KEAY & COSTELLO, P.C.
ATTORNEYS AT LAW

128 S. County Farm Road
Wheaton, Illinois 60187
(630) 690-6446
(630) 690-5454 Fax

1605 W. Wilson Street, Suite 106
Batavia, Illinois 60510

www.keaycostello.com

Thank you for allowing us this opportunity to introduce our firm. Included in this package is information which details our experience, our fee structures, and various informational articles.

We have concentrated in the area of community associations, homeowners' associations and cooperative law for more than twenty years. From its inception in 1964, through its current format, there has been and continues to be quite an evolution in the area of efficient management and administration of community associations and cooperative properties. We are committed to providing quality counsel to our clients based upon a sound foundation of institutional knowledge that two decades of community association and cooperative practice affords while also actively participating in the continuing development of the statutory and case law that governs how our clients operate.

Enclosed you will find curriculum vitaes of the attorneys in the firm involved in representing our community association clients. We are fortunate to represent clients and appear before courts in Cook County, DeKalb County, DuPage County, Winnebago County, Jo Daviess County, Kane County, Kendall County, Lake County, McHenry County, and Will County. In providing full-service representation to our clients, we perform numerous services including: conducting legal "check-ups;" reviewing and amending governing documents; drafting legal opinions; reviewing corporate structure and registration with the State of Illinois; advising boards of directors regarding legislative updates and new statutes; and attending board meetings. We also have extensive experience in litigation efforts on behalf of condominium associations, homeowners' associations, and cooperatives including enforcement proceedings, injunctive relief, suits against vendors and developer litigation.

Recognizing that assessments are the "life blood" of our clients, we have developed an efficient and cost- effective collection procedure to aid associations and cooperatives in the recovery of delinquent assessments. We are confident that our office provides superior assessment collection services for a reasonable fee. Enclosed is our Fee Schedule, which describes each of our collection services and the fees generated for each such service. We also have provided a list of those services for which there is no charge. We have also enclosed a sample "status report." The status report is sent to each of our clients on a monthly basis and provides a complete picture of the current account status, including discussion of any assessment collection efforts, foreclosure and bankruptcy. Our clients never have to wonder what is going on with a delinquent account.

We always welcome the opportunity to meet new boards. If you believe that your board would be interested in meeting, we would welcome the opportunity to introduce our firm at a mutually convenient time and place. To obtain additional information about our firm and our staff please take some time to look at our website at www.keaycostello.com. Thank you for your time and interest in our firm.

KEAY & COSTELLO, P.C.

COURTESY OF

KEAY & COSTELLO
ATTORNEYS AT LAW

PATRICK T. COSTELLO

KEAY & COSTELLO, P.C.
128 S. County Farm Road
Wheaton, Illinois 60187

LICENSED:

Supreme Court of Illinois	1993
Northern District of Illinois	1993

EDUCATION:

Northern Illinois University College of Law
DeKalb, Illinois
Graduated May, 1993, J.D., Magna Cum Laude
Assistant Editor of Northern Illinois University Law Review

University of Illinois-Urbana/Champaign
Urbana, Illinois
Graduated December, 1989 B.A. – English

AFFILIATIONS AND MEMBERSHIPS:

Illinois State Bar Association
DuPage County Bar Association
Kane County Bar Association
Community Associations Institute (CAI)
- Co-Chair of Illinois Legislative Action Committee 2014-2016
- Legislative Liaison for Illinois Legislative Action Committee 2013-2016
- Amicus Committee for CAI National

Association of Condominium, Townhouse and Homeowners Associations (ACTHA) – Illinois
Arbitrator - 18th Judicial Circuit, DuPage County, Illinois

AREAS OF PRACTICE:

General Civil Practice – Officer/Shareholder – Keay & Costello, P.C.
Concentration:
Condominium/Common Interest Community Association Law:

- preparing and amending governing documents, including Declarations, By-Laws and Rules and Regulations;
- litigation relating to homeowners, third party contractors, municipality disputes, developer issues and administrative hearing;
- advising boards of managers, including attendance and meeting and legal opinion letters;
- enforcement of governing documents;
- collection of unpaid assessments, fines and expenses

Commercial/Business Law: corporate counsel, employment matters, commercial litigation and collection proceedings.

Real Estate Law: contract review, lease drafting and negotiations and all areas of litigation, including, suits to quiet title, forcible entry and detainer, mortgage foreclosures and receiverships.

LECTURES/PRESENTATIONS/EDUCATIONAL AND SPEAKING ENGAGEMENTS:

- February 2017, CAI Illinois Annual Conference, Rosemont, Illinois "*Legal, Legislative and Case Law Update Assessment Collection: Myth vs. Reality,* CAI Illinois Law Forum, April 2016
- February 2016, CAI Illinois Annual Conference, Rosemont, Illinois "*Legal, Legislative and Case Law Update.*"
- January 2016, CAI College of Law Annual Seminar, New Orleans, LA – "*Panel of Pundits*"
- October 2015, Naperville Homeowners Confederation - "*Legislative Update*"
- *Dealing with Disabled Owners: Common Issues Arising Under The Fair Housing Act,* CAI Illinois Law Forum, May 2015
- April 2015, CAI Illinois, Schaumburg, Illinois, DCAL Course "Governing your Community"
- February 2015, CAI Illinois Annual Conference, Rosemont, Illinois "Legislative Update."
- May 13, 2014 CAI-Illinois, Naperville, Illinois – "Homeowner Forum"
- May 1, 2014 CAI Illinois Law Forum "*Post Foreclosure Issues: Just when you thought you had seen (and heard) it all."*
- February 2014, CAI Illinois Annual Conference, Rosemont, Illinois "Legislative Update."
- November 2013, Chicagoland Cooperator Expo, Chicago, Illinois - "WHO KNEW? Practical Truths from a Professional Perspective"
- July 2013 CAI Law Forum "*Association Legal Check-Up: What You Don't Know Can Hurt You"*
- May 21, 2013, CAI- Illinois, Schaumburg, Illinois – "Intro to Governing Your Community (Homeowner/Board Member Program)"
- April 26, 2013, CAI-Illinois, Naperville, Illinois – "Homeowner Forum"
- November 14, 2012, Chicagoland Cooperator Expo, Chicago, Illinois - "The Truth and Nothing But the Truth"
- September 19 2012, CAI-Illinois, Oak Brook, Illinois – "Homeowner Forum"
- June 26, 2012, ATCHA Seminar – "Rentals"
- May 11, 2012, CAI Illinois Law Forum - "Taking the Mystery out of Mortgage Foreclosure"
- March 14, 2012, CAI-Illinois, Roselle, Illinois – "ABC Essentials: Rules and Regulations"
- September 2011, Naperville Homeowners Confederation - "Update on the Common Interest Community Association Act"
- September 2011, CAI Illinois Law Forum - "What Should We Do About These Renters?"
- March 20, 2010 ATCHA Seminar and Spring Conference - "Selecting a Manager" and "Ask a Lawyer"
- August 26, 2009 Vanguard Community Management Seminar, Schaumburg, Illinois – "Federal Housing Administration and the impact upon those interested in living in common interest communities"
- May 27, 2009 A TCHA Seminar Wheaton, Illinois – "10 Things a Board Must Know"

- November 22, 2008 ATCHA Seminar and Annual Conference "Contracts and Contractors" and "Ask a Lawyer"
- October 15, 2008 CAI-Illinois, Naperville Illinois – "Rules and Regulations"
- March 8, 2008 ATCHA Seminar, Elgin, Illinois – "Board Duties and Associations"
- March 24, 2007 ATCHA Seminar and Annual Conference – "Breach of Fiduciary Duty"

PUBLICATIONS:

- *Electronic Voting* Common Interest Winter - 2015
- *The Ombudsperson: Coming Soon to a State Near You* Common Interest-Spring – 2015
- *California v. Hodari D.: The Demise of the Reasonable Person Test in Fourth Amendment Analysis*, 12 N. Ill. U.L. Rev. 463, 496 (1992)

DOUGLAS J. SURY

KEAY & COSTELLO, P.C.
128 S. County Farm Road
Wheaton, Illinois 60187

LICENSED:

Supreme Court of Illinois	1999
Northern District of Illinois	1999

EDUCATION:

Northern Illinois University College of Law
DeKalb, Illinois
Graduated May, 1999, J.D.

University of Illinois-Urbana/Champaign
Urbana, Illinois
Graduated May, 1995 B.A. – History

AFFILIATIONS AND MEMBERSHIPS:

Illinois State Bar Association
DuPage County Bar Association
Kane County Bar Association
Will County Bar Association
Community Associations Institute
Illinois Association of Lake Communities
ACTHA Legislative Action Committee, September 2011 to present
Faculty, Illinois Institute of Continuing Legal Education

AREAS OF PRACTICE:

General Civil Practice – Officer/Shareholder-Keay & Costello, P.C.
Concentration:
Condominium/Common Interest Community Association Law:

- preparing and amending governing documents, including Declarations, By-Laws and Rules and Regulations
- litigation relating to homeowners, third party contractors, municipality disputes, developer issues and administrative hearing
- advising boards of managers, including attendance at meetings and legal opinion letters
- enforcement of governing documents
- collection of unpaid assessments, fines and expenses

PUBLICATIONS/ARTICLES/LEGISLATION:

- *The Ombudsperson: Any Closer to Reality?* ACTHA Newsletter-July 2016
- *1010 Lake Shore vs. Deutsche Bank: The Illinois Supreme Court's Recognition and Respect of Condominium Association Lien Rights* Common Interest-Spring 2016

- Drafted Illinois Senate Bill 1374 which became Public Act 99-0041-February 2015
- Drafted Governor Quinn's Amendatory Veto to Illinois Senate Bill 2664-August 2014
- *Déjà Vu All Over Again: Declarant's Rights and Unfinished Communities* Common Interest-Winter 2013
- *Fiduciary Obligation to Collect Assessments, Use of the Forcible Entry and Detainer Act and its Impact upon Associations* ACTHA News-September 2012
- *Easing the Pain Following Foreclosure: How Condominium Associations Can Minimize their Losses* Common Interest-Winter 2010
- *Open Meetings and the Community Workshop: Are All Invited?* Common Interest-Fall 2006

LECTURES/PRESENTATIONS/EDUCATIONAL ENGAGEMENTS/TESTIMONY:

- *Governance Strategies for Boards*, Illinois Institute of Continuing Legal Education Condominium Law, Chicago, December 2016
- *CICAA for Dummies: The Act's History, Application and its Role in Community Association Governance,* ACTHA South Expo, September 2016
- Panelist, *Homeowner Forum*, CAI Illinois, June 2016
- *Assessment Collection: Myth vs. Reality*, CAI Illinois Law Forum, April 2016
- Moderator/Panelist, *Legislative/Case Law Update/Ask an Attorney*, ACTHA Spring Conference, April 2016
- *Legal Pitfalls: What Boards Need To Know*, ACTHA, Countryside, Illinois, February 2016
- *Essentials of Community Association Leadership (DCAL)*, CAI Illinois, October 2015
- *The Gift That Is Palm: How Complying With Illinois Law Can Actually Make Your Life Easier*, CAI Illinois Law Forum, August 2015
- *Palm and Legislative Update, with State Senator Michael Hastings,* ACTHA, Richton Park, Illinois, July 2015
- *Dealing with Disabled Owners: Common Issues Arising Under The Fair Housing Act,* CAI Illinois Law Forum, May 2015
- *Essentials of Community Association Leadership (DCAL)*, CAI Illinois, November 2014
- *A New Law: Electronic Voting*, ACTHA South Expo, Tinley Park, Illinois, September 2014
- Panelist, *State Representative Stephanie Kifowit/ACTHA Town Hall Meeting: 10 Things Every Board Must Know*, Aurora, Illinois, May 2014
- *Post-Foreclosure Issues: Just When You Thought You Had Seen (and Heard) It All*, CAI Illinois Law Forum, May 2014
- *Illinois Senate Judiciary Committee*, testified in opposition to Senate Bill 2664, March 2014
- *Essentials of Community Association Leadership (DCAL)*, CAI Illinois, November 2013
- *Legislative Update*, ACTHA 2013 South Expo, Tinley Park, Illinois, September 2013
- *Foreclosures*, ACTHA 2013 South Expo, Tinley Park, Illinois, September 2013
- Panelist, *State Representative Kelly Burke Condominium Issues Town Hall Meeting*, Oak Lawn, Illinois, August 2013
- *Association Legal Check-Up: What You Don't Know Can Hurt You,* CAI Illinois Law Forum, July 2013
- *Homeowner Forum,* Attorney Panelist, CAI Illinois Annual Trade Show, February 2013
- *Condominium Associations and the FHA*, CAI Illinois Law Forum, September 2012
- *Taking the Mystery out of Mortgage Foreclosure*, CAI Illinois Law Forum, May 2012

- *Common Interest Community Association Act*, ACTHA Spring Conference, April 2012
- *What Should We Do About These Renters?* CAI Illinois Law Forum, September 2011
- *Collections- Part I, Manager Only Educational Session*, CAI Annual Trade Show, January 2011
- *Rules and Regulations*, CAI Illinois Annual Trade Show, January 2008
- *Trauma & Evictions*, CAI Illinois, November 2007
- *Monitoring Sex Offenders*, CAI Illinois, April 2007
- *Foreclosures*, CAI Illinois Annual Trade Show, January 2007
- *Fiduciary Obligation*, CAI Illinois, November 2005

BENJAMIN J. ROONEY

KEAY & COSTELLO, P.C.
128 S. County Farm Road
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LICENSED:

Supreme Court of Illinois, 2012
United States District Court for the Northern District of Illinois, 2012
Supreme Court of Minnesota, 2013

EDUCATION:

University of DePaul College of Law
Chicago, Illinois
Graduated May, 2011, J.D.

Iowa State University
Ames, Iowa
Graduated May, 2008 B.S. – Political Science

AFFILIATIONS AND MEMBERSHIPS:

Illinois State Bar Association
Kane County Bar Association
DuPage County Bar Association
Community Associations Institute

AREAS OF PRACTICE:

General Civil Practice – Shareholder - Keay & Costello, P.C.

Concentration:
Condominium/Common Interest Community Association Law:

- preparing and amending governing documents, including Declarations, By-Laws and Rules and Regulations
- litigation relating to homeowners, third party contractors, municipality disputes, developer issues and administrative hearing
- advising boards of managers, including attendance at meetings and legal opinion letters
- enforcement of governing documents
- collection of unpaid assessments, fines and expenses

LECTURES/PRESENTATIONS/EDUCATIONAL AND SPEAKING ENGAGEMENTS:

- Lecturer, *Electronic Voting: Can We or Can't We?*, ACTHA Spring Conference, April 2015
- Panelist, *The Homeowner's Forum hosted by CAI - Illinois Chapter*, Downers Grove, Illinois, September 2014

PUBLICATIONS:

- *Regulating Political Signs within Your Association*, ACTHA News, October 2016
- Contributor, *The Clubhouse Rules, Renting Out Common Areas,* The Chicagoland Cooperator, November 2015
- *How to Implement Electronic Voting and Notices within your Association*, ACTHA News, March 2015
- Contributor, *Know what to look for when dealing with contractors*, Chicago Tribune, June 2014

KEITH R. JONES

KEAY & COSTELLO, P.C.
128 S. County Farm Road
Wheaton, Illinois 60187

LICENSED:

Supreme Court of Illinois, 2006
United States District Court, Northern District of Illinois, General Bar, 2007

EDUCATION:

Northern Illinois University College of Law
DeKalb, Illinois
Graduated May, 2006, J.D., magna cum laude

DePauw University
Greencastle, Indiana
Graduated May, 2000 B.A. – Economics

AFFILIATIONS AND MEMBERSHIPS:

Illinois State Bar Association, DuPage County Bar Association, Kane County Bar Association

AREAS OF PRACTICE:

General Civil Practice – Associate Attorney with Keay & Costello, P.C.

Condominium/Association Law:

- preparing and amending governing documents, including Declarations, By-Laws and Rules and Regulations
- litigation relating to homeowners, third party contractors, developer issues; advising board of directors, including legal opinion letters
- enforcement of governing documents
- preparation and review of documents for FHA approval applications for condominium associations

Commercial/Business Law: commercial litigation

LECTURES/PRESENTATIONS/PUBLICATIONS:

- *Article—Caps on Special Assessments and Expenditures within Condominium Associations*, CAI Community Chronicle, November 2016
- *Lunch Panel*, CAI Illinois Legal Forum, August 2015
- *2015 Legislative Issues*, ACTHA and PropertyU.net webinar, December 2014
- *Homeowner's Forum*, CAI Illinois, April 2014
- *Managing Vacant and Occupied Units*, CAI Illinois 2014 Conference & Exposition, February 2014

- *Condominium Associations and the FHA*, CAI Illinois Law Forum, September 2012
- *FHA Approval and Re-certification Requirements for Condominium Associations*, Chicago Bar Association YLS Real Estate Law Committee, November 2011
- *FHA Approval and Re-certification Requirements for Condominium Associations*, Chicago Bar Association Real Property Condominium Law Subcommittee, May 2011
- *FHA Approval for Condominium Associations*, ACTHA, September 2010

COMMITTEES:

- Co-Chair of CAI Illinois Legal Forum/Conference Education Committee, 2016-present; Member, 2014-present

KEAY & COSTELLO, P.C.

ATTORNEYS AT LAW

128 S. COUNTY FARM ROAD
WHEATON, ILLINOIS 60187
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1605 W. WILSON STREET, STE 106
BATAVIA, ILLINOIS 60510
TELE: (630) 454-4270
FAX: (630) 454-4276

ENGAGEMENT AGREEMENT

Client:_____

Address:_____

Phone:_____ Fax:_____ E-mail:_____

This document is the Engagement Agreement ("Agreement") between the law firm of KEAY & COSTELLO, P.C. and _____ (Client), with respect to the payment of attorney's fees and costs incurred in connection with general Association and Cooperative matters, including revisions to governing documents. KEAY & COSTELLO, P.C. agrees to represent the Client in connection with the preparation and execution of the above proceedings pursuant to the terms and provisions set out below.

1. **HOURLY RATE/BILLING**

General Hourly Rates for Corporate Representation

Attorneys	*Patrick T. Costello-*	$300.00/hour for office time; $325.00/hour for court time
	Douglas J. Sury -	$275.00/hour for office time; $300.00/hour for court time
	Benjamin J. Rooney -	$250.00/hour for office time; $275.00/hour for court time
	Keith R. Jones -	$250.00/hour for office time; $275.00/hour for court time
	Suzanne M. Fitch -	$250.00/hour for office time; $275.00/hour for court time
	Nicholas R. Lange -	$225.00/hour for office time; $250.00/ hour for court time
	Nick E. Porter -	$225.00/hour for office time; $250.00/hour for court time

The hourly paralegal fee is $125.00 per hour. No charge for administrative staff on general matters.

Collection Matters - Please see attached General Fee Sheet.

A. Client will receive an itemized bill each month, is due upon receipt, showing the time spent and services provided by each attorney or paralegal who worked on its case during the prior month. **Please examine the bill promptly.** If, within 30 days, the Client fails to remit the balance, Keay & Costello, P.C. reserves the right to suspend all services, until the amounts are paid and, and Keay & Costello, P.C. reserves the right to withdraw from representation.

B. Client agrees to pay all bills and statements promptly when rendered and understand that failure to pay any statement will serve as an authorization for Keay & Costello, P.C. to discontinue its representation and to withdraw any appearance made on its behalf, unless otherwise agreed to between Client and Keay & Costello, P.C. The Client further agrees to pay .75% monthly interest on any unpaid balance more than 30 days past due and agree to pay all costs of collection of said balance, including reasonable attorney's fees, should said collection become necessary.

C. If Client has any questions about any charges on a bill, it must submit them in writing to Keay & Costello, P.C. within thirty (30) days of the date of the bill in question, along with payment for that portion of the bill which is not in dispute. Attempts will be made to reconcile the bill immediately. If Client fails to raise any questions concerning the bill, Keay & Costello, P.C. will presume the Client has no such objections, and Client waives its right to object to any charge stated on the bill in any future proceeding.

D. The amounts reflected in the statement primarily consist of time expended on the matters within the representation, or for out-of-pocket expenses which must be paid when incurred by us; therefore, please be prompt with payment as statements are received. Payments on delinquent accounts will be first applied to the oldest charges.

E. The hourly rates set forth above shall remain in effect through December 31st of the year in which this Agreement is dated. Keay & Costello, P.C. reserves the right to increase those hourly rates after December 31st. Client will be provided at least 30 days' notice of the increased rates. Absent a subsequent written agreement to the contrary, Client agrees to pay those increased hourly rates.

F. Client acknowledges that Keay & Costello, P.C. has advised Client that the amount of any fees (retainer or otherwise) paid to Keay & Costello, P.C. may pursuant to statute, be disclosed to the Court.

2. **OUT OF POCKET EXPENSES.** Out of pocket Expenses: Client acknowledges and agrees that costs of litigation are separate and distinct from fees. Client will reimburse Keay & Costello, P.C. for all costs advanced by them in connection with its case within thirty (30) days of the date a bill for such costs is mailed to Client. Costs may include, without limitation, court costs, travel expenses, parking expenses, tolls, court reporter and transcript costs, process server fees, photocopying, postage, long distance telephone charges, facsimile costs, and expedited or overnight delivery.

