KMK KASS, MITEK & KASS, PLLC

Newsletter

A newsletter on general legal matters

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NEW CONDO BOARD: TRANSITION IS IMPORTANT

By: Benny L. Kass, Esq.

Being a board member is not fun; the hours are long, the pay is zero and no one ever thanks you for your hard work. They do, however, complain a lot.

What many condo owners – especially first-time home buyers – do not understand is that many associations are big businesses, with budgets in the millions of dollars. Unless owners get involved, learn the process and hire competent professionals, the association may be headed for disaster – financially as well as emotionally.

A condominium board comes into existence when the condo documents are recorded among the land records in the county or city where the property is located. The developer selects the first board of directors, which manages the association until turnover of control is accomplished. In general, the laws in the surrounding jurisdictions require that control be turned over to the owners within so many years after the first sale, or when a certain percent of the homes have been sold, whichever comes first. The turnover requirement is spelled out in your association's governing documents.

Transition between developer and owner control is perhaps the most important aspect of any community association. If done properly, the association will be off to a good start; if done poorly, it may take a long time to get back on track. And some associations never succeed.

Once the owners are in control, there are four mandatory steps that must be taken by the new board:

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ASSOCIATION MAKING UNIT REPAIRS?

By: Mark M. Mitek, Esq.

There has always been an issue of whether a Condominium Association, via the Board of Directors, can or should maintain, repair and replace certain items that are part of the Unit. In some cases, a Condominium Board will have its managers and agents do inspections of units looking for water issues, e.g., leaking toilets and faucets, as well as inspecting HVAC condensation lines which serve each unit. And if they find such leaks or clog lines, the Association's engineer or contractor makes the repair. Can the Board legally have the unit component repaired? Can the Board legally assess the unit owner's account for the repairs? Or can the Board treat each repair as a common expense? The short answer – it depends on the law and your Association's governing documents.

A condominium consists of: (1) units and the parts of the unit, i.e., unit components, 2) limited common elements, and (3) general common elements. In general, unless the governing documents state otherwise, each unit owner is responsible for

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NEW CONDO BOARD: TRANSITION IS IMPORTANT

Select a management company: The new board must decide whether to retain the existing management company – which had been selected by and may be too loyal to the developer – or select a totally independent management company. The association may decide to forgo hiring such a company and become "self-managed," but I personally do not recommend this, even for a small association. If the board gets involved in everything from collecting condo fees to arranging to shovel snow and cut the grass, burnout will take place quickly. The board's role is to make sure that management is doing its job and reporting monthly to the board.

Audit the books: An independent auditor or a certified public accountant must examine the association's books. It is important for members of the new board to satisfy themselves (and the owners they represent) that during the time the developer was in control, all money collected and all expenses paid were properly accounted for. Keep in mind that while the developer is in control of the association, the developer also has access to the association funds. You want to make sure that funds that should have been paid by the developer are not inadvertently (or purposely) paid out of association proceeds.

Sometimes, the developer-controlled board may have allowed owners to become seriously delinquent in paying their association fees. The new board must establish a comprehensive collection policy that will be applied uniformly. I am a strong believer in not letting owners get more than one month behind. It's easier to collect when the owner does not owe a lot of money.

My advice to condo boards: Your policy should be zero tolerance but with a heart. Clearly, if owners have legitimate financial problems, you should try to work with them and develop a comfortable payment schedule. But you have a fiduciary duty to those who elected you, and making sure you are not going into debt is part of your obligations.

Retain legal counsel: The association should retain a lawyer knowledgeable about community association laws. The lawyer will have to handle a wide variety of issues, ranging from developer problems – such as warranty and other transition issues – to assisting the association in its day-to-day activities. A community association is not only a mini-democracy – it is also a business and must function in that capacity as well. Issues ranging from zoning to criminal, labor to health are some of the problems that associations encounter.

Physical inspection of the property: The board should hire a licensed engineer to inspect the common areas of the complex. The engineer should determine whether there are any warranty defects that should be called to the attention of the developer. The engineer can also help the board determine the proper level of reserves that are needed for future repairs. This is known as a "reserve analysis study."

The professional engineer determines the useful life of the major components in the complex – the roof, elevators and other common areas – and the projected cost to replace them at the end of their life. On an annual basis, sufficient funds should be placed in reserve so that when the component wears out, there will be enough money in reserve to pay for its replacement.

