate complied with the requirements of CIOA. Therefore, the association is entitled to a judgment in its favor. The court disagreed.

The court acknowledged that CIOA does not expressly require the disclosure of aged payables in a resale certificate. However, if the association knew or should have known that an assessment was forthcoming, and it failed to disclose that in the resale certificate, then the court could find that such a failure constituted bad faith in violation of the statute.

Citing several other cases, the court stated the following:

> *To prove a claim for bad faith under Connecticut law, the plaintiffs are required to prove that the defendants engaged in conduct designed to mislead or to deceive, or a neglect or refusal to fulfill some duty or some contractual obligation not prompted by an honest mistake as to one's rights or duties. Bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity and contemplates a state of mind affirmatively operating with furtive design or ill will.*

Given the above, when one of our colleagues gave a presentation in which they provided advice on how to avoid several of CIOA's most meaningful requirements, we were shocked and appalled. It was as if they were laying out a roadmap for how to get an association sued for breaching its duties to the community.

The following are examples of the kind of advice that was given and why we strongly disagree with it:

Avoid Open Meetings by Creating a Committee. Subsection 47-250(b) of CIOA requires the board of the association to conduct meetings that are open to the unit owners, and the unit owners shall have a right to comment on association matters at those meetings. It further states that the board may conduct executive sessions for limited purposes, but it may not conduct any votes while in executive session. Additionally, it states that if a committee is appointed by the board for the sole purpose of making recommendations, but is not empowered to act on behalf of the association, then the committee need not conduct open meetings.

The bad advice given here was to form a committee, made up exclusively of board members. If the resolution to form the committee states that the committee may not act for the board, then the committee can avoid open meetings.

Why This is Bad Advice. The open meeting requirement and the limitations on the use of executive sessions were added to CIOA in 2009 and are based on requirements contained in the 2008 version of the Uniform Common Interest Ownership Act ("UCIOA"). The official commentary to UCIOA states that these requirements were added to curtail abuses in the decision-making process and to prevent boards from acting behind closed doors. Thus, the advice given here is contrary to the express intention of the statute. Furthermore, this advice reeks of bad faith and relies on a sham argument that a committee made up of the decision-makers is not really making decisions.

The open meeting requirement and the limitations on the use of executive sessions were added to CIOA in 2009 and are based on requirements contained in the 2008 version of the Uniform Common Interest Ownership Act ("UCIOA").

Conduct Closed Hearings and Keep Enforcement Actions Secret. Subsection 47-250(b) of CIOA contains a list of subjects that may be discussed while in executive session. Enforcement actions and hearings on not on that list. Executive session may be used to avoid violating the privacy of a unit owner. Subsections 47-260(c) and (d) contain a list of association records that unit owners are not entitled to inspect. Again, records of enforcement actions are not on this list, but individual unit owner files are on the list.

The bad advice given here is to conduct hearings while in executive session to protect the privacy of the alleged offender. Furthermore, the association should create "red files" for all unit owners, and any record of enforcement actions should be placed in the file to keep them separate from records that other owners may inspect.

Privacy is a concern when a resident requests an accommodation for a disability. It is not a concern when the owner fails to obey the rules and the failure is reported to the association.

Why This is Bad Advice. First, this advice is again contrary to the express intention of the statute. The official commentary to UCIOA states that the open meeting and record inspection requirements are designed to promote "meaningful, open procedures for adoption *and enforcement* of rules . . ."

Second, most violations occur in public view. Otherwise, the association would not know that the violation existed. If the violation is public, then there is no privacy to protect. Privacy is a concern when a resident requests an accommodation for a disability. It is not a concern when the owner fails to obey the rules and the failure is reported to the association.

Lastly, CIOA provides the association with broad discretion to decide whether and how to take enforcement action when there is a violation. Subsection 47-244(h) of CIOA states that the board's decision to take enforcement action in one case does not obligate it to take enforcement action in another. However, it also states that the association may not be arbitrary or capricious in taking enforcement action. In other words, the association must have a reason for treating one situation differently from another, similar situation. If the association is keeping its enforcement decisions secret, then it cannot prove that the decision was not arbitrary or capricious. Without a stated, known rationale, the decisions may appear to be very arbitrary, which is a violation of CIOA.

Don't Redact Ballots or Proxies to Prevent Inspection. Section 47-260 of CIOA requires the association to keep ballots, proxies, and other voting records for at least one year after the vote is conducted. Up until recently, CIOA said nothing about withholding these from inspection, meaning that, by default, owners had a right to inspect the ballots and proxies. On October 1, 2023, however, an amendment to CIOA became effective which states that any "unredacted paper or electronic ballot, any unredacted proxy form and any other unredacted record that identifies a vote cast by a unit owner" may be withheld from inspection.