3. **EXPERT WITNESSES AND ADDITIONAL COUNSEL.** Client agrees that it will pay, directly, the fees and costs of any expert witness retained in connection with this litigation, regardless of whether or not such expert testifies in court on behalf of the Client. Furthermore, Client agrees to be solely responsible for the fees and costs of any additional counsel ("additional counsel" is defined to mean any attorney not employed by Keay & Costello, P.C. directly). It is expressly understood that Keay & Costello, P.C. shall not be responsible for or pay any additional counsel fees and that any additional counsel shall arrange to bill Client for their fees and costs directly. Client authorizes Keay & Costello, P.C., in its discretion, to retain experts on its behalf, subject to its prior approval, to prosecute or defend its case. It is expressly understood that any fees paid by Client to the aforementioned experts or additional counsel shall not be applied against any fee due Keay & Costello, P.C.

4. **MULTIPLE BILLING.** It is understood that it may be necessary for more than one attorney and/or paralegal from Keay & Costello, P.C. to work on the case at any given time (i.e., to attend trial, hearings, depositions, settlement conferences or meetings). Client understands and acknowledges that it will be billed for each attorney's time at the applicable rates set forth herein in connection with any such multiple attorney representation.

5. **DECISION-MAKING AUTHORITY.** It is expressly understood that the final authority to make the decision as to whether to proceed to trial or to settle the case through negotiation rests with the Client. Keay & Costello, P.C. will advise the Client and offer opinions in this regard, but will not bind Client to any settlement without its express agreement.

6. **PREDICTION AND RESULTS.** It is expressly understood that Keay & Costello, P.C. has made no guarantees, predictions or representations as to the result it will achieve for Client, other than to use its best efforts and judgment on the Client's behalf.

7. **BINDING AGREEMENT.** Client acknowledges that it has been advised that if it fails to pay Keay & Costello, P.C. as required by the terms of this Engagement Agreement, Keay & Costello, P.C. can elect to withdraw as its attorneys. Client agrees that this Engagement Agreement shall be binding on the court in connection with assessing any attorneys' fees and costs owed to Keay & Costello, P.C. by the Client.

8. **TERM OF AGREEMENT.** Keay & Costello, P.C reserves the right to discontinue representation that would involve either party in unethical or illegal conduct. This Agreement shall commence upon receipt by Keay & Costello, P.C. upon execution of the Agreement, as set forth in paragraph 1 of this Agreement. Upon termination of this Agreement, by either party, Keay & Costello, P.C.'s representation of Client ends.

9. **ACKNOWLEDGEMENT.** By the signature below, Client acknowledges that they have read this entire Agreement, that Client understands the entire Agreement, that any questions they have concerning the Agreement have been answered to their satisfaction, that Client finds the Agreement fair, reasonable and satisfactory. Finally, Client has been advised of its right to have an attorney of its choosing review this Engagement Agreement on its behalf and it has voluntarily waived its right to do so.

Date:_____ By: _____

Its: _____

KEAY & COSTELLO, P.C.
GENERAL FEE SHEET FOR COMMUNITY ASSOCIATION/COOPERATIVE MATTERS

General Hourly Rates
For Assessment Collection Matters

Attorneys	All attorneys are billed at $225.00 per hour for office time and $250.00 per hour for court time
Assessment Collection Paralegals	$75.00 per hour

Assessment Collection Fees

30-day demand

Preparation of statutory 30-day demand, review of account statement, title search, foreclosure search (if applicable), bankruptcy search, all emails, phone calls and correspondence with board, management and owner prior to filing suit	$185.00 (does not include cost of certified mailing)

Preparation, filing and prosecution of suit

Preparation of summons and complaint and all other services prior to the first court appearance. If case is resolved prior to first court appearance, no additional fees are billed	$350.00
If the case is resolved after suit is filed and within two court appearances (this does not include fees billed for contested hearings or trials, which are billed at the hourly rate)	$600.00 ($800.00 for Cook County.) Please note that the $350.00 described above is included in this amount.
If an owner files motions, a trial is requested or more than two court appearances are necessary	Hourly rate ($250.00)

Motions to Reinstate

Preparation and filing of a motion to reinstate a collection suit as a result of an owner's failure to make all payments and no court appearances are necessary	$250.00
If court appearances are required	Hourly rate ($250.00)

Evictions

Review of file, update bankruptcy, ownership/foreclosure foreclosure searches, obtaining certified writ from clerk of court, scheduling eviction with sheriff and all communication	$250.00

Post-Judgment Collection

All work related to preparation, filing, service plus 2 court appearances on citations to discover assets or wage garnishment proceedings	$500.00
If more than 2 court appearances are required in any citation or garnishment proceeding	Hourly Rate ($250.00)

*Assessment collection services provided at **NO CHARGE***

All phone calls with management, board and owner

Preparation of releases of liens or judgments

All letters to owners, including payment plan letters and reminder letters

All letters to management and board concerning payments, court appearances and evictions

Monitoring of payment plans

Verification of Debt letters under the Fair Debt Collection Practices Act

Military service search/affidavit

Foreclosure monitoring

Receipt and review of the foreclosure complaint along with preparation of a letter to the client	$50.00
Review of the foreclosure file and preparation of letter to client regarding entry of judgment	$100.00
Review of the foreclosure file and preparation of letter to client concerning completion of public auction and new ownership. Included in this fee is a tract search to determine if deed from auction has been recorded.	$100.00
Letter to client advising of new ownership if no recorded deed can be located after completion of the public auction. A second tract search is included in this fee.	$50.00

Letter to client concerning dismissal of foreclosure This charge is the alternate to the letters concerning the public auction and new ownership.	$100.00
NO OTHER CHARGES to monitor a foreclosure are billed *The MAXIMUM amount of fees that could be charged to monitor a foreclosure that proceeds through a public auction is* ***$300.00***	
Preparation of Affidavit in Lieu of Answer or Answer and Notice of Filing; preparation of Appearance; file with Clerk of Circuit Court	$275.00

Bankruptcy

Preparation of Motion for Relief from Automatic Stay (includes preparation and filing of the motion along with 2 court appearances)	$600.00
If more than 2 court appearances are necessary	Hourly rate ($250.00)
Receipt and review of bankruptcy notice; Review bankruptcy petition and plan (if applicable); Detailed letter to client	$175.00
Preparation and filing of Proof of Claim	$125.00
Preparation of letter to client concerning owner's successful completion of bankruptcy or dismissal	$100.00
NO CHARGE to monitor bankruptcy	
NO CHARGE to send payments received from bankruptcy trustee to the client/management company	

Governing Document Review

Upon completing our review, we provide a detailed letter advising the client of any conflicts between the declaration or bylaws and applicable law. The review letter also identifies any provisions in the declaration and bylaws that conflict with each other, as well as those provisions that in our opinion are too vague or otherwise may have enforceability issues. If applicable, the letter will also recommend additions to the documents in an effort to improve the Association/Cooperative's overall governance and administration.	$695.00

PLEASE NOTE THAT ALL COURT COSTS, SERVICE OF PROCESS, SHERIFF FEES AND CERTIFIED MAILING COSTS HAVE NOT BEEN INCLUDED AND ARE BILLED SEPARATELY

MONTHLY RETAINER PROGRAM

In an effort to comprehensively serve the growing legal needs of our association clients, we are pleased to offer the following services in return for a monthly retainer fee of in the amount of $550.00, subject the terms and conditions herein:

- All telephone and email communications with the board, property management and the association's legal counsel
- Service as the association's registered agent and preparation and filing of all annual reports
- Legal research and preparation of legal opinion letters to the association
- Review, preparation and completion of audit letters for the association's auditors
- Client notifications and alerts regarding changes in governing statutes and case law
- Communications regarding foreclosures and closing with realtors, lenders, attorneys and title companies
- Review of and revisions to Association contracts, loans and other legally-binding documents
- Review and analysis of the Association's Declaration, Bylaws and Rules and Regulations
- Drafting of amendments to the Declaration, Bylaws and/or Rules and Regulations
- Preparation of necessary corporate resolutions to ensure compliance with governing documents
- Preparation of correspondence to third parties in dispute with the Association (this does not include correspondence sent to owners/occupants for violations of the Association's governing documents in anticipation of litigation or enforcement proceedings which is an excluded item)
- All monthly status reports concerning open assessment collection files, pending bankruptcies and foreclosures
- Preparation of Amended and Restated Declaration and By-laws for compliance with applicable statutory requirements

Excluded items include out-of-pocket costs, attendance at meetings, assessment collection matters, litigation (including covenant enforcement actions) and appearance at administrative actions or alternative dispute resolution proceedings.

This retainer shall commence the next full month following the date below. The Association will be billed the retainer fee on a monthly basis and we request that payment be made within 30 days of invoicing. The fees are deemed earned when paid. At the end of 12 months, if the parties agree, the monthly retainer fee may be adjusted. This Agreement shall continue until cancelled.

If the Association is in agreement with above, please have an officer execute in the space provided below and return a fully-executed copy to my office.

KEAY & COSTELLO, P.C.	**ASSOCIATION**
By: _____	**Name:** _____
	By: _____
	Its: _____

Dated: _____**, 20__**

MONTHLY COMMUNICATIONS RETAINER PROGRAM

In an effort to serve the growing legal needs of our association clients, we are pleased to offer the following services in return for a monthly retainer fee of in the amount of $300.00, subject to the terms and conditions herein:

- All telephone and email communications with the board and/or property management
- Service as the association's registered agent and preparation and filing of all annual reports
- Review, preparation and completion of audit letters for the association's auditors
- Client notifications and alerts regarding changes in governing statutes and case law law
- All monthly status reports concerning open assessment collection files, pending bankruptcies and foreclosures

This retainer shall commence the next full month following the date below. The Association will be billed the retainer fee on a monthly basis and we request that payment be made within 30 days of invoicing. The fees are deemed earned when paid. At the end of 12 months, if the parties agree, the monthly retainer fee may be adjusted. This Agreement shall continue until cancelled.

If the Association is in agreement with above, please have an officer execute in the space provided below and return a fully-executed copy to my office.

KEAY & COSTELLO, P.C.

By: _____

ASSOCIATION

Name: _____

By: _____

Its: _____

Dated: _____**, 20___**

REVIEW OF DELINQUENT ASSESSMENT ACCOUNTS

Every association has them haunting their books: delinquent homeowner assessment accounts. Do any of the accounts belong to owners who lost their units in foreclosure but left an outstanding assessment balance? What should be done with the balance? Should the association try to collect it? Who is responsible for paying it? Should it just be written off? Or what about the current owner who is behind on her assessments but keeps saying she will pay it "next month?" This article seeks to provide guidance on how associations can determine answers to those questions. By obtaining a comprehensive review of its delinquencies, an association can put itself in a better position to collect those delinquent balances and to place itself on solid financial footing.