Otherwise, each owner may face a large special assessment. Financial organizations, such as Fannie Mae, Freddie Mac and the Federal Housing Administration, all look at an association's budget when determining whether to approve a loan for a purchase or even a refinance. And having adequate reserves is very important to those lenders.

Turnover of developer control is the most important aspect in determining the future success of a community association. Good dialogue among unit owners, the developer and the board goes a long way toward creating a successful association. It's hard work to be on a board of directors, but your home is your investment, and you certainly want to protect it as best you can.

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his/her unit and the parts thereof, and the condominium association is responsible to maintain, repair and replace the common elements – limited and general.

Three questions must always be asked in connection with any access and unit maintenance, repair and replacement issue:

1. Does the Board have the authority to access the unit, without unit owner consent?

2. Make a repair?

3. Assess the owner's account for the maintenance, repair or replacement cost – or treat the cost as a common expense?

ACCESSING UNITS

The first issue is whether the Board and its agents have the right to access a unit? Generally, condominium law and an association's document do allow a Board and its agents access for certain reasons, and the access can be immediate if it is an emergency. What is an emergency? Certainly, if water is leaking all over, including units below, it is an emergency.

In non-emergency situation, many governing documents provide the Board of Directors has the authority to enter a unit to correct or summarily abate and remove a structure, thing or condition that may be in violation of the governing documents, and the Board shall not be guilty of any trespass. For example, the fact a unit owner does not maintain, repair or replace a leaking kitchen pipe which is part of his or her unit could be considered a violation of the governing documents, and the Board may have the right to enter the unit and correct the violation, i.e., make the necessary repair.

But should the Board exercise that right, especially if the owner does not provide prior consent? For example, the owner is at work, and the building engineer enters the unit to inspect for leaking toilets, sees such and makes the repair. Unit owner did not even know the engineer was in the unit. That is, not until the owner receives notice the repair costs were assessed against the owner's account.

In non-emergency situations, a Board has one of three choices: 1) Access the unit without owner consent and take the risk; 2) Obtain the prior consent of the unit owner; or 3) Go to Court and obtain an Order allowing access to the unit. If the owner will not give consent, the Board may be able to fine the owner per day, after notice and an opportunity to be heard. However, that may still not make the owner provide consent. Simply, the best approach – go to court and request an order for access. Note: the DC Condominium Act and most condominium Bylaws provide for attorneys' fees to the prevailing party or the substantially prevailing party.

MAKING A REPAIR

Once access is obtained in non-emergency cases, the next issue is whether the Association, via the Board, has the authority to maintain, repair and replace unit components? For example, does the Board have the authority to replace air filters that are part of each residential unit and the responsibility of the unit owner to replace? What about bathroom or kitchen pipes in the unit?

In the District of Columbia, there is a provision in the Condominium Act that states in part:

> "Notwithstanding any provision of this section or any provisions of the condominium instruments, the unit owners' association may elect to maintain, repair, or replace specified unit components or limited common element components for which individual unit owners are responsible, using common expense funds, if failure to perform the maintenance, repair or replacement could have a material adverse effect on the common elements, the health, safety, or welfare of the unit owners, or the income and

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> common expenses of the unit owners' association. The maintenance, repair, or replacement may be at the expense of the unit owners' association or, in the reasonable judgment of the executive board, if a limited number of units is affected, at the expense of the unit owners affected."

Thus, a condominium association in the District of Columbia does have the ability, under certain circumstances, to maintain, repair and replace a unit component. But first – could the failure to make the maintenance, repair or replacement have a "material adverse effect on the common elements, the health, safety, or welfare of the unit owners, or the income and common expenses of the unit owners' association"? [Emphasis Underlined.] Depending on the facts, this can become a judgment call for a condominium Board, weighing the pros and cons of each option.

ASSESSING A UNIT OWNER ACCOUNT FOR REPAIRS

Some associations have "in unit" programs in which the Board has its building engineer or plumber enter each unit to inspect the unit for any leaking toilets or faucets. Again, there is the issue of unit owner prior consent? Even if consent is provided, can the Association's plumber inspect and repair the leaks and drips? Can the Board assess the unit owner's assessment account for the repair cost or treat the repair cost as a common expense, and thus, the expense shared by all owners?

