

Dear Client:

As many of you may have heard, a recent Illinois Appellate Court decision has addressed a number of issues pertaining to how boards of managers of condominium associations conduct and discuss association business. Despite what you have heard to the contrary, the sky is not falling, and this case will not wreak havoc with day-to-day operation of your Association. There will, however, need to be some changes in business operations for those associations that do not currently comply with the law in areas raised by this case.

The following is a brief summary of the issues discussed in the Case. Again, most of these issues were dependent on the specific declaration at issue, and your board will have to follow the dictates of your declaration on many of the issues below.

Conducting Business in Closed Sessions: The court concluded that the phrase "conducting board business" in Section 2(w) of the Illinois Condominium Property Act ("Act"), defining a "board meeting", encompasses *discussions* by a gathering of a quorum of the board, and includes activities by a board in workshops. According to the Court, not only must all board voting occur at meetings open to owners, so must all board discussion or consideration of association matters, except for discussion or consideration of the three specified exceptions set forth in Section 18(a)(9) of the Act (actual or probable litigation, appointment, employment or dismissal of an employee, or violations of rules and regulations or unpaid assessments). The Court concluded that notice must be provided for, and owners permitted to attend, any gathering of a quorum of the board where association business will be discussed, and all votes, including those on matters discussed or permitted in executive session, must be taken at meetings open to all owners.

Voting by Email and Canvassing of Board Members: The court found that email voting or written canvassing of board members in order to make decisions is not permitted under Section 18(a)(9) of the Act. The Court concluded that these decisions must be made at open portions of board meetings. The Court held that this impacts decisions as routine as

whether or not to waive an association's right of first refusal. No exceptions. However, we can review your declaration to determine if specific resolutions can address these matters for you.

Board Vote on Contracts/Enforcement of Management Agreement: The Court concluded that the Defendant Association's Declaration granted the board authority to delegate its ability to enter into contracts to its management company. The Court noted that the Association's Management Agreement permitted the managing agent to enter into certain contracts *with approval of at least three officers of the board*. The Court also noted that the Association's Declaration authorized the Board to allow management to enter into contracts on behalf of the Association.

The Court held that there was no authority for the Board to delegate its rights to enter into contracts (to the management company) with approval by less than the entire Board. The Court concluded a board has two options: It can either (1) delegate the power to enter into contracts to another entity (management, a properly constituted Committee, etc.) *without board approval* or (2) delegate the power to enter contracts *with full board approval* (meaning it must be considered by the full board at an open portion of a meeting). This again, can be accomplished with specific Resolutions as necessary.

Board Vote on Litigation Matters: The court concluded that the decision to initiate or defend litigation is association business that must be voted on by a board at meetings of the board open to owners.

Transferring Surplus Association Income to Reserve: The court declared that the Board breached its fiduciary duty by transferring surplus income to the Association's reserve account rather than crediting it against unit owners' future assessments, as required by the Declaration. The Board should carefully review their Declaration to see if this is at issue.

Commingling of Operating Funds and Reserve Funds: The court also found that the Board breached its fiduciary duty by using the operating fund to pay reserve expenses and later reimbursing the operating fund from reserves. The Board should carefully review their Declaration to see if this is at issue.

Notice Procedures: The Court concluded that the Association's Declaration in this case required that all meetings of the board be mailed to owners no later than 48 hours prior to such meeting. The association's practice was to mail notice of board meetings to nonresident owners, but to deliver such notices to resident owners by leaving the notices in front of the unit owners' doors. Here the court found that notices, based on

the language in the Declaration had to be mailed to owners and not merely left at the owners' doors. The Court found that the board breached its fiduciary duty in failing to mail all notices of board meetings. The Board should carefully review their Declaration to determine the specific notice requirements for your association.

*What should your Board do in the aftermath of this decision?*

As stated above, there is no "one size fits all" way to address the points raised in this decision. In most cases, a review of existing Association documents will help you decide what needs to be changed to assist you in avoiding similar claims to those raised in *Palm*. Some day-to-day operations may need to be adjusted, but we are confident that we can help your Association avoid any potential claims with minimal disruption to your overall structure.

If you have any questions, please contact Kerry Bartell at [kbartell@ksnlaw.com](mailto:kbartell@ksnlaw.com) or 847-777-7246.



750 W. Lake Cook Road, Suite 350 | Buffalo Grove, Illinois 60089  
33 N. Dearborn Street, Suite 1910 | Chicago, Illinois 60602  
855.537.0500 | [www.ksnlaw.com](http://www.ksnlaw.com)