In addition to cluttering the monthly report from the management company, carrying delinquent account balances harms an association in several ways. First and foremost, every delinquent account represents budgeted assessments that, if not paid, must eventually be recovered by increasing the future assessments on the other, paying homeowners. An association's board has a fiduciary duty to collect assessments. By not taking steps to address delinquencies, board members could fall short of their fiduciary obligations to the homeowners. Second, for condominium associations, FHA guidelines include a maximum delinquency threshold. If the number of delinquent account exceeds a certain percentage of the total accounts in the association, homeowners' ability to qualify for FHA financing could be revoked. Third, when an association applies for a loan, one of the elements the bank considers is the delinquency rate. If an association has too many delinquent accounts, the loan's underwriter may determine the risk in lending to the association is too great and deny the loan. Therefore, allowing delinquent accounts to fester affects the board's ability to effectively manage the association and places a greater financial burden on the paying homeowners while also negatively impacting both the association and homeowners' ability to obtain credit.

In order to help the board maintain as low of a delinquency rate as possible it is important to review the association's delinquent accounts and develop answers to the questions posed at the beginning of this article. By making decisions on the association's ability to collect delinquent accounts, the association's financial standing should be greatly improved. There are essentially two primary legal proceedings that inhibit an association's ability to collect a delinquent balance: mortgage foreclosure and bankruptcy. If a unit is foreclosed, the association's lien is extinguished as of the date of the foreclosure sale; the new owner of the unit (typically the foreclosing bank) is not responsible for the prior balance, with certain limited exceptions (such as the 6 months of unpaid common expenses pursuant to Section 9(g)(4) of the Condominium Property Act.) The previous owner is still obligated for the charges that accrued prior to the foreclosure sale; however, the association's ability to collect these charges is limited. The most common method to collect unpaid assessments is a forcible entry and detainer action, which allows the association to evict the owner of the unit if the assessments are not paid. However, this option is unavailable following a foreclosure sale because the party who owes the charges no longer owns/occupies the unit. Therefore, even if the association obtains a judgment against the defaulting owner, it must rely on post-judgment collection to collect the debt.

Post-judgment collection begins with a court proceeding known as a citation to discover assets. In a citation to discover assets, the debtor is required to appear in court to provide, under oath, financial information, such as the name of his/her employer, bank accounts, etc. If the debtor has assets or a job, the association can ask the court to turnover those assets or wages and apply these amounts to the association's judgment. While post-judgment collection can be an effective tool, there are a few issues with this part of the collection process. First, the citation to discover assets summons must be personally served (not mailed) upon the debtor by a Sheriff's deputy or private process server. If the association is unable to locate the debtor, the debtor cannot be served and the post-judgment collection process cannot begin. Second, even if the debtor appears and provides financial information to the association, the debtor has the ability to claim he/she lacks sufficient assets or income (called exemptions) so that the court could not order a turnover. Therefore, while under the proper circumstances post-judgment collection can result in payment for the association, it is not a certainty.

The second legal proceeding that affects an association's ability to collect on delinquent accounts is bankruptcy. When a person files for bankruptcy protection, any personal liability she has for debts owed as of the date of the bankruptcy filing is legally removed (known as a "discharge"). Without personal liability, an association cannot use any of the post-judgment collection procedures described above. The bankruptcy does not extinguish the association's lien for unpaid assessments. However, if the unit of a bankrupt owner is subsequently foreclosed, the foreclosure removes the lien. Therefore, if a bankrupt owner's unit is foreclosed, the balance owed as of the date the bankruptcy was filed cannot be collected from any party. If, however, the bankrupt owner maintains ownership of the unit, any balance owed as of the date of the bankruptcy filing (the pre-petition amount) remains as a lien on the unit and can be collected at closing whenever the owner sells or refinances or through an in rem judgment against the property itself. The owner remains personally responsible for assessments that accrue beginning the month following the bankruptcy filing (the post-petition amount).

Cross checking the association's delinquent accounts against foreclosure and bankruptcy records in order to determine the collectability of those accounts can be a daunting task for the board. Fortunately, our firm can help. We now offer a comprehensive review of an association's entire delinquency report. Our office charges $650.00 for this service, which includes a review of all delinquent accounts against foreclosure and bankruptcy court records and a recommendationof options available to the association on each account. The board can then use this data and these recommendations to make informed decisions on how to proceed with each account. In some situations, an old balance previously viewed as uncollectable might be available through post-judgment collection. In other situations, a balance must be legally removed due to bankruptcy. Whatever the particular circumstance of each account, the review will give the board the tools it needs to fulfill its obligations to the association's homeowners in order to reduce assessment delinquencies and promote the financial stability and creditworthiness of the community.

KEAY & COSTELLO, P.C.

ATTORNEYS AT LAW

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FAX: (630) 454-4276

_____, 201*

Association
c/o Management Company
Attn: Property Manager
Street Address
City, State Zip

Re: (Association) Status Letter

Dear Property Manager:

The following is a status on each account for the Association currently in our office:

Owner A/Property Address
RECENT UPDATE

ASSESSMENT COLLECTION: Owner A was not served prior to court on January 25th. The appropriate documents were placed with the sheriff for service by posting and this case was continued to February 22, 2017 at 9:00 a.m.

FORECLOSURE: A foreclosure complaint was filed on January 11, 2016. On February 8th we corresponded with the managing agent concerning the Association's rights and the collection of assessments. Unless we receive additional notices or pleadings, we will check this matter in early June.

HISTORY
ASSESSMENT COLLECTION: Our office filed suit and this case was scheduled for court on January 25, 2017.

Owner B/Property Address
RECENT UPDATE

FORECLOSURE: No activity since our last update.
HISTORY

FORECLOSURE: A foreclosure complaint was filed on June 21, 2015. Entry of judgment was scheduled for October 25, 2016 and the case was continued to December 18, 2016 for status. This case was again continued to March 20, 2017 for status. We will check the file in early April.

Owner C/Property Address
RECENT UPDATE

ASSESSMENT COLLECTION: Our office filed suit and this case is scheduled for court on February 22, 2017 at 9:00 a.m.

HISTORY

ASSESSMENT COLLECTION: A 30-day demand letter was forwarded on November 29, 2016.

Owner D/Property Address
RECENT UPDATE

FORECLOSURE: This case was dismissed on November 7, 2016 and our file is now closed.

HISTORY

FORECLOSURE: A foreclosure complaint was filed on February 14, 2015. This case was scheduled for status on October 19, 2015 and was continued to April 25, 2016 and September 5, 2016. This case was again continued to January 14, 2017.

Owner E/Property Address
RECENT UPDATE

BANKRUPTCY: This owner filed for chapter 13 (reorganization) bankruptcy protection on November 19, 2016. Our office filed a proof of claim for $1,118.60 and sent a letter to the Association regarding the bankruptcy and post-petition collection on February 4, 2017. We will check the status of the file in May.

Owner F/Property Address
RECENT UPDATE

FORECLOSURE: No activity since our last update.

HISTORY

ASSESSMENT COLLECTION: A 30-day demand letter was forwarded on December 15, 2015. Our office filed suit and this case was scheduled for court on May 11, 2016. None of the Defendants were served prior to court on May 11th. The appropriate documents were placed with the sheriff for service by posting and this case was scheduled for court on June 8, 2016.

Owner G/Property Address
RECENT UPDATE

ASSESSMENT COLLECTION: Owner G was not served prior to court on January 25th. The appropriate documents were placed with the sheriff for service by posting and this case was continued to February 22, 2017 at 9:00 a.m.

HISTORY

ASSESSMENT COLLECTION: A 30-day demand letter was forwarded on October 11, 2016. Our office filed suit and this case was scheduled for court on January 4, 2015. The Defendants were not served prior to court on January 4th. In an effort to obtain a personal judgment, Alias Summons' were issued and this case was continued to January 25, 2017.

Owner H/Property Address

RECENT UPDATE

FORECLOSURE: No activity since our last update.

HISTORY

FORECLOSURE: A foreclosure complaint was filed on November 7, 2016 and received at our office on December 3, 2016. On December 11th we corresponded with the managing agent concerning the Association's rights and the collection of assessments. Unless we receive additional notices or pleadings, we will check this in early March.

Should you have any questions please do not hesitate to contact me.

Sincerely,

Legal Assistant
KEAY & COSTELLO, P.C.

Informational Articles

COURTESY OF

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PALM V. 2800 LAKE SHORE DRIVE CONDOMINIUM ASSOCIATION AND IMPLICATIONS FOR ASSOCIATIONS

This is a summary of a recent case many of you may already be aware of, Palm v. 2800 Lake Shore Drive Condominium Association, et. al., a case recently decided by the Illinois Appellate Court for the First District, Fifth Division. The First District Appellate Court initially issued its opinion on March 21, 2014 as a Rule 23 order, which meant the court's opinion was not binding (except in a few very limited circumstances) on any individuals or entities other than the parties involved in this particular case. Attorneys in our office reviewed the original court opinion within days after it was released. At that time, though, our office did not send out mass "alerts" or other e-mail blasts on this case advising association clients that significant changes in the law had been made as a result of *Palm* because, legally speaking that was not true. We had also learned that the First District Appellate Court was considering publishing the opinion, and therefore deemed it prudent to wait for the First District Appellate Court to make its decision on publication.

The First District Appellate Court, on May 2, 2014 published its opinion. The case citation is 2014 IL App (1st) 111290. It is therefore important for all associations, and in particular board members, to understand the *Palm* case and the implications. Please note, that there is still a possibility that this case could be appealed to the Illinois Supreme Court.

The First District Appellate Court's decision in *Palm* is a fifty-four (54) page opinion covering numerous issues and containing approximately fifteen (15) pages of facts. It is not easy to read. The case has been pending for fourteen (14) years and appealed multiple times. This summary will address what we consider to be the most pertinent facts as well as the most significant rulings. If you would like a copy of the full court's opinion in this case, please contact our office and we would be happy to provide it to you.

Facts of the case:

The Plaintiff in the case, Mr. Palm, was a board member for his condominium association for six (6) years. In 1999, while not serving on the board, he requested certain documents from the association related to association management. The board did not produce the documents. This led Mr. Palm to sue the association, the board of directors and the board president. Palm did not seek monetary damages in his lawsuit; rather, he sought declaratory and injunctive relief. In other words, he asked the court to decide certain matters and enter an order directing the association and board members to take certain actions.

With respect to the allegations made by Palm, he claimed the board:

i. Regularly acted outside of open meetings by conducting business at workshops, conducting e-mail votes, and canvassing for votes via telephone;

ii. Violated the association's declaration and bylaws by:

a. making decisions without a majority vote of the board,

b. making certain expenditures without the required owner approval as set forth in the declaration,

c. failing to handle reserve funds in the manner provided within the declaration,

d. transferring excess operating funds to the reserve fund; and

e. failing to provide proper notice of board meetings.

Decisions by the Appellate Court in the case:

Workshops:

The defendant board members admitted it had been a regular practice for board members to get together in workshops to discuss association and board business. They also admitted the workshops were not open to owners and notices of the workshops were not given to owners. The court reviewed the definition of what constitutes a board "meeting" in the Illinois Condominium Property Act (765 ILCS 605/1 et. seq., the "Condo Act") and ruled that the workshops were meetings of the board which were required to be open to the owners and for which owners needed to be provided prior notice.