Before assessing any unit owner account, a Board or management needs to find a provision in the governing documents for starters which provides such authority. Yes, there maybe authority for the Association, via the Board to make the repair, but what about assessing an account? Where is the specific legal authority for the Board to do so? And with no notice or opportunity to be heard? No due process? Merely a letter to the unit owner that his or her account has been assessed $1,000 for "unit repairs." Risky stuff, especially if the DC Condominium Act section is not applicable.

In summary – remember the three questions. More importantly, make sure you have the legal authority answers to take the specific action: 1) enter the unit, 2) make the repair, and 3) assess the account.

"WHEN OLD MAN WINTER COMES TO TOWN, HE'S GOT A SPECIAL WAY OF DROPPING IN..."

By: Brian L. Kass, Esq.

Don't be mislead by the recent spells of warm weather, Old Man Winter hasn't lost his way and will soon be settling in for a while. While there is still time to prepare, here are a few ways to prevent the upcoming winter weather from taking a toll on you and your property:

1. Prepare your home's snow removal arsenal now: If you are like me, the heavy snow last winter won the battle with my snow shovel. By the time I finished shoveling out, the blade was hanging off the handle like a loose tooth and not a store in town had a replacement in stock. Stashed in the corner of my garage, the beaten shovel quickly became out of sight and out of mind. Now is the time to buy a new one or even a back-up. While you're out shopping, pick up a couple bags of snow/ice melter as well. No matter what brand you choose, make sure to always store these in an air-tight container away from children and pets.

2. Winterize outdoor hose bibs and faucets: This is so often neglected until its too late or forgotten altogether. Before the first frost, outdoor hoses should be removed and outdoor spigots should be shut off and drained of all water. Installing frost-free hose bibs are a relatively inexpensive way to reduce the need to winterize the spigots.

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"WHEN OLD MAN WINTER COMES TO TOWN, HE'S GOT A SPECIAL WAY OF DROPPING IN..."

Additionally, any pipes exposed to the elements or in unheated areas should be wrapped in insulating materials.

3. Prepare for the inevitable loss of power: So many household conveniences are taken for granted until the power goes out. Preparing meals, conserving cellphone battery, using the bathroom and everything else really becomes a struggle when there is a loss of power, especially for an extended period of time. Now is the time to make sure flashlights have fresh batteries and are in easy to find areas along with blankets, medications, bottled water and some non-perishable snacks. Don't forget pet supplies as well. Most importantly, make certain there is a back-up plan if any family members rely on electric powered medical equipment.

4. Check the roof: Unless you can do so safely yourself, have a professional clear all gutters and make sure there are no areas of your roof that need patching or repair. Make certain chimneys and exhaust vents are unobstructed. Clear overhanging and dead branches, which could cause damage if brought down by heavy snow and ice.

5. Vehicles: While it is safest to stay off the roads during a winter storm, make sure your vehicle is prepared in the event you find yourself stuck on the road. Having a small shovel, ice scraper, blanket, water, snacks and a working flashlight in the trunk is a safe bet.

Whether you choose to believe it or not, the Farmers' Almanac predicts the upcoming winter to bring frigid temperatures and "above-normal precipitation." Now is the time to prepare. Stay safe and warm my friends!

DC REAL PROPERTY TAX DEFERRAL FOR LOW INCOME AND SENIOR HOMEOWNERS

By: Laurie Pyne O'Reilly, Esq.

It's no secret that the cost of housing in the District is one of the highest in the country. The associated real property tax burden to homeowners can be prohibitive, especially for seniors and retirees living on fixed income. Although there has been a senior citizen tax relief program in effect for many years in the District which cuts the tax in half for seniors with annual household income below a certain amount–currently that amount is $127,600--effective in October of 2014, eligible seniors can also defer paying all real property tax until the property is sold. Responding to the growing gap between senior incomes and the cost of home ownership, the DC Council passed legislation allowing certain low-income homeowners to defer payment of real property tax. Here is a summary of the requirements which need to be met in order for seniors to qualify for tax deferral. A more limited tax deferral program available to all low income homeowners that also went into effect in October of 12014, is also discussed.

