GASSEN

TOWN HALL MEETING

Audience Questions And Attorney Responses

In February of 2016, Gassen Company held a Town Hall Meeting. We invited Nancy Polomis, Fredrick Kreitzman and Anthony Smith, three local attorneys experienced in handling litigation, real estate, townhome and condominium law, to answer questions from our Board Member clients and shed some light on important HOA issues.

NANCY T. POLOMIS

Hellmuth & Johnson

Nancy T. Polomis is a partner with the firm and chair of the Real Estate Development Practice. Her clients include builders, developers, banks, condominium and townhouse associations, and individuals and entities involved in real estate transactions.
Nancy's practice is focused on:

- Real estate development
- Community association law
- Residential real estate transactions
- Lender-based collections

Nancy brings an in-depth understanding of the real estate market, coupled with the unique perspective of a former mortgage banking professional to work for her clients, who benefit from her decidedly direct and proactive counsel.

Nancy's services include real estate purchases, sales, financing, land acquisition, the negotiation of commercial leases and the formation and maintenance of community associations. Representing numerous community associations, she brings considerable experience and insight to all stages of association development – and all association matters – including entity formation, the creation and interpretation of covenants and bylaws, and collections.

Her ongoing representation of established associations enables her to anticipate potential issues when new associations are formed, and she works accordingly with builders in the initial development process to help ensure that documents are crafted with future needs in mind.

One of the biggest challenges for our Board is how to go about resolving issues relating kids, both our own kids and kids from the nearby neighborhoods, playing in the yards and causing damages to the grass and tree?. The kids sometime break windows and other properties.

We want to communicate to parents about making sure that they stop the kids from damaging properties. How do we do that without causing another problem for the Association?

This is a very sensitive issue. Directing communication to kids (or parents) can result in Fair Housing complaints (based on a perception that families are being targeted). If people (children or adults) are damaging property, the police should be called. Any effort to protect landscaping should be directed to all owners/residents – not just those with children. Several recent cases in which associations or other entities tried to regulate behavior of children, specifically, resulted in Fair Housing complaints and, in turn, significant penalties against the party deemed to have violated the Fair Housing Act's prohibition on discriminating based on familial status. Tread very carefully, and, before adopting any rules that could be perceived to single out families and/or children, have the rules reviewed by legal counsel.

Have there been any recent changes in legislation regarding reserve requirements for Homeowners' Associations?

No.

When a Board Member leaves a Board, should they turn over all Association records and information?

Yes. The records of the Association belong to the Association.

Should they be sharing it with people outside the Association?

No. The records of the Association are private records, and should not be shared with people who are not members of the Association (except, of course, the Association's professional team or as required under a court order).

What procedure is required to remove a condominium owner from the condominium association, thereby removing them from the property with an adverse proceeding?

Based on the additional facts presented at the Town Hall, it is my understanding that, in fact, the party living in the unit is NOT the owner, but the daughter of the owner. It is extremely difficult to dispossess a property owner of his/her property. Removing a tenant can be a little easier, but still not easy if the owner is not cooperative. If the owners of the property are unwilling to take action (1) fine them for the repeated and continuing violations and, if the fines are not paid, pursue collection action (which may include foreclosure of the assessment lien);

(2) consider pursuing a court action seeking a court order declaring the resident in violation of the governing documents and requiring the person to leave. Short term, a court may be willing to issue a restraining order against the resident based on the health and safety risk her behavior imposes on other residents. Whether attorneys' fees and costs related to such actions can be assessed against the owners depends on your governing documents. Of course, even if the fees and costs are assessable, that doesn't mean they are paid by the owner.

How often are audits supposed to be done?

There is no requirement under MCIOA to do full audits every year. Under 515B.3-121, "a review of the association's financial statements shall be made at the end of the association's fiscal year, unless prior to 60 days after the end of that fiscal year, at a meeting or by mailed ballot, unit owners, other than declarant or its affiliates, of units to which at least 30 percent of the votes in the association are allocated vote to waive the review requirement for that fiscal year." (Emphasis added.) Such a waiver is valid only for that fiscal year. However, some associations' governing documents require an audit at regular intervals (sometimes annually), so the ultimate answer depends on the terms of your association's governing documents. Where annual audits are not required under the governing documents, many associations establish a routine of doing a full audit one year, a review the next and an internal "evaluation" the following year, and then repeat that cycle.

Explain the difference between common elements and limited common elements.

Generally speaking, and subject to the specific terms of your governing documents, "Common Elements" are those parts of the community other than the Units. "Limited Common Elements" are a subset of Common Elements, and constitute those portions of the Common Elements allocated for the exclusive use of the Unit to which they are allocated. In a condominium, typical Limited Common Elements might include decks or patios. You state below that your community is a "planned community." Many planned communities have no Limited Common Elements, since the Units are defined as the platted lot and the Common Elements are everything outside the lots (and are often green space). Simply because the Association maintains an area does not, in and of itself, determine whether that area is Common Elements/Limited Common Elements/Units. For example, most associations maintain yards, even though those yards lie within the lot lines and thus are part of the Unit.

What happens if a homeowner cannot pay a special assessment fee?

A failure to pay special assessments should be treated in the same manner as non-payment of annual assessments and other fees and charges.

Our community has been described to us to be "a PUD association created November 2, 1994, as CIC 703 Summerfield Townhomes, a planned community". What does that mean? What is a PUD association? What does it mean to be a CIC?

A "PUD" is a planned unit development—a zoning and land development designation. The term Planned Unit Development (PUD) is used to describe a type of development and the regulatory process that permits a developer to meet overall community density and land use goals without being bound by existing zoning requirements. A PUD generally does not appear on the municipal zoning map until a designation is requested. This is applied at the time a project is approved and may include provisions to encourage clustering of buildings, designation of common open space, and incorporation of a variety of building types and mixed land uses. A designation as PUD often allows for higher density development.

The phrase "planned community" is defined in MCIOA as "a common interest community that is not a condominium or a cooperative." "Planned communities" are often commonly referred to as "townhomes."

A "CIC" is a "common interest community," which is defined in MCIOA as real estate in Minnesota that is subject to an instrument such as a Declaration which obligates persons that own parcels subject to the Declaration to pay certain charges (*e.g.*, insurance premiums, maintenance costs, real estate taxes) on real estate other than what the owner owns. That is, in the case of a planned community, the owner of a lot subject to a Declaration is obligated to pay (i) charges related to maintenance and insuring of Common Elements (which that owner does not own), as well as the real estate taxes allocated to those Common Elements and (ii) a pro rata share of costs related to maintenance of portions of lots other than that owner's (*i.e.*, everyone pays for everyone's roofs – not just their own).

Our association has lost money on homeowners who have stopped paying their association dues. At what point does legal action start particularly when collections has not be successful and what are the next steps I collecting association fees.

An association should adopt a collection policy that lays out the collection process. For example, the policy might say: (i) any account more than 30 days past due gets a letter from the management or Board; (ii) any account 60 or more days past due is referred to legal counsel/collection agency. Briefly, an association has two avenues for collection: foreclosing the assessment lien or enforcing the owner's personal obligation to pay (suing the debtor). The decision whether to foreclose or sue depends on a number of factors, including, but not limited to, the extent of other, prior liens of record against the property (*i.e.*, is the property "under water"?), whether the debtor has filed bankruptcy and received a discharge of the debt (which eliminates their personal obligation to pay the amounts owed as of the date the bankruptcy petition is filed), etc. Your collection professionals can help the Board evaluate the best option for the Association. There is no "one size fits all" method of collection. Each situation must be evaluated individually. Ultimately, there may be some debts that are simply not collectible. In that case, the Board may make the business decision to write off the debt rather than spend more money trying unsuccessfully to collect it.

Our condominium complex is exploring going smoke-free from the current situation where residents are allowed to smoke in their own units and on their balcony/patio. We have been advised that grandfathering in smokers until the unit sells can be problematic because the health hazard to other residents continues for many years and such a provision would be very difficult to police or enforce, even though some other Twin Cities condominiums have gone this route. We understand that grandfathering might also leave us open to a lawsuit for damage from second-hand smoke or a smoking-related fire on the property. On the other hand, smokers are telling us that they could sue the Association as well because of loss of their property rights that allowed them to smoke in their unit when they purchased it. An alternative might be to approve a total smoking ban that includes individual units but make it effective in one or two years to allow smokers to decide if they want to continue to live here under the total ban. From a legal perspective, which is the best alternative, or are there others, realizing that any change will require a lengthy process of changing our governing documents?

Owners who purchase condominiums purchase subject to the Declaration which, by its terms, can be amended (presuming the purpose of the amendment is legal, of course). As such, if an Association follows the requisites for amending the Declaration to prohibit smoking—which is a legal purpose—smokers would be hard-pressed to claim they have "lost their property rights that allowed them to smoke in their Units." Such a right is not guaranteed.

Efforts to amend the Declaration to prohibit smoking in an effort to address a request for reasonable accommodation under the Fair Housing Act are just that: efforts. Under the Fair Housing Act, the Association would be required to make *reasonable* accommodation. The Association cannot guarantee the success of an amendment to prohibit smoking, since amendment requires consent of owners and possibly lenders, and the Association has no control over whether an owner or lender chooses to consent to an amendment.

Actions short of total bans are difficult to enforce, since it is difficult to police when some people are entitled to continue to smoke, but some associations adopt provisions short of a total ban (including a phased-in ban) because there isn't sufficient support for a total ban (and thus not enough owners would vote for it to meet the amendment threshold), so the Association compromises in an effort to get something rather than nothing.

What the best alternative is for one association may not be the best choice for another. Each association must choose the option that best suits that association and that has a reasonable chance of success.

FREDRICK R. KRIETZMAN

Felhaber Larson

Fred Krietzman is a shareholder with the law firm of Felhaber Larson, which has offices in Minneapolis and St. Paul, and is the Chair of the law firm's Real Estate Section. Fred represents several homeowners associations, as well as multi-family developers and individuals. Fred is a member of the Minnesota State Bar Association and the Hennepin County Bar Association. He is a former director of, and former chair of the Legal Committee of, the Minnesota Chapter of the Community Associations Institute. Fred is a frequent speaker at seminars on issues relating to homeowners associations and common interest communities, and has also authored several articles on those issues.

The information and answers provided by me (Fred Krietzman), below, are intended to be for educational purposes only, are intended to provide legal information in general terms, are not intended to be used as a basis for specific legal advice, and do not establish an attorney/client relationship. The facts and circumstances specific to a particular association or matter may dictate a certain course of events or necessary action which may require specific legal advice or assistance.

When our Townhouse Development was built there was at the property line a chain-link fence. Now years later this fence has deteriorated. We believe the adjacent development is responsible for the repair. In our governing documents is nothing mentioned that the Association is responsible to maintain this fence?

I recommend that a written/certified survey be done to establish on whose property the fence is located. If the fence is on your association's property (common elements), then, most likely, your association will have the obligation to repair it (or your association might also have the authority to remove it). If the fence is on property that is not within your CIC (common interest community), I recommend that your Board or property manager contact the owner and discuss repairs. In the alternative, your Board or property manager can contact the city to see if it will contact the neighbor and demand repair.

What's new with MCIOA?

Nothing at this time.

If your association's bylaws state delinquent units are unable to vote at the Annual meeting do MCOIA rules negate that bylaw?

Yes. Please see the last sentence of Section 515B.3-1110(a) of MCIOA (found online at: https://www.revisor.mn.gov/statutes/?id=515B.3-110), which states: "Any provision in the articles of incorporation, bylaws, declaration, or other document restricting a unit owner's right to vote, or affecting quorum requirements, by reason of nonpayment of assessments, or a purported violation of any provision of the documents governing the common interest community, shall be void."

Is it riskier to go smoke free with some grandfathered owners in units only and risk non-smokers suing due to health, or go total smoke ban and risk suits from smokers who now will have to move or quit.

There is no easy answer to this question. I am not aware of any legal right that a person has to smoke in his/her unit that would override a properly approved amendment to the declaration that prohibits smoking in units. However, grandfathering is common; or associations often designate a common element smoking area. As to non-smokers, they buy units knowing that residents are allowed to smoke in the CIC and that it is reasonable to assume that smoke will migrate into common elements and certain units. They might have a claim for nuisance, though. The Board might want to take a non-binding survey of the membership to see if it supports a total ban on smoking, or a ban on smoking subject to grandfathering.

What's one best practice you wish all boards would follow?

Good and consistent communication with the membership.

Can housing cooperatives organized under co-op statute 308A have non-members be on their Boards of Directors? We are part of a Master Association with another housing association, and would like to have members of the other association be on our board as well as our own members.

Subject to the cooperative's bylaws, articles of incorporation, or declaration (if one exists), the relevant Minnesota cooperative law (https://www.revisor.mn.gov/statutes/?id=308A.305) states that a cooperative housing corporation as defined in United States Code, title 26, section 216, subsection (b)(1) (I assume your cooperative falls under that definition), must have at least three directors who are members of the cooperative. So if your cooperative's bylaws state that the cooperative has three directors, then there can be no outside directors. But if your cooperative's bylaws state that the cooperative has five directors, then there can be up to two outside directors (again, all subject to the cooperative's bylaws, articles of incorporation, or declaration (if one exists).

We have a no pet policy (by-laws). A board member, when talking to a renter occupant of a unit, saw a cat in the unit. The board member reported this to our management company who sent an email to the homeowner instructing him to have his renter remove the cat. The homeowner responded that he spoke with the renter who told him they do not have any pets. So we are at a stand-off. How should this situation be handled?

I recommend that the association send a letter to the owner stating the facts presented by the board member (no need to name that board member), stating the relevant provision of the governing documents that prohibit the keeping of animals at the community, and insist that the owner confirm in writing to the association by a particular date (which should be stated in the letter) whether or not a cat or any other animal has been in the unit between "X" date and the date of the letter, and if the association does not timely receive that written response from the owner the association will assume that a cat or other animal is or has been in the unit in violation of the relevant provision of the governing documents. The association should then follow its regular enforcement procedures. One other alternative is to invite the owner to a Board meeting to discuss the situation, and ask the owner to bring the unit occupant to the meeting.

POLITICAL SIGNS:
For 2015 it states:
211B.045 NONCOMMERCIAL SIGNS EXEMPTION.
All noncommercial signs of any size may be posted in any number beginning 46 days before the state primary in a state general election year until ten days following the state general election. Municipal ordinances may regulate the size and number of noncommercial signs at other times. What I can't figure out is if the caucus is treated the same as a primary so we would have to allow signs 46 days prior to the March 1, 2016 caucus. Not that I would get into it as far as allowing or disallowing signs, I'm just curious.

Technically, there are differences between a caucus and a primary. However, it is my recommendation that the association vie those terms synonymously for purposes of the statute, in order to minimize the risk of legal action by the owner and the possible negative publicity that could come from the prohibition.

What constitutes a service animal proof? Credentials". Our condo has a no pet policy.

Please note that a "service animal" is a term of art used in the Americans with Disabilities Act (ADA), which generally does not apply to private homeowners associations. With regard to homeowners associations, the relevant statutes that apply are the federal Fair Housing Act (and the related regulations) and the Minnesota Human Rights Act. An animal that a disabled person requests to keep in a CIC is generally referred to as an "assistance animal" or a "therapy animal." In these situations, the animal does not need to be specially trained and does not need any credentials (unlike a service animal under the ADA, which must be specially trained, and can be only a dog or a small horse), and can really be any type of animal.

You said Board members must turn over all records when leaving the Board. What about their emails? Are they required to delete them?

Aside from e-mails that may be relevant to ongoing association business or litigation, I don't know of any law that requires a former Board member to turn over the e-mails or delete them. However, I recommend that all such e-mails be downloaded to a thumb drive or DVD and given to the Board or property manager. In fact, it would be good practice for directors to be told at the beginning of their Board service to keep all association-related e-mails segregated on their computers from all other e-mails, and the directors are expected to turn over to the association electronic copies of all such e-mails when their Board service ends.

How do we cap on rentals? We do not have any rules or regulations as of now.

By properly approving and recording an amendment to the declaration setting out the leasing restrictions, caps, grandfathering, etc.

How does a homeowner association legally evict a homeowner (or relative of the actual owner)?

This can be done if the association becomes the owner of the unit following a lien foreclosure against the unit, for examples. There might be other scenarios where an association can, in good faith, begin a court action and seek an order from the court for the eviction of an occupant of the unit (albeit that these are rare circumstances).

Aside from fining the homeowner and billing for repairs, what can we do about homeowners that violate the rules and keep trying to break the security doors?

The association can invite the owner to a Board meeting to discuss the situation and advise the owner that, if the practice does not stop, the association will have no choice but to pursue its legal remedies, which may include a court action seeking an order from the court prohibiting the owner (and any and all residents of the owner's unit) from the prohibited conduct. The particular facts of the situation, and the anticipated costs of litigation, must be analyzed by the Board and the association's legal counsel before a court action is started. If the owner does not pay the fines, however, and if the fines are a lien against the owner's unit, the association should foreclose the lien or sue the owner for the outstanding amounts. Unless prohibited by the association's governing documents, the association should also undertake an aggressive fining program with that owner for subsequent violations.

How obligated is the Board to enforce rules that we feel are not enforceable until they can be updates? Example: Pet height and weight limits.

My general advice is that, if the Board determines that a particular rule and regulation is no longer needed, the Board (if it has the authority to do so without membership approval) should, as soon as possible, vote to rescind the rule and regulation. Otherwise, the association is subject to legal action for failing to enforce the rules and regulations.

Are building permits required for condo remodel?

The answer to this question depends upon the type of remodeling that is taking place in a particular unit, since the city might require a permit for the work or it may not. The owner and his/her contractor must inquire with the building department of the city in which the condo is located to determine if a building permit is required for the work.

Anthony T. Smith

Roeder Smith & Jadin

Anthony (“Tony”) T. Smith has been representing property owners for most of his career. He regularly represents and advises condominium and townhome associations, property management companies and individual homeowners in insurance claim disputes involving both coverage and valuation. He has represented condominium and townhome associations in insurance appraisals, civil litigation, the Minnesota Court of Appeals, and the Minnesota Supreme Court.

Additionally, Tony frequently advises property managers on insurance issues affecting their clients, and has presented on insurance claims for CAI in the past.

Tony utilizes an aggressive litigation strategy built around focused expert investigation, information gathering, and preparation to maximize his clients’ likelihood of success. Well-respected by his clients and peers, he was selected as a Minnesota Rising Star from 2007-2010 and 2012-2014, a distinction awarded to only 2½ % of Minnesota attorneys under the age of 40.

Can an association define age limits in common spaces? Example: Children underage must be accompanied by adult at pool.

In most cases, no. The Federal Fair Housing Act ("FHA") and the Minnesota Human Rights Act ("MHRA") prohibit associations, from discriminating in any activities related to the sale, rental or use of a dwelling because of a variety of factors including, among other things, familial status.

Discrimination based on familial status is discrimination against families with children under the age of 18, anyone with legal custody of a child under the age of 18, and women who are pregnant.

Associations may violate the FHA and/or the MHRA if they treat families with children differently than other residents in the community. This can occur through direct discrimination or through the enforcement of rules or restriction that target children or families with children. Generally, rules that treat children and families with children differently than other residents are discriminatory. Examples of discriminatory rules include:

"No one under the age of 18 may use the pool without a parent or guardian."
"Children that are not potty trained are prohibited from using the pool."
"Children cannot play in the common areas."

That said, associations can pass a rule that may disproportionately affect children and families with children if: (i) it is rooted in a "compelling business necessity" and (ii) constitutes the "least restrictive means" to achieve the desired effect. For example, keeping a pool safe is certainly a compelling business necessity. But the rule must be reasonably limited to achieve the purpose of protecting the safety of its residents and cannot cast too broad of a net.

One association enforced a rule that prohibited children under age 18 from using its recreational facilities without a parent or guardian. A court decided that the rule violated the FHA because it was overly restrictive and that a less restrictive rule could achieve the same safety goals. The court noted that the age-based rule would, for example, prohibit a 17-year old certified life guard from swimming alone. The court also noted that less restrictive means could achieve the same safety goals, and suggested that an age-neutral rule that requires all persons without swimming skills to be accompanied by a person with swimming skills would be acceptable.

Only associations that establish and maintain themselves as "Housing for Older Persons" ("HOPA") communities are exempt from discrimination based on familial status. In order to be considered a HOPA community, an association must satisfy the following requirements:

The association must be intended for occupancy by persons aged 55 or older;
At least 80% of the units must be occupied by a person who is aged 55 or older; and
The association must publish policies and procedures that demonstrate its intent to qualify for the exemption.

An over-55 community that satisfies HOPA is exempted from the familial status provisions of the FHA. It does not have to allow families with children to live in the community.

Associations should be mindful that discrimination claims under the FHA are investigated and prosecuted by the United States Department of Justice, and violations are subject to significant fines and penalties. Accordingly, it is a good idea to consult with an attorney before implementing and/or enforcing rules that restrict the use and enjoyment of property and facilities.

We have many homeowners on fixed incomes, some with home loans that are under water. We are now facing a huge supporting wall replacement. What happens if we have a special assessment and homeowners can't afford it? Leave or have their homes go into foreclosure?

Homeowners are obligated to pay assessments, including special assessments, as set forth in the declaration for their common interest communities. And homeowners who cannot pay special assessments expose themselves to liability to their association.

Associations have the right to take legal action against homeowners who fail to pay assessments. Associations may sue the defaulting homeowners, take personal judgments against them, and collect on those judgments by (among other things) levying on the homeowners' bank accounts or garnishing the homeowners' wages. Associations may also take action to foreclose a lien against the property for the unpaid assessments.

That said, associations should consider the ability of their homeowners to pay for an unexpected capital improvement project to be financed by a special assessment. For example, associations may want to consider obtaining commercial financing (i.e., a bank loan) for the project, amortizing that expense over a period of time, and allowing homeowners to pay the special assessment for that project in installments over time.

Unfortunately, there is occasionally a tension between an association's need to make and pay for necessary maintenance and repairs and its homeowners' ability to pay for them. With good guidance and strategic planning, associations often find ways to "thread the needle" to balance these competing interests.

Tony, how many condominium associations have you represented during the smoking conversion process? Are you in favor of grandfathering or not?

I've represented three or four condominium associations that have amended their respective declarations to prohibit smoking at the property. Some associations grandfathered existing owners out of the amendment and allowed them to continue to smoke in their units (but not the common elements or limited common elements) until they are sold or transferred. Other associations chose not to grandfather existing owners out of the amendment and banned smoking throughout the entire property with no exceptions.

Whether an association should consider grandfathering existing owners out of a proposed smoking ban depends on whether the homeowners will support it without such a clause. A supermajority of the units in an association (usually 67% but sometimes as high as 75%) must

approve an amendment to an association's declaration to prohibit smoking. An association with several smokers may find it difficult to get the required homeowner approval without grandfathering. Conversely, an association with few smokers might have an easier time passing an amendment that does not include grandfathering.

Before attempting to amend the declaration to prohibit smoking, an association should survey its members and gauge whether, and under what circumstances, they would support the proposed amendment.

Does the Board designate the items to be covered by the reserve fund or does the membership/residents designate/vote for