The Condo Act (765 ILCS 605/2(w)) defines a "meeting" of the board of a condominium association as *"any gathering of a quorum of the members of the Board of Managers or Board of the Master Association held for the purpose of conducting board business."* The court decided that all board discussion, consideration of association matters, and all voting by the board must occur at board meetings open to the owners. According to the court, the only exceptions to the open meeting requirement are those found in Section 18(a)(9) of the Condo Act. These are the "executive session" exceptions. Executive session is a closed portion of a board meeting held *"(i) to discuss litigation when an action against or on behalf of the particular association has been filed and is pending in a court or administrative tribunal, or when the board of managers finds that such an action is probable or imminent, (ii) to consider information regarding appointment, employment or dismissal of an employee, or (iii) to discuss violations of rules and regulations of the association or a unit owner's unpaid share of common expenses."* However, the court reiterated that all votes, even for those matters which can be discussed in executive session, must take place at the portion of a meeting which is open to the owners.

[As a note for non-condominium associations, the Illinois Common Interest Community Association Act (765 ILCS 160/1-5, "CICAA") contains the same definition for board meetings as the Condo Act in addition to a similar open meeting requirement (Section 1-40(b)(5). For associations not subject to either the Condo Act or the CICAA, the Illinois General Not for Profit Corporation Act (805 ILCS 105/108.21, the "NFP Act") contains an open meeting requirement

as well as a definition for board meetings which defines a "meeting" as "any gathering of a quorum of the members of the board of directors held for the purpose of discussing business of the homeowners association".]

Voting by e-mail and canvassing of board members:

The court determined that the board conducted voting via e-mail by distributing ballots to board members via e-mail on at least one matter. While it was not clear to the court how extensive this practice was, the court reiterated that the Condo Act requires all votes take place at an open board meeting, and any voting that takes place outside of a board meeting is in violation of the Condo Act.

Delegation to property manager

The practice engaged in by the defendant board, and which was memorialized in the management agreement between the association and its property management company, was for the property manager to solicit several bids for projects and then to seek the input from a few, but not all, of the board members. Ultimately, certain association contracts were entered into with the approval of less than a majority of the board. The court ruled this practice violated the association's declaration.

The court's ruling on this issue is very specific to the association's declaration. The declaration contained a relatively common provision that allowed the board to delegate its authority to enter into contracts to the property manager. What the court ruled that the association could not do, though, is delegate its authority to the property manager and then designate a few board members who would have the final say on approving a contract. In reviewing the language of association's declaration, the court ruled that approval of contracts required a vote of the entire board. Therefore, the board had to choose to either reserve approval on contracts for a vote by the entire board at an open meeting or, alternatively, choose to completely delegate the authority to enter into contracts to the property manager without a further board vote.

Fiduciary duty, business judgment and obtaining appropriate advice

As mentioned earlier, Palm claimed the association board members transferred surplus association income into reserves and commingled reserve funds and operating funds. Palm alleged that both of these practices were prohibited by the association's declaration and therefore the board members breached their fiduciary duty to the owners by taking these actions. What is relevant from this part of the case for other associations is not the court's interpretation of the specific language of the association declaration in this case, but rather the procedures board members should follow.

Every board member owes a fiduciary duty to the owners in his/her respective association. Board members must act in a manner reasonably related to the exercise of their fiduciary duty, and if board members fail to do so the board itself, and the individual board members, may be liable to the owners. But, when board members exercise business judgment in making decisions, a

certain amount of insulation from claims of breach of fiduciary duty can be achieved. The business judgment rule provides that unless there is evidence of bad faith, fraud, illegality or gross overreaching on the part of board members, then courts will not interfere with the exercise of business judgment. As the court explained, the purpose of this rule is to protect board members who have acted carefully and diligently in performing their duties from being subjected to liability for honest mistakes in judgment. However, as the court also pointed out, if board members fail to exercise due care in making decisions, then they cannot use the business judgment rule to protect them from potential liability.

To be entitled to protection under the business judgment rule, the court stated that board members must inform themselves of material facts necessary to make decisions. Specifically, the court stated that "*if a board seeks legal advice before reaching its decision and relied on that advice in reaching its decision, it will be found to have properly exercised its business judgment*." Based on statements made by the court elsewhere in the opinion, it would appear that had the board members clearly shown they had obtained legal advice and were following this advice when they took the actions Palm complained about, this case may well have turned out very differently.

Notice of meetings

Palm claimed that even when the defendant board members provided notice of board meetings the notice was improper. This is another instance where the court's decision turned on the specific language of the declaration for this particular association. While Section 18(a)(9) the Condo Act provides that notices of board meetings must be "mailed or delivered," the court found that the declaration in this case required that meeting notices must be "mailed." It had been the practice of the association to mail notices to off-site owners, but hand deliver notices to on-site owners. The court decided that this was a case where the declaration required notice via one particular method (i.e. mailing), and therefore providing notice to owners via a method other than mailing was a breach of the board members' fiduciary duty.

Key points from the case:

- Board "workshops," "working sessions" or "planning sessions," where a quorum of the board members gather for the specific purpose of conducting and/or discussing board business in a closed session without prior notification to owners should not take place.
- Anytime a quorum of the board members gather for the purpose of conducting and/or discussing board business, that is a board meeting which must be open to owners (except for those three (3) limited executive session exceptions provided by statute) and for which owners must be provided prior notice.
- All votes by board members must take place at an open board meeting. [As a note, the court did not address the provision of the NFP Act (805 ILCS 105/108.45) which provides that, unless prohibited by the articles of incorporation or bylaws, any action that can be taken at a meeting of the board of directors "may be taken without a meeting if a

consent in writing, setting forth the action so taken, shall be approved in writing by all of the directors."]

- Board members must understand and follow the provisions of their association's governing documents as well as Illinois law.
- If board members obtain advice from a qualified professional on a particular topic, such as the association's attorney, accountant, insurance agent, etc., as applicable, and the board members subsequently follow that advice, the board members should be protected by the business judgment rule if the board's decision on that particular topic is challenged by an owner. When obtaining this advice, the board should obtain a specific, written opinion from the individual(s) providing the advice.

Action points for association boards moving forward:

While we are aware that the *Palm* decision has caused much consternation amongst a number of association board members over the past several weeks, it sets out clear steps for board members to take to protect themselves and their respective associations from liability. As a starting point, every board member, if he or she has not done so already, should become familiar with the terms of his or her association's declaration and bylaws and any other governing document. Board members are obligated to follow these governing documents. Simply doing something because that is the way it has always been done, or because that is the way it was done when the board member joined the board, is not appropriate if the governing documents contain language to the contrary.

The board members of each association should ask the following questions:

- Does your board regularly convene "workshops" to discuss board business?
- Does your board vote on association business?
- Does your board, without a vote, permit management to enter into contracts on behalf of the association?
- Does your board transfer surplus funds into the reserve account at the end of the year?
- Does your board pay reserve expenses from its operating account?
- Does your association provide proper notice for board and membership meetings?

The above questions relate to issues that were discussed in the *Palm* case, however, much of this case was decided on the specific terms of the declaration and bylaws for the association involved. Therefore, if you are uncertain about whether your association is complying with its

governing documents and Illinois law, you should obtain a written legal opinion as to whether your association is carrying out its business appropriately.

Based on our understanding of the court's decision, had the board in *Palm* obtained a legal opinion from the association's attorney before taking the actions it did, and had it followed that legal advice it should have obtained, the court may not have found the board members to have violated their fiduciary duties. Relying on a general summary of the *Palm* case such as this, or relying on something you may have heard at a seminar or read in the newspaper is likely not a sufficient basis for a board to claim protection under the business judgment rule. Since every association is different, and every set of declaration and bylaws is different, a board with questions on how it should conduct itself should only rely on a specific legal opinion from the attorney for its association.

Should you have any questions related to the *Palm* case, or should you wish to have one of our attorneys provide your association with a legal opinion related to the way you operate, please do not hesitate to contact us.

LEASING RESTRICTIONS AFTER STOBE V. 842-848 WEST BRADLEY PLACE CONDOMINIUM ASSOC.

Recently, on February 3, 2016, the Illinois First District Appellate Court, Third Division, issued a ruling in the case of Stobe v. 842-848 West Bradley Place Condominium Association (2016 IL App (1st) 141427) pertaining to certain leasing restrictions within condominium associations. At this time, this case is binding on all condominium associations within the First Appellate District (e.g. those within Cook County, Illinois) and could be viewed as persuasive as to associations located elsewhere in Illinois. This Article is a summary of the Stobe case.

Summary of Stobe case

In Stobe, the plaintiff owners purchased a condominium unit within the defendant condominium association for purposes of renting out the unit. The association's declaration did not contain any express right of owners to lease their units, but rather included restrictions on owners leasing their units such that no units could be leased for transient or hotel purposes or for terms of less than six (6) months. The article in the association's declaration pertaining to leasing did not include a specific right of the association board to adopt further rules pertaining to leasing. The association's declaration and bylaws did contain elsewhere general language regarding the board's ability to adopt rules and some specific language regarding the board's ability to adopt rules pertaining to other types of restrictions.

The plaintiffs in Stobe purchased their condominium unit in late 2005, and then the association board adopted rules in July 2010 that placed a cap on the number of units that could be leased at any given time of thirty percent (30%). In 2012, the association sought to enforce its leasing cap and evict the plaintiffs' tenants which prompted the plaintiffs to file a lawsuit against the association declaring the board adopted leasing cap invalid.

The court in Stobe decided that the board adopted rule placing a cap on leasing was invalid because it conflicted with the association's declaration. While the association's declaration did not contain an express right for owners to lease their units, the court determined that owners did have a right to lease their units because the association's declaration contained certain restrictions related to leasing (i.e. the prohibition on leasing for transient or hotel purposes or for less than six (6) months) and these restrictions would be meaningless if owners did not have the right to lease their units. Thus, the court reasoned that because the association's declaration granted owners the right to lease their units, a board adopted rule could not take away this right.

Additionally, the court focused on the fact that elsewhere in the association's declaration where restrictions were enumerated there was express language included that the board could adopt rules related to those particular restrictions, but there was not similar language in the article of the declaration that included the leasing restrictions. Thus, the court held that because "the

declaration has spoken on the matter of leasing, any augmentation or diminution of plaintiffs' right to lease their unit must be accomplished through an amendment to the declaration, not a rule promulgated by the Board."

For the past couple of decades, the seminal case in Illinois regarding leasing restrictions adopted by associations has been Apple II Condominium Ass'n v. Worth Bank & Trust Co., 277 Ill.App.3d 345 (1995). For our summary of this case, please visit our website at (http://www.keaycostello.com/board-operations/the-return-of-leasing-and-restrictions-at associations). The Stobe court discussed the Apple II case but found it inapplicable because Apple II addressed a leasing restriction adopted by an amendment to a declaration as opposed to a leasing restriction adopted by a board which, in the Stobe court's determination, conflicted with the association's declaration. While the Apple II court discussed the possibility of a board adopting leasing restrictions, the Stobe court found this discussion non-binding on it since Apple II did not actually involve a leasing restriction adopted by a board rule.