The bad advice given here was don't redact these records, and then they are never subject to inspection.

Why This is Bad Advice. Again, the advice given is contrary to the express intention of UCIOA. The official commentary to UCIOA states that its record-inspection requirements promote "the rights of unit owners to participate in association affairs, including meaningful voting protocols," as well as unit owner access to records. The ability to redact the ballots and proxies is designed to protect the concept of a secret ballot, not to hide the outcome of a vote. Refusing to redact the proxies and ballots constitutes an intentional interference with the rights of owners to inspect those records. And again, it reeks of bad faith.

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The Role of the Attorney

Yes, there are times when attorneys need to be creative when representing their clients' interests. Nonetheless, perhaps the most important function of an attorney is to provide advice that is designed to keep the client from getting sued, rather than providing advice that is virtually guaranteed to result in a lawsuit. Which is the better attorney? The attorney that can think up creative arguments to raise in a lawsuit, or the attorney that advises his or her client how not to get sued in the first place? We believe that the attorney's obligation is to tell clients what they need to hear, not what they want to hear.

And by the way, good advice costs a lot less than advice that leads to a lawsuit. Once the suit is filed, only the attorneys win.

ALLOCATED INTERESTS ARE ABSOLUTE

With VERY limited exceptions, the allocated interests assigned to units by the developer cannot be changed without the UNANIMOUS consent of the unit owners.

What are the Allocated Interests?

When a developer creates a common interest community, he or she assigns an allocated interest to each unit. The allocated interest includes the following:

- **Share of Common Expenses.** This determines the percentage share of expenses allocated to each unit. The three most common allocations are based on the relative size of the units (larger units pay more than smaller units), relative fair market value of the units when the community was created (more expensive units pay more than less expensive units), or equality (everyone pays an equal amount).

- **Share of Ownership of the Common Elements.** This applies only to condominiums and is typically identical to the share of common expenses allocated to each unit.

- **Voting Power.** This determines the weight of the vote assigned to each unit. The two most common methods for allocating voting power are a weighted vote equal to the share of expenses allocated to each unit, or equality (each unit has one equal vote).

Mistakes Cannot be Automatically Corrected

Mistakes happen from time to time. The developer or the attorney representing the developer confuses two units, or inadvertently uses an incorrect square footage figure, or makes some other error, and the result is that the allocated interests are not properly calculated. And of course, the mistake isn't discovered until years later, long after the developer has completed the community and the unit owners have taken control of the association.

Question: Can the association adjust the allocated interests to correct the error?

Answer: NO! Not without the UNANIMOUS consent of the unit owners. If just one owner votes against the adjustment, or even fails to vote, then the allocations set by the developer cannot be changed.

Subsection 47-226(e) of the Connecticut Common Interest Ownership Act ("CIOA") states that if there is an error in the calculation of the stated allocated interest, the allocated interest prevails. This means that the association must honor the stated allocation, even if a mistake was made in calculating it. Subsection 47-236(d) of CIOA states that allocated interests may not be changed without the unanimous consent of the unit owners.

Subsection 47-236(d) of CIOA states that allocated interests may not be changed without the unanimous consent of the unit owners.

These provisions of CIOA are an acknowledgement of how crucial the allocated interests are to the operation of the community. Voting power and shares of financial responsibility are the lifeblood of an association. The statute recognizes that mistakes may happen, but it also recognizes that unit owners, the association, and their legal representatives will all rely on the stated allocations. Therefore, those allocations must be absolute and, with very limited exceptions, any changes should require everyone's approval

The Limited Exceptions

Changes may be made to the allocated interests without the unanimous approval of the unit owners, only in connection with the following:

- The developer may change the allocated interests throughout the development of the community as he or she is adding new units. The developer may not unilaterally change the basis for allocating the interests (size, value, equality, etc.), but he or she may add units and then recalculate the allocated interests to take those units into account.

- Often, the governing documents of the association will permit the owners of adjoining units to move the boundary between the units. In that case, the two owners may determine how to redistribute the allocated interests assigned to their two units. This redistribution would not impact the allocated interests of any other units.

- If unit owners may subdivide their units into smaller units, then they must assign to each smaller unit a share of the allocated interests assigned to the original unit. Again, this redistribution would not impact the allocated interests of any other units.

WHAT KEEPS YOUR ATTORNEY UP AT NIGHT?

The attorneys in our office have over 50 years of combined experience working with community associations. And it is safe to say that certain kinds of challenges are likely to impact all associations at one time or another. An association contacts us with a problem and, while it may be new to that community, our response has been recycled over and over for the many associations that we represent. So, in the hope that we all sleep better, we offer the following guidance to your association:

- **Communication is key.** That sounds obvious and trite, but it is also very true and important. First, as stated elsewhere in this issue of *Common Sense*, the Connecticut Common Interest Ownership Act ("CIOA") is designed to require transparency and open governance. Second, informed unit owners are typically content unit owners. When the association is exploring a capital repair project, a document amendment, or preparing an annual budget, it's best to keep the owners informed as you proceed. The more they know, the more comfortable they will be. The more discussions the board has behind closed doors, the more suspicious the owners will be. People need to feel that they've been heard. Associations don't get into trouble by being too transparent. They get into trouble by acting in secret.

Associations don't get into trouble by being too transparent.

- **Do not adopt rules or requirements that you cannot easily administer and enforce.** When considering a new requirement, ask yourself the following:

  - What happens if an owner refuses to abide by this?
  - How will we enforce it?
  - Are we willing to pay the attorney to bring suit if an owner refuses to comply?

- **There are no confidential informants in associations.** Enforcement actions need witnesses. If a board member or the manager can independently verify the violation, then that's sufficient. But if another resident was the only one to witness the violation, and he or she is unwilling to be identified, then the association cannot proceed with enforcement action.

- **Don't alter your documents without consulting with your attorney.** The governing documents of the association, e.g., the declaration, bylaws, and rules and regulations, are legal documents. Do not attempt to change them without the benefit of an attorney. You (hopefully) wouldn't remove your own appendix. Likewise, you shouldn't change your documents without the guidance of an attorney.

- **Respect the limitations of a community association.** This cuts both ways. We have seen boards trying to tell people how to parent their children, and unit owners who expect the association to solve all of their problems, particularly with their neighbors. Too many folks have unreasonable expectations of their association. The association has a limited purpose, which is to maintain a nice community. It has limited means for doing so. It can charge assessments to pay for community expenses, it can levy fines when there are violations, and if need be, it can proceed with legal action, typically in the form of a lawsuit.

- **The association is not strictly liable for damage to a unit caused by an outside event.** The roof leaks and causes water damage to the ceiling. A storm hits and water gets into the basement. A tree falls and hits the building. People often assume that if a unit sustains damage from something that originated outside, then the association is responsible for the repairs. That is not necessarily true. By default, unit owners are responsible for the maintenance, repairs, and replacements within their unit. The owner may be entitled to reimbursement from the association if the association was somehow negligent in maintaining the common areas outside of the unit. To prove negligence, the unit owner must establish the following:

    - The association knew or should have known about the problem.
    - The association had a duty or obligation to address the problem. Not every external issue falls within the duties of the association to maintain the community.
    - The association failed to take reasonable action to address the problem.
    - That failure led to foreseeable damage to the unit.

  If a roof appears to be good shape, no one would know there was a problem until the leak occurs. During a heavy storm, water can get into a basement no matter how well the association maintains the building and grounds. A tree may appear to be healthy but can still fall. Absent negligence, the association would not be responsible for damage to the unit caused by these events.

When facing a new challenge, please contact your attorneys. Chances are it's not so new to us.

NEWS ABOUT OUR PEOPLE

Sandler & Hansen, LLC will be an exhibitor at the CAI-CT Annual Expo, which takes place on Saturday, March 16, 2024, at the Aqua Turf in Plantsville, Connecticut. We can be found at booth #59.

Scott J. Sandler continues to chair the committee responsible for planning the CAI-CT Legal & Legislative Symposium. Scott was a featured speaker at the Symposium, which took place on October 26, 2023. At the upcoming Annual Expo, Scott will participate in a presentation on preparing RFPs and contracts for large capital plans. Scott continues to serve on the CAI Government & Public Affairs Committee. Additionally, Scott is again chairing the Connecticut Legislative Action Committee as a delegate.

Scott and Rebecca Sandler will be attending the CAI National Law Conference in Las Vegas in February 2024. The law conference, which is held over several days, is the only national event that is designed to provide ongoing legal education for attorneys who are specifically focused on the representation of community associations. Scott will be giving a presentation on terminating common interest communities.

Christopher E. Hansen was a featured speaker at the CAI-CT Legal & Legislative Symposium which took place on October 26, 2023, speaking about strategies for dispute resolution. At this year's Annual Expo, Chris will hold a "Lunch with an Expert," discussing governing document interpretation and amendments. Chris continues to chair the CAI-CT Summer Sizzler social event. This event takes place every August, immediately following a board member and manager education session. For the past several years, the event takes place at Amarante's Sea Cliff in East Haven, overlooking Long Island Sound.

Bev LaBombard participated in the CAI Fall Fun and Vendor Fair at the Hops on the Hill Brewery in South Glastonbury this past September. During the event, Bev moderated a program on catastrophic losses and insurance coverage issues.

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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