Tax Deferral for Low-Income Seniors

This program allows income eligible property owners age 65 and older to defer payment of real property taxes until the property is sold or until one year after the date of the owner's death, whichever occurs first. The law applies to current as well as prospective and retroactive tax liabilities. By statute, a lien on the deferred amount arises in favor of the District. If the full amount of the deferred tax and any interest is not paid within five days of the end of the deferral period, the tax is deemed delinquent. Interest on the deferred amount of tax accrues at the rate of 6% per year unless the senior is over the age of 75 and meets additional residency and income tests, in which case no interest accrues.

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DC REAL PROPERTY TAX DEFERRAL FOR LOW INCOME AND SENIOR HOMEOWNERS

There is a limit on the amount that can be deferred, but it would not–in most cases–be reached. Under the law, no further deferral of property tax is allowed once the total amount of deferred tax, penalties and interest reaches the threshold of 25% of the assessed value of the property. So, for example, for a property worth $300,000 the aggregate amount of deferred tax, interest, etc. would have to reach $75,000 before deferral of additional tax would be disallowed. Given that the annual tax on such a property for a qualifying senior would be only around $1,300 annually (0.425% of assessed value), reaching the limit would be unlikely.

In order to qualify for tax deferral, an application must be filed with the Office of Tax and Revenue asserting that: 1) the applicant is a domiciliary of the District; 2) the applicant owns at least 50% of the DC property for which for tax deferral is being sought; 3) there are no more than 5 dwelling units in the property; 4) the applicant lives in the property as his/her principal residence; 5) the applicant is 65 years of age or older; and 6) the aggregate adjusted gross income of the applicant and all persons residing in the household (excluding tenants with fair market value leases) is less than $50,000.

To qualify for deferral of real property tax without accruing interest, the applicant must satisfy the above six requirements and additionally must: 1) be at least 75 years of age; 2) have been continuously domiciled and owning a principal place of residence in the District of Columbia for the previous 25 years; and 3) have household interest and dividend income of less than $12,500 per year.

This program was established to assist seniors and low income individuals who have been living in steadily appreciating homes but who have limited income to meet the property tax increases. The program is meant to relieve, at least temporarily, the tax burden to eligible homeowners so they can remain in their homes. There are many older citizens living on reduced or fixed income who can benefit from the program. This applies to some who inherited their homes and never had the purchasing power to buy it themselves. For example an individual who inherited a family home now worth $600,000 whose only income is Social Security or a modest civil service annuity might have difficulty paying the annual property tax of around than $2,500 (adjusted for senior deduction). Even if only paying a small or no mortgage payment, the real property tax cost could make it very difficult for the senior to remain in the house. The tax deferral program is designed to alleviate this burden on seniors and allow them to remain in their homes and use available funds for other needs.

Although there are clear benefits to deferring the tax until the property is sold, an eligible homeowner should go into the program with eyes open of the consequences of a tax lien and a balance due upon sale of the property. And, even more critically, prior to entering the deferral program, a homeowner who is not eligible for interest-free deferral must take into account that interest on the deferred tax will accrue at the rate of 6%, a rate that is now, and may or may not be later, higher than typical interest rates on mortgages. With this in mind, the District requires that any taxpayer who is 65 years of age or older who applies for real property tax deferral must undergo counseling to explain the financial implications of the program and the impact on the estate and heirs of the homeowner, as well as any other available options.

Deferral of Increases in Real Property Tax for Low-Income Owner

Under another program instituted by the DC Council, effective as of October 2014, low income property owners – just seniors-- may be entitled to deferral of annual increases in real property tax (rather than deferral of the entire tax) based on the following criteria which is less stringent than the deferral requirements for seniors. To be eligible, owners must: 1) own and reside in the property for which they are requesting deferral of taxes; and 2) have adjusted gross household income (exclusive of income from tenants with fair market value leases) of less that $50,000. As with the senior tax deferral program, interest at the rate of 6% accrues on any deferred amount and
the total amount of deferred taxes plus interest must be paid upon sale of the property or within one year of the owner's death, and the deferred amount may not exceed 25% of the property's assessed value.

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DC REAL PROPERTY TAX DEFERRAL FOR LOW INCOME AND SENIOR HOMEOWNERS

As with all tax programs, it is important to be informed about eligibility requirements as well as the pros and cons before making a decision to participate.

BOARD ACTION AND MEETINGS

By: Anthony R. Champ, Esq.

A well run Condominium Association is directly based on the active involvement of its unit owners in Association meetings. However, many well meaning Boards run into trouble by holding meetings that are not in compliance with the D.C. Condominium Act. Failure to hold a meeting in compliance with the Association's governing instruments and the D.C. Condominium Act could result in a legal challenge to any Board action taken at that meeting. As such, this article summarizes the changes to the D.C. Condominium Act as it pertains to meetings of the Association, more specifically Board meetings.

The newest amendments to the D.C. Condominium Act (the "Act") became effective June 21, 2014. Among other changes, the Act sought to increase Unit Owner involvement and transparency within condominium associations by requiring that all meetings of the unit owners' association, committees of the unit owners' association, and meetings of the executive board be open for observation to all unit owners in good standing, unless the condominium instruments state otherwise. The Act further requires the Board of Directors to provide notice to the any unit owner who requests it, including the time, date, and place of each executive board meeting, and publish in a location reasonably calculated to be seen by unit owners. Requests by a unit owner to be notified on a continual basis must be made at least once a year in writing and include the unit owner's name, address, and zip code.

At the meeting, except when concerning a meeting of the Board in executive session (a private meeting of only the Board), at least one copy of the agenda furnished to members of the Board for a meeting must be made available for inspection by unit owners. Subject to reasonable rules adopted by the Board, the Board shall provide a designated period of time during each regularly scheduled meeting to allow unit owners an opportunity to comment on any matter relating to the unit owners' association. During a meeting at which the agenda is limited to specific topics, or at a special meeting, the Board may limit the comments of unit owners to the topics listed on the meeting agenda.

Situations do occur, however, which require a Board of Directors to meet in private in executive session. The Act now carves out these limited basis whereby the Board may meet without the observation of the unit owners. For example, the Board, may adjourn from an open meeting to assemble into an executive session in order to consider the following:

(i) Personnel matters relating to specific, identified persons who work for the unit owners' association, including a person's medical records;

(ii) Contracts, leases, and other commercial transactions to purchase or provide goods or services, currently in or under negotiation;

(iii) Pending or anticipated litigation;

(iv) Matters involving state or local administrative or other formal proceedings before a government tribunal for enforcement of the condominium instruments or rules and regulations promulgated by the executive board;

(v) Consultation with legal counsel;

(vi) Matters involving individual unit owners or members, including violations of the condominium instruments or rules and regulations promulgated pursuant to the condominium instruments and the personal liability of a unit owner to the unit owners' association; or

(vii) On an individually recorded affirmative vote of two-thirds of the board members present, for some other exceptional reason so compelling as to override the general public policy in favor of open meetings

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BOARD ACTION AND MEETINGS

In order for the Board to assemble in executive session a motion to assemble in executive session must be made, seconded and carried. The motion must state specifically the purpose for the executive session. An example would be a motion to assemble in executive session to "consult with legal counsel." Reference to the motion and the stated general purpose for the executive session must be included in the minutes. In the executive session, the Board may only consider matters specifically set forth in the motion. A motion passed, or other formal action taken, in an executive session shall be recorded in the minutes of the open meeting, but this shall not require disclosure of any details that are properly the subject of confidential consideration in an executive session. The action or actions authorized by a motion passed in an executive session shall be reflected in minutes available to unit owners in good standing.

There may be instances when the Board is unable to meet to discuss a matter. Subject to the limitations of the condominium instruments, the Board may take action without a meeting by resolution issued with the unanimous written consent of the members of the Board in support of the action being taken. A copy of the resolution to be attached to the minutes of the next executive board meeting that occurs following its adoption.

As you can see, the Act now provides greater involvement and transparency. Thus, in holding meetings, a Board must take additional steps to effect notice and involvement. To the extent that there are questions as to whether a meeting should be open or held in executive session, what should be stated in the minutes, etc., the Board should always consult with legal counsel.

KASS, MITEK & KASS

A Professional Limited Liability Company

1050 17th Street, N.W., Suite 1100
Washington, D.C. 20036
Tel. 202.659.6500
Fax. 202.293.2608

email address: firm@kmklawyers.com
www.kmklawyers.com

Benny L. Kass, Esq.
Mark M. Mitek, Esq.
Brian L. Kass, Esq.
Laurie Pyne O'Reilly, Esq.
John H. Brillian, Esq.
Anthony R. Champ, Esq.

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