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MEMORANDUM:

TO: Our Condominium Clients

SUBJECT: Amendments to D.C. Condominium Act

Earlier this year, the DC City Council passed significant changes to the DC Condominium Act. FYI – the original Condominium Act became law in 1976. Then, in 1991, there were sweeping changes made. Thus, there have not been so many changes, and such important ones, since 1991.

The legislative history regarding the current changes state the reason for the new amendments: “that time, best practices and technologies have changed considerably, justifying the types of modernizations made in this legislation . . . ”

It is expected that the new legislation will become condominium law within the next month or so. A copy of the legislation can be found on our firm’s website at KASSLEGALGROUP.COM.

The new changes to the Condominium Act (“Act”) will not specifically require Condominium Associations to amend their Condominium Instruments (“Declaration,” “Bylaws,” or “Plats”). However, some Boards may want to consider doing such so that their documents are consistent with (“mirror”) the new Condominium Act provisions.

Nevertheless, as we highlight just some of the proposed changes to the Condominium Act below, a Condominium Board may want to amend their “Rules, Regulations and Policies” in connection with some of the new Condominium Act provisions, e.g., providing notice of meetings and permitting voting electronically, unit owner insurance requirements, leasing restrictions, etc. In addition, resale certificate forms need to be revised.

1. Notice of Meetings, Unit Owner Forum, Voting, Agendas, Meetings, and Minutes.

(A) Notice of Meetings. Notice of Association meetings (regular or special) to unit owners can still be done in the same current manner – e.g., U.S. regular mail or hand delivery with the Secretary of the Association certifying such in writing. Alternatively, the new Act provides that notice of a Meeting (or delivery of other information) MAY be sent by electronic

transmission to any unit owner if: (i) the Board authorizes such, (ii) the unit owner requests that notices are done electronically and waives notice by mail or hand delivery as to an Association meeting, AND (iii) an officer or agent of the Association certifies in writing that notice (or other information) was provided electronically as authorized by the unit owner. Electronic transmission in essence is defined as producing a written record to retain, retrieve, review and reproduce.

(B) Owners right to be heard at Board Meetings. Subject to reasonable Rules adopted by the Board, at each regularly scheduled Board meeting, a designated period of time must be set aside to give unit owners an opportunity to comment on any matter relating to the condominium association. If the meeting is a special meeting, unit owners would only be able to comment on the specific issue addressed at that meeting.

(C) Electronic Voting. Notwithstanding the language in the Condominium Instruments, voting can be done electronically if the process used to provide notice of the vote and the way votes or proxies are made are in a consistent form approved by the Board. Thus, this will have to be worked out carefully by way of a Board Rule or Policy so as to assure that owners are: (i) given an opportunity to receive notice of a vote, and (ii) provided the form to submit their vote or proxy, so that the vote or proxy submitted electronically can be verified to assure it is valid.

(D) Open Meetings. Except as otherwise provided in the Condominium Instruments, all meetings of the association, committees, and the Board are to be open for OBSERVATION to all unit owners in “good standing.” Notice of Board meetings (regular, special, emergency) shall be provided to unit owners who request notice, and they must make the request at least once a year in writing and including their name, address and zip code. Notice of Board meetings must also be published (shown) in a location reasonably calculated to be noticed by unit owners.

(E) Executive Session Board Meetings. Under certain circumstances, e.g., personnel matters, negotiating contracts, pending or anticipated (defined as a specific threat of) litigation, governmental proceedings, meetings with legal counsel, matters involving individual unit owners, or upon an individually recorded vote of 2/3rds of Board members present for some other exceptional reason which compels and overrides the general public policy for an open meeting, the Board may meet in executive session (in private). However, before doing so, in open session, there must be a motion and with affirmative vote of the Board to convene in executive session.

(F) Minutes. They shall be made available for review and copying by unit owners in good standing. Such right can only be exercised during reasonable business hours or at a mutually convenient time and location – and upon 5 days’ written notice, identifying the Minutes requested. Formal action taken in executive session shall be recorded in the Minutes – but shall

not require disclosure of any details that are properly the subject of the confidential matters in executive session, e.g., no names, unit numbers, litigation strategies, etc.

(G) Board Action without a formal Meeting. The Board may take action on a matter without a meeting by Board Resolution – with the unanimous written consent of all Board members. A copy of the Resolution must be attached to the Minutes of the next Board meeting. [Note: if the action taken is regarding a matter that would have been in executive session, the Resolution should provide limited information for privacy and privileged reasons.]

(H) Telephone Conference or Video Conference Board Meetings. Board meetings can be conducted by telephone conference or video conference; provided the Board member via telephone or video and Board members present in person can hear one another.

2. **Books and Records.**

(A) Right to review Books and Records. Unit owners who are in “good standing” are entitled to review, exam and copy the books and records of the association, provided it is for a proper purpose and not for pecuniary gain, commercial solicitation, etc. This includes the association’s membership list, mailing addresses of unit owners, financial records including aggregate salary information of association employees.

(B) Exceptions. There are a number of exceptions to the right to review records, such as, personnel matters, pending or anticipated litigation, and individual unit owner or member files (other than those of the requesting owner).

(C) Unit Owner in Good Standing. Is a unit owner who is neither more than 30 days delinquent on condominium assessments nor found by the association or its executive Board to be in violation of the Condominium Instruments or Rules of the Association.

(D) Right to Impose a fee. Before providing any copies of books and records, the association may impose a fee reflecting the actual costs of materials and labor for providing access to copies of books and records requested by an owner.

3. **Business Judgment Rule.**

From a Board’s perspective, perhaps the most significant amendment was to repeal the “reasonableness test” and substitute the “business judgment rule.” Currently, in the District of Columbia, when courts are determining if a unit owner has a case against the association, the judge will try to determine if the actions of the Board were “reasonable.” So even if the Board

followed the Bylaws word-for-word, if the judge believed that the Board was unreasonable in its actions, the Plaintiff (the unit owner) would win the case.

In many states, including Maryland and Virginia, the courts have adopted the “business judgment rule.” In effect, the court is saying “even if the board makes a mistake, unless it involves a serious crime or breach of fiduciary duty, we will not second-guess the decisions or actions of the board.” According to the legislative history regarding the amendments to the Condominium Act, the business judgment rule “is generally thought to be more deferential to the informed judgment of the association or executive board, giving such bodies confidence to govern without fear of second guessing by courts.”

But note – the City Council warned that this does not absolve officers from their fiduciary duties. “They must still work in good faith, stay reasonably informed, and only take actions in furtherance of the legitimate interests of the condominium association they represent in their role as officers.”

4. **Subdividing and Joining Units.** The new changes to the Condominium Act allow a unit to be subdivided (from one unit into two) – unless expressly prohibited by the Condominium Instruments. Further, if there are two units (adjoining each other), the boundaries between the joining units can be changed – unless expressly prohibited by the Condominium Act. Both rights to subdivide and change boundaries are subject to amending the Condominium Declaration and Plats, as well as subject to any lawful restrictions or limitations in the Condominium Instruments.

5. **Lender Consent.** Unless otherwise stated in the Condominium Instruments, if consent is required on the part of a unit owner’s lender, e.g., to amend the Condominium Instruments, the lender’s actual written approval is not necessary. In general, a copy of the proposed amendment needs to be sent to the last known address of the lender, and if the lender fails to object within 60 days from the date the proposed amendment is mailed or delivered to the lender, the lender shall be deemed to have approved the amendment. The fact that the lender did not receive such proposed amendment, despite the good faith by the association to do so, shall not invalidate any action taken by the association.

6. **Maintenance, Repair and Replacement to Unit Components or limited Common Elements.** Notwithstanding any provision of an association’s Condominium Instruments or another provision of the Condominium Act, under certain circumstances an association, via its Board, may elect to maintain, repair or replace specified unit components or limited common element components if the failure to perform could have a material adverse effect on the common elements, the health, safety and welfare of unit owners, or the income and expenses of the association. The cost can be an expense of the association, or if in the reasonable judgment of the

Board, at the expense of the unit owners affected. In such cases, the expense shall be an assessment against any unit to which the limited common element appertains.

7. Insurance.

(A) Unit Owner Insurance. The adopted legislation requires all unit owners, to the extent reasonably available, to purchase unit owner insurance of at least \$10,000 property insurance and at least \$300,000 general liability coverages. The Board may increase the minimum amounts at a meeting in which proper notice of the meeting has been provided to unit owners. A unit owner policy is commonly referred to as an HO-6 policy. Thus, Boards should first consult with their insurance agents as to whether such amounts are reasonable or should be increased. Further, the Board should adopt a Rule on requiring unit owners to have individual unit owner coverage, including owners providing the Board, via the association's managing agent, a copy of the owner's certificate of insurance. And if not provided, the Board can, per the current Condominium Act, after notice and an opportunity to be heard, impose a fine (even per day), on the unit owner for not providing such.

(B) Association Deductible. Unless the Condominium Instruments provide otherwise, if the cause of any damage originates from the common elements, the association's property insurance deductible shall be a common expense. Further, if your Bylaws do not address who is responsible for the deductible payment if the cause of the damage originates from a unit, the owner of the unit shall be responsible for the association's deductible in an amount not to exceed \$5,000, which can be assessed against the owner's unit; PROVIDED, the association affords notice to the unit owners of this responsibility to pay such deductible "before" the damage is caused. Thus, it is a good idea that a Board consider at least adopting a Rule requiring unit owners: (i) to have an HO-6 policy with appropriate insurance amounts, (ii) to provide management their certificates of insurance, and (iii) to be responsible for the association's deductible under certain circumstances, e.g., the cause of the damage originated in their respective unit.

8. **Attorneys' fees.** The Condominium Act amendments state unless otherwise provided in the Condominium Instruments, the "substantially" prevailing party in an action brought either by an owner against the association or by the association against an owner, shall be entitled to recover reasonable attorneys' fees and costs.

9. **Association/Board Powers.** The new legislation allows an association, via a Board, to obtain a loan and assign condominium assessments as collateral to the lender – unless the Condominium Instruments expressly prohibit it. Thus, this provides significant authority to a Board, especially since there was no restriction on the amount that can be borrowed. In addition,

an association, via a Board, can “reasonably” restrict the leasing of residential units; PROVIDED, that this shall not apply to a unit that is leased at the time of the action to restrict the leasing of units – but shall apply to the unit when it is subsequently occupied by the owner, or there is an ownership transfer of the unit.

10. **Resale Certificates.** The current law states resale certificates with regard to the sale of condominium units that an association provide information of any capital expenditures “anticipated” by the association within the current or succeeding 2 fiscal years. The new law deletes such language and requires a resale certificate to include: “A statement of any capital expenditures approved by the unit owners’ association planned at the time of the conveyance that are not reflected in the current operating budget.” Accordingly, all resale certificates need to be revised.

The above summary of some of the newly adopted legislation should not be considered legal advice. Each set of Condominium Instruments is different. You should contact the lawyer in our office that handles your general condominium matters to seek advice in connection with the specific issues and matters regarding your Condominium Association as they relate to the newly adopted changes to the Condominium Act.