The Stobe court also discussed the case of Board of Directors of 175 East Delaware Place Homeowners Ass'n v. Hinojosa, 287 Ill.App.3d 886 (1997), which dealt with a board adopted rule prohibiting owners from having additional dogs. The Stobe court reasoned that the Hinojosa case did not apply because in Hinojosa the association's declaration did not contain any language related to dog ownership and therefore the board's rule to prohibit new dogs did not conflict with any language within the declaration.

Going Forward

For some associations, the Stobe case provides clear guidance going forward. For other associations, though, the Stobe case potentially raises more questions than it does provide answers.

For those associations that have any language or restrictions related to leasing within their declaration, if the articles/sections related to leasing do not have language specifically permitting the board to adopt rules related to leasing, the Stobe case would indicate that the boards for these associations are not permitted to adopt any rules or regulations related to leasing. Any further restrictions related to leasing would need to be adopted through an amendment to the association's declaration.

For those associations that have language or restrictions related to leasing within their declaration, if the articles/sections related to leasing do have language specifically permitting the board to adopt rules related to leasing, the Stobe case would indicate that the boards for these associations could adopt additional rules and regulations related to leasing as long as such rules and regulations do not conflict with the terms of the declaration.

On the other hand, if an association's declaration contains no language related to leasing, the Stobe decision would seem to indicate that associations could adopt leasing restrictions through either a declaration amendment or through rules adopted by the board as further discussed in the Apple II case.

Additionally, the Stobe case raises questions regarding whether the court's ruling could extend beyond just leasing restrictions. For example, if an association's declaration contains restrictions on a particular topic (such as pets, recreational activities, parking, storage of items, etc.), and does not contain language within such sections specifically providing that the board may adopt rules on these particular topics, the Stobe decision raises the question of whether or not the board would be able to adopt any rules on such topics. The Stobe case solely dealt with leasing restrictions, so it cannot conclusively be applied to other types of restrictions at this point, but this does nevertheless put associations on notice that future courts could expand the reasoning from Stobe to other types of restrictions besides leasing restrictions.

As we did before the Stobe case was decided, our firm continues to highly recommend that any association seeking to adopt restrictions on leasing do so through an amendment to the declaration as opposed to a rule adopted by the board. If your association is considering adopting restrictions on leasing, or already has such restrictions in place and would like them reviewed, please feel free to contact our office and one of our attorneys would be happy to assist you.

RULES AND REGULATIONS: HOW ARE THEY CREATED? HOW ARE THEY ENFORCED?

I. What are they?

While the adoption of rules and regulations is not required of any community association in Illinois, most find it advantageous to do so. As compared to the declaration, which creates/establishes the condominium or common interest community, and the bylaws, which deal primarily with the obligations and duties of the board and governance of the community, the rules and regulations provide an opportunity to govern the details, operation and day-to-day living at the entire property.

II. How do rules and regulations differ from the declaration and bylaws?

A. Declaration

With respect to condominium associations, Section 4 of the Illinois Condominium Property Act (the "ICPA") requires that certain provisions be included in each condominium declaration. Some of these provisions are:

a. the legal description of the property;
b. legal description of each unit;
c. the name of the condominium association;
d. the name of the city and county in which the condominium is located;
e. the percentage of ownership in the common elements assigned to each unit, and;
f. a description of the common and limited common elements. (765 ILCS 605/4)

The declaration for each an association must also be recorded in the county in which the community is located. The recording of the declaration informs the public that the common interest community has been created and that all property within the community is subject to its provisions, covenants and restrictions.

B. Bylaws

The Illinois Condominium Property Act sets forth certain provisions that must be included in each set of bylaws for condominium associations. Some of these provisions are:

a. the procedures for the election of a board of managers;
b. the powers and duties of the board;
c. the mechanism for removal of board members;

d. notice requirements to the owners regarding adoption of the association's annual budget;
e. the mechanism for filling vacancies on the board;
f. maintenance, repair and replacement of the common elements and the method of payment therefore, and;
g. the mechanism for calling special meetings

The bylaws for an association prescribe the operations and dealings of the board, which is the governing authority for the community. The bylaws also play an important role by establishing the rules for payments made in conjunction with the maintenance, repair and replacement of the common elements.

C. Rules and Regulations

Unlike the declaration and bylaws, an association's rules and regulations are not required to include any particular provisions. As stated in the introduction, there is no requirement that an association, be it condominium, townhome or other, adopt rules and regulations at all. But there are a number of day-to-day concerns of individual owners, and the community as a whole, that are not typically included in declarations and/or bylaws and must therefore be addressed and codified in a separate document. That document is a set of rules and regulations.

IV. What types of provisions are appropriate for inclusion in a set of rules and regulations?

The specific needs and concerns of a community truly dictate what provisions would be appropriately included in a set of rules and regulations. For illustrative purposes, the following areas of concern are routinely addressed by way of rule:

A. parking;
B. storage of personal items;
C. exterior appearance of units/homes (architectural controls);
D. disposal of refuse;
E. use and enjoyment of common areas;
F. appearance and use of limited common areas;
G. landscaping on individual lots;
H. use and storage of play equipment;
I. pets, and;
J. satellite dishes/over-the-air reception devices.

V. Procedures and considerations for creating, adopting and enforcing rules and regulations

A. Creation.

One of the first questions a community should ask, and answer, prior to adopting certain rules is whether or not the proposed rule is necessary. If the item of concern is already addressed in either the association's declaration or bylaws, the additional rule may be superfluous. Further, if the declaration and/or bylaws specifically address the issue at hand, the association may not change the language contained in the declaration and/or bylaws by adopting a rule. Any rule that is contrary or in conflict with a similar provision in the declaration and/or bylaws will be invalid and unenforceable. The only way to modify, alter or overturn a provision in the declaration and/or bylaws is to amend that specific document. The declaration and/or bylaws may not be amended, modified or rescinded by passage of a rule. If, however, the declaration and/or bylaws contain no provisions addressing the association's specific concern, adopting a rule to govern the desired conduct is appropriate. Lastly, the rule adopted by the community may not conflict with statutory law.

Other than determining whether a proposed rule conflicts with the law or the association's declaration and/or bylaws, the most important consideration when drafting a rule is to avoid vagueness. If an owner does not know what he or she is permitted or prohibited from doing, the association will have a difficult time enforcing the rule. Therefore, all rules should be drafted as narrowly as possible to avoid any "gray areas" or confusion.

B. Adoption

For common interest communities, there are no specific statutory procedures to be followed for adopting rules and regulations. For those communities, the declaration and bylaws must be consulted to determine the appropriate process. Should the governing documents be silent, the discussion below with respect to condominium associations and the procedures to be employed would be appropriate for all such communities. The procedures for adoption are significant as if an owner challenges a rule, a court will be called upon to determine: 1) whether the rule is enforceable and 2) whether the owner violated the rule. The association must follow its own procedures established by its governing documents or, for condominium associations, those procedures established by the ICPA. Should those procedures not be followed, then the rule is not likely to be enforceable. Attention to procedure is of critical importance to assure the enforceability of an association's rules.

For a condominium association, section 18.4 of the ICPA governs the procedures condominium associations must employ when seeking to adopt or amend rules and

regulations. First, once the board has developed the rule or rules it seeks to adopt, the same should be prepared in written form, suitable for distribution to the owners. Section 18.4(h) of the ICPA requires that all owners be given the full text of the proposed rules along with the notice of the meeting at which discussion of the rules will take place. Notice of such a meeting, which must include a copy of the full text of the proposed rule or rules, is to be delivered to the owners not more than 30 and not less than 10 days prior to its scheduled date. Voting on whether to adopt or amend rules and regulations is within the specific purview of the board. Once the meeting to discuss the rules has been held, the board, by majority vote, will determine whether the rules are adopted.

C. Enforcement

The two concepts that all communities seeking to enforce its rules and regulations must be cognizant of are uniformity and reasonableness. It is imperative that an association, when enforcing a specific rule, does so equally and without prejudice as to all owners. This is true whether an owner is delinquent in his or her assessment payments, is a chronic violator of the rules, or is one of your friends. All owners must be viewed and treated the same when evaluating a violation of the rules and regulations.

As for reasonableness, this is a difficult concept to define. How can a board make a determination as to whether a rule or regulation is reasonable? Obviously, there can be a myriad of opinions as to what rules an association should enact. Since a true and complete consensus on most rules is most likely unattainable, finding some common ground is the goal. If the association can develop a rule or set of rules that a majority of the owners can live with, while perhaps not agreeing with the specifics of each rule, that association is probably acting "reasonably." When an association's rules and regulations reflect that certain compromises and concessions concerning personal tastes and preferences must be made when living in a common interest community, reasonableness has probably been achieved.

i. Notices of violation

It may seem obvious, but it is important to remember that an owner cannot be determined to have violated a rule without first being notified of the violation. While no specific form of notice is required, the owner should be informed of the rule he or she has allegedly violated, along with the time, date and location of the violation. The notice should also set forth whether the alleged violation is the first, second, etc. occurrence and the fine that could be levied in the event the board determines that the violation did in fact occur. The notice should also afford the owner an opportunity to request a hearing with the board. The association can handle this in a couple of different ways. First, the notice can set forth a specific date and time at which the owner is welcome to appear before the board and present facts supporting her contention that the violation did not occur or why any fine to be levied in conjunction with the violation is inappropriate. Alternatively, the association can merely inform the owner that he or she has the

right to request a hearing before the board by notifying the association in writing of the request. As my discussion below will establish, the failure to provide an owner the opportunity for a hearing (i.e. some form of due process) prior to levying a fine could invalidate any such fine levied by the association. Section 18.4 (l) of the ICPA and Section 1-30 (g) of the CICAA require an association provide the owner with an opportunity to be heard. This means the hearing (or at least the opportunity) must come before the fine.

ii. Hearing

Once again, there is no set method for conducting hearings on violations of the rules and regulations. Minimally, the owner should be afforded an opportunity to tell his or her side of the story to the board. The owner should also be allowed to present witnesses on his or her behalf. There is no requirement that the person who reported the violation be present at the hearing or that the owner be provided an opportunity to question the reporting witness. Once the owner has presented his or her side of the story, no further process is required prior to the board making its ruling. Please note that Section 18.5(c)(4) of the ICPA and Section 1-40(b)(5) of the CICAA allow the board to conduct hearings on violations of the rules and regulations in closed, executive session. If the board conducts the hearing in executive session, the board must re-convene to the open portion of the meeting for voting on the alleged violation and fine.

Following the board's determination, a letter should be sent to the owner setting forth the ruling, what fine (if any) has been levied against the owner's account and if a fine has been levied, the amount of time the owner has to pay the fine before it is considered late.

iii. Fines

As indicated by the discussion above, the ICPA and the CICAA provide associations with the ability to levy fines against owners who fail to abide by the rules and regulations. Any fines so levied will be added to and become part of the owner's common expense account with the association. In order for fines to be considered valid and levied properly, the consequences for failing to abide by the rules and regulations must be specifically spelled out. Failure to put the owners on notice that a violation of the rules and regulations may result in a monetary fine could result in the association's inability to collect the fine.

Courts are generally reluctant to award substantial amounts to associations as a result of owner violations of the rules or other governing documents. Therefore, while a board may think that a $500.00 fine will compel owners to clean up after their pets, in all likelihood, if the owner does not pay and the association takes the owner to court, the fine will not be upheld. Simply put, fines are acceptable, but the amount of the fine cannot be greatly disproportionate to the offense and

damage to the association/owners resulting therefrom. Acceptable fine structures usually start with either a written warning or a small fine (i.e. $25.00) upon the finding of a first violation. From the first fine forward, the association may adopt a graduated scale of fines for subsequent violations (i.e. $50.00 for the second violation, $100.00 for the third violation and $100.00 for each such subsequent violation of the same rule). Should an owner fail to pay any fines properly levied, the association may pursue the unpaid fines as it would unpaid assessments. Most governing documents also allow an association to recover the attorney's fees and court costs it incurs in pursuing such an action.

POTENTIAL CONSEQUENCES WHEN BOARD MEMBERS FAIL TO COMPLY WITH DUTIES IMPOSED BY ASSOCIATION GOVERNING DOCUMENTS AND ILLINOIS LAW

Members of community association boards of directors are granted a number of powers by association governing documents (declarations, by-laws and rules and regulations) and Illinois law, but they are also charged with a number of duties and responsibilities that they must comply with or else face potential consequences ranging from removal from their positions to litigation.

While every associations' board of directors potentially has different duties and responsibilities as outlined in the specific association's governing documents, in general, all boards of community associations have duties which include, but are not limited to, the following: to ensure that the association performs all of the obligations it has as outlined in the association's governing documents and the law; all of those duties of board members specifically delineated in the association's by-laws, typically in a section titled "powers and duties of the board" or something similar thereto; to ensure that all meetings required by the association's governing documents and applicable law are held and that the proper procedures for such meetings are followed; to ensure that all covenants, restrictions, rules and regulations of the association are enforced and applied uniformly to all owners in the community; preparation of annual budgets and establishing methods for collection of assessments; and obtaining the insurance required by the association's governing documents.

In the event a board, or one or more of its directors, fails to perform the duties outlined in the association's governing documents or proscribed by law, there are a number of remedies owners in the association may take to rectify this. These potential remedies are outlined below.

1. Voice Concerns at Board Meeting

Perhaps the most cost effective and least time consuming way for owners to voice their concerns regarding a board's failure to comply with its duties under the governing documents and applicable law is to attend a regular board meeting and request an opportunity to address the board regarding the owner's concerns. Pursuant to the Illinois Condominium Property Act (765 ILCS 605/18), boards are required to meet at least four (4) times annually, provide advance notice to owners of each board meeting, and conduct open meetings except in certain limited situations. Therefore, an owner with concerns regarding the board's performance would have several times throughout the year to attend a board meeting and request an opportunity to express the owner's concerns to the board. The limitations of this method for owners is that simply voicing their concerns at a board meeting does not provide them with any manner of compelling a board to comply with its proscribed duties.

2. Call Special Owners Meeting

Pursuant to the Illinois Condominium Property Act (765 ILCS 605/18), a special meeting of the owners may be called by twenty percent (20%) of the unit owners in the association. For homeowners and townhouse associations, the governing by-laws typically provide that twenty percent (20%) of the owners in the association may call a special meeting of the owners, however the percentage of owners required for calling the meeting may be higher or lower than twenty percent (20%). A typical method for requesting a special owners meeting is for the requisite number of unit owners to sign a petition addressed to the board and/or the board president asking that a special meeting of the owners be called, however individual association by-laws may prescribe a different method. The petition to the board must specify the purpose for the special meeting. In this scenario, there are likely two (2) potential purposes for calling a special meeting of the owners. First, the special meeting may be called simply to address and discuss the board's failure to comply with the governing documents and/or applicable law. On the other hand, the special meeting may be called to hold a vote on removing some, or all, of the directors on the board.

In the first instance, if a special meeting is called only to discuss and address the board's failure to comply with the governing documents and/or applicable law, then owners should be given an opportunity to raise their concerns to the board. However, like the option of owners attending board meetings to express their concerns, nothing may be done at such a special meeting to compel the board to comply with its proscribed duties.

In the second instance, if a special meeting is called to vote upon the removal of some, or all, of the directors on the board, then a vote of the owners must be taken on whether the directors in question shall retain their positions as directors, or whether they should be removed from office. Every association's by-laws should contain specific requirements that must be complied with when the removal of a director is sought, and these requirements likely call for written notice given to the director(s) up for the removal vote as well as all of the owners in the association. The by-laws also should dictate the required percentage of votes necessary to remove a director from office. If the requisite number of votes is reached to remove a director, the director will be removed from office and the provisions in the association's by-laws should be followed for replacing the director. Typically by-laws permit the board to appoint a replacement director and/or provide that a special election be held to elect a replacement director.

3. Gather Proxies for Next General Election

Another option for owners in this situation is to wait until the next general board election and gather enough proxies to ensure that another candidate(s) for the board, rather than the current director(s) on the board, gets elected for the following board term. One benefit of this method for owners is that they do not need to gather signatures for a petition and then campaign for the requisite number of votes to remove a director from office, which requisite number could be as high as two-thirds (2/3) or three-fourths (3/4) of all of the owners in the association.

Rather, concerned owners could focus their efforts on campaigning and collecting proxies for the next general election instead.

4. Litigation

Additionally, owners faced with a board that fails to comply with its duties under the governing documents and/or applicable law also have the option of suing the board for breach of fiduciary duties. Each director on the board is charged with the responsibility of carrying out their director duties with the same care as a fiduciary of the association. In short, this requires directors to act in the best interest of the association and comply with all of the obligations placed upon directors of the association. A lawsuit for breach of fiduciary duties typically alleges that directors have failed to act as fiduciaries of the association or failed to perform some obligation that the directors were required to perform, and as a result the association and the owners have been harmed. These lawsuits typically do not seek financial compensation for the plaintiff owners bringing the suit, but rather ask the court to require the directors to do something that they should be doing but are not or to cease from doing something that the directors are doing but should not be doing.

The downside of a lawsuit for breach of fiduciary duties is that litigation is expensive and lengthy and therefore resolution of the issues involved could take years to achieve. Many association governing documents require the association to maintain directors' insurance policies, and these policies typically cover suits for breach of fiduciary duties against directors. However, in the event the insurance policies do not cover the lawsuit, the association faces large legal fees if such a lawsuit is instigated, as do the owners bringing the lawsuit. Furthermore, even if the association's insurance policy covers its legal fees for such a lawsuit, the association's future premiums, and thus the future assessment amounts charged to owners in the association, could potentially rise as a result of the lawsuit.

5. Sell

Finally, owners who find themselves in a situation where they are represented by a board that fails to comply with the governing documents and/or the applicable law may decide that their best option is to sell their unit and leave the association community. While this may seem like a drastic step, owners may simply determine that the time and potential expense involved with the other potential remedies listed herein are not worth the owner's troubles and it would be easier just to move to another community.

In conclusion, while board members of community associations are granted a number of powers by the association governing documents and the applicable laws, they are also given a number of duties to perform. If they fail to perform these duties, they may be held accountable by the owners in their association through a number of mechanisms available to the owners.

NEW CHICAGO ORDINANCE DETERS OWNERS FROM ENTERING INTO SHORT-TERM AND VACATION LEASES IN VIOLATION OF COMMUNITY ASSOCIATION GOVERNING DOCUMENTS

Many, if not most, community association declarations prohibit owners from leasing their units for transient or hotel purposes. While these types of restrictions have historically been uncontroversial and infrequently violated, the increasing popularity of peer-to-peer rental services such as AirBnB, VRBO, and HomeAway are quickly changing this. These services make short-term and vacation leasing by owner very convenient and in turn created enforcement and administrative nightmares for community association boards of directors.

On June 22, 2016, the Chicago City Council passed an ordinance further regulating short-term and vacation leasing, including adding additional registration requirements for owners within community associations leasing looking to lease their units for short-term or vacation purposes. Below is an outline of some of the changes that significantly affect community associations:

The ordinance:

1. Allows community associations to submit an affidavit stating that short-term and vacation leasing is prohibited within the community association. This affidavit can attest that the prohibition was established be either 1) a vote of the Board (i.e., an amendment to the rules and regulations) or 2) a restrictive covenant contained in the association's declaration or bylaws. Upon receipt of this affidavit, the commissioner must maintain a "Prohibited Buildings List," which shall be posted on the City of Chicago's website. In the event a community association is included on this "Prohibited Buildings List," an owner cannot obtain a license to lease his or her unit for short-term or vacation purposes.

   (*While it has long been our opinion that most community associations have the right to restrict leasing via a board adopted rule (see Apple II Condominium Association v. Worth Bank & Trust Co.) this provision would appear to be the City of Chicago's recognition that short-term and vacation leasing can be prohibited by a community association's board of directors, not soley through a restriction approved by the members. While this acknowledgement by the City of Chicago is far from an absolute guarantee that a courts will uphold short-term and vacation leasing restrictions adopted via rule, it certainly aids a community association's efforts to defend such a rule's validity and enforceability.*)

2. Provides limits on the number of units within a community association building that can be leased for short-term or vacation purposes. In community association buildings with two (2) to four (4) units, only one unit per building can be rented. In community association buildings with more than five (5) units, short-term and vacation rental leases will be limited to either six (6) units or one-quarter (1/4) of the total number of units, whichever is less.

3. Requires that any owner seeking to list his or her unit as a short-term or vacation rental first register with the City of Chicago and pay a licensing fee. Further, this application requires the owner to attest that the 1) community association has not adopted prohibitions of vacation rentals, and that that 2) the leasing limits (discussed above) have not been reached.

4. Prohibits on-line platform companies (i.e., Airbnb, VRBO, HomeAway, etc.) from permitting advertisements of units ineligible to be leased for short-term or vacation purposes, including, advertisements for those units within a community association on the City of Chicago's "Prohibited Building List." Further, the ordinance provides penalties for on-line platform companies failing to comply this prohibition on advertising ineligible units.

5. To ensure compliance, the ordinance establishes certain penalties for those violating the ordinance., including fines of $1,500 to $3,000 per offense, with each day that a violation exists treated as a separate and distinct offense. More egregious violations, such as criminal activity or public nuisance, will be subject to a fines of $2,500 to $5,000 per offense.

The passage of this ordinance is definitely good news for community associations struggling with owners leasing units in violation of short-term and vacation leasing restrictions, as it unquestionably discourages such violations. That being said, the restrictions created by this ordinance are only enforceable by the City of Chicago, and therefore its effectiveness will be completely dependent upon the City of Chicago's willingness, and ability, to enforce its provisions. While community associations located within the City of Chicago which prohibit short-term and vacation leasing should certainly take the necessary steps to be included on the City of Chicago's "Prohibited Building List," ultimate enforcement may still fall at the hands of the board.

HUD ANNOUNCES NEW FHA OWNER OCCUPANCY REQUIREMENTS

The U.S. Department of Housing and Urban Development ("HUD"), recently published Mortgagee Letter 2016-15, which modified the owner occupancy requirements for condominium associations seeking Federal Housing Administration ("FHA") approval. Prior to the adoption of Mortgagee Letter 2016-15, a condominium association with an owner occupancy rate of under fifty percent (50%) could not be granted FHA approval. With the adoption of Mortgagee Letter 2016-15, however, condominium associations with owner occupancy rates as low as thirty-five percent (35%) may be eligible for FHA approval, provided they meet certain additional requirements.

Specifically, a condominium association with an owner occupancy rate between thirty-five percent (35%) and fifty percent (50%) may be eligible for FHA approval if it meets the following additional requirements:

1. The association's financial documents (i.e. budget, balance sheet, and income and expense statement) provide for the funding of replacement reserves for capital expenditures and deferred maintenance at a level of at least twenty percent (20%) of the total annual budget for the association.

For condominium associations with an owner occupancy rate of at least fifty percent (50%), the reserve contribution requirement is ten percent (10%) of the annual budget. So, HUD's minimum reserve contribution requirement for associations with under fifty percent (50%) owner occupancy rates is double the minimum reserve contribution requirement for associations with at least fifty percent (50%) owner occupancy rates.

2. No more than ten percent (10%) of the total units in the association may be delinquent by more than sixty (60) days on assessment payments to the association.

For condominium associations with an owner occupancy rate of at least fifty percent (50%), the delinquency requirement is that no more than fifteen percent (15%) of the total units in the association may be delinquent by more than sixty (60) days on assessment payments to the association. So, HUD is requiring associations with under fifty percent (50%) owner occupancy rates to have significantly fewer units delinquent by more than sixty (60) days on assessment payments to the association then it requires for associations with at least fifty percent (50%) owner occupancy rates.

3. The association must provide financial documents (i.e. budget, balance sheet, and income and expense statement) for the previous three (3) years.

For condominium associations with an owner occupancy rate of at least fifty percent (50%), HUD requires only the current year budget, a balance sheet that is no more than ninety

(90) days old, and an income and expense statement from the prior fiscal year end as well as one that is no more than ninety (90) days old. Thus, HUD is requiring associations with under fifty percent (50%) owner occupancy rates to provide financial documents for two (2) additional prior fiscal years as compared to what it requires for associations with at least fifty percent (50%) owner occupancy rates.

4. The association must apply for FHA approval through the HRAP process.

The HRAP process means the association submits its application directly to a HUD office for review. Associations with at least fifty percent (50%) owner occupancy rates also have the ability to apply for FHA approval through the DELRAP process, whereby an authorized lender has the ability to grant the association FHA approval. It would appear that the DELRAP process is not available for associations with under fifty percent (50%) owner occupancy rates.

These new owner occupancy requirements announced by HUD should permit additional condominium associations to obtain FHA approval, provided that an association with an owner occupancy rate between thirty-five percent (35%) and fifty percent (50%) can also meet the new financial requirements set forth by HUD. If your condominium association is considering applying for FHA approval and would like assistance with this process, please feel free to contact our office and one of our attorneys would be happy to assist you.

SECURED OR UNSECURED, NO LONGER A QUESTION: ASSOCIATIONS MUST FILE PROOF OF CLAIM BY THE DEADLINE IN ORDER TO BE INCLUDED IN CHAPTER 13 BANKRUPTCY PLANS

A recent federal court decision highlights the importance of an association's manager or board contacting the association's attorney whenever a homeowner files for bankruptcy protection. When an individual files for chapter 13 bankruptcy protection, she is allowed to repay her debts over a period of up to five years through a court-approved payment plan, and her creditors are barred from attempting to collect on those debts unless first granted permission by the bankruptcy court. The plan is administered by the bankruptcy trustee, an official who collects money from the individual in bankruptcy (known as the "debtor") and pays the creditors. In order to be included in the chapter 13 payment plan, a creditor, such as an association, must file a legal document with the bankruptcy court known as a "proof of claim." The proof of claim sets forth the amount the debtor owed to the creditor as of the date she filed for bankruptcy protection (the "pre-petition debt"). Unless the debtor successfully objects to the proof of claim (i.e., convinces the court of some legal reason why the money is not owed or should not be paid through the bankruptcy), the creditor should be included in the plan and receive payments toward the pre-petition debt.

Because unpaid assessments are a lien on a homeowner's unit in favor of the association, an assessment obligation is a "secured" debt (The lien on the unit "secures" the obligation.). The Federal Rules of Bankruptcy Procedure provide a deadline for when a proof of claim must be filed if a creditor wishes to be included in a chapter 13 plan. However, while it is well accepted that "unsecured" debts such as credit card debt will not be paid through the plan unless the creditor files a proof of claim by the deadline, there has been some confusion over whether this deadline applies to creditors, such as associations, holding secured claims.

The federal Seventh Circuit Court of Appeals, whose jurisdiction includes Illinois, settled this confusion in May 2015 with its decision in *In re Pajian*. For the first time, the Seventh Circuit clarified the proof of claim deadline established by the Rules of Bankruptcy Procedure applies to both unsecured and secured creditors. If a secured creditor does not file its proof of claim by the deadline, it may not be included in the chapter 13 plan and will not receive payments from the bankruptcy trustee.

The upshot of *Pajian* for associations is managers and board members, in order to ensure the association receives payments to which it is entitled, must notify the association's attorney immediately upon receiving notice that a homeowner has filed for bankruptcy protection. The notice typically mailed to creditors by the bankruptcy court includes the proof of claim filing deadline. Given the ruling in *Pajian*, the proof of claim must be filed by this deadline in order for the association to receive payments through the plan. While a secured debt, even if not included in the plan, survives a discharge in a chapter 13 bankruptcy, collecting that debt five years down the road can be a much more cumbersome process when all that could have been

required was filing a form with the bankruptcy court. Therefore, when the association's manager or board becomes aware of a bankruptcy, notify the association's attorney so she may, if necessary, file a proof of claim.

USE OF "REPLY ALL" IN LIGHT OF THE PALM V. 2800 LAKE SHORE DRIVE CONDOMINIUM ASSOCIATION DECISION

While much consternation has taken place over the past few months regarding the recent Illinois Appellate Court for the First District, Fifth Division case Palm v. 2800 Lake Shore Drive Condominium Association, et. al. (2014 IL App (1st) 111290), one question we have received from multiple board of directors is whether or not the *Palm* decision means that board members may no longer hit "reply all" when communicating via e-mail with each other. While the *Palm* decision certainly has some potentially significant implications for many associations, the *Palm* decision should not prevent board members from communicating via e-mail and copying all board members on e-mails between a board member and the association's property manager, attorney, accountant, etc. This article will address the use of "reply all" in relation to *Palm*. For our complete summary of some of the major issues and implications of the *Palm* decision, please see the link on our webpage, www.keaycostello.com.

In *Palm*, the court reviewed the definition of what constitutes a board "meeting" in the Illinois Condominium Property Act (765 ILCS 605/1 et. seq., the "Condo Act") and ruled that meetings of the board are required to be open to owners, except in three (3) limited circumstances set forth in the Condo Act (765 ILCS 605/18(a)(9)) and that owners need to be provided notice prior to board meetings. Specifically, the Condo Act (765 ILCS 605/2(w)) defines a "meeting" of the board of a condominium association as *"any gathering of a quorum of the members of the Board of Managers or Board of the Master Association held for the purpose of conducting board business."*

While not at issue in *Palm*, the Illinois Common Interest Community Association Act (765 ILCS 160/1-5, "CICAA") contains the same definition for board meetings as the Condo Act in addition to a similar open meeting requirement (Section 1-40(b)(5)). Additionally, for associations not subject to either the Condo Act or the CICAA, the Illinois General Not for Profit Corporation Act (805 ILCS 105/108.21, the "NFP Act") contains an open meeting requirement as well as a definition for board meetings which defines a "meeting" as *"any gathering of a quorum of the members of the board of directors held for the purpose of discussing business of the homeowners association"*.

The court in *Palm* addressed some board communications that take place via e-mail. Specifically, the defendant board members, according to the court, had engaged in "voting" via e-mail on at least one occasion. The *Palm* court held that this practice violated the requirement within the Condo Act (which also exists in the CICAA) that all votes of the Board must take place at an open meeting. Thus, *Palm* made it clear that, in the court's opinion, no "voting" may take place by board members outside of an open board meeting.

However, for the purpose of determining whether the use of "reply all" in a discussion thread within a series of e-mails between board members and/or between board members and a property manager, attorney, accountant, etc. is appropriate, the court in *Palm* did not make a

direct ruling on this issue since this was not an issue in the *Palm* case. Therefore, in addressing this matter, one key phrase that is used in the definition of a board "meeting" in the Condo Act, CICAA and NFP Act is "gathering of a quorum" of the board members.

Merriam-Webster's online dictionary defines a "gathering" as "*an occasion when people come together as a group*" and also as an "*assembly; meeting*". (http://www.merriam-webster.com/dictionary/gathering?show=0&t=1406150377). In other words, the definition of "gathering" contemplates board members physically getting together. This does not take place where one board member sends an e-mail and copies the other board members on this e-mail. Even if the definition of "gathering" is stretched to include some type of online get together, like a "google hangout" or online "chat" function, where board members could communicate electronically in real time, this would still not cover a situation where a board member sends an e-mail and copies the other board members on the e-mail.

A board member sending an e-mail and copying the other board members, or hitting "reply all" in response to an e-mail from a property manager, attorney, accountant, etc., is no different in practice than a board member who mails a physical letter and makes copies of that letter and mails the copies to each of the other board members. In that scenario, no "gathering" has occurred. The fact that an e-mail can arrive to the other board members within a few seconds, rather than within a few days like a mailed letter would, does not transform this means of communicating into a "gathering". Without a "gathering", no "meeting" of the board has occurred according to the definitions outlined above from the Condo Act, CICAA and NFP Act.

Finally, while it is customary, and often necessary for practical purposes, for one officer to communicate with property managers, attorneys, accountants, etc. on behalf of the entire board in most cases, copying all board members on correspondence can help the other board members stay informed on matters concerning the association. Failure to use "reply all" or copy all board members on correspondence with a property manager, attorney, accountant, etc. could create a situation where board members are left out of the information loop on association matters.

In summary, the court in *Palm* addressed board members voting via e-mail. But, there is no language in the *Palm* opinion specifically prohibiting board members from corresponding with each other via e-mail, or copying each other on e-mails with third-parties such as property managers, attorneys, accountants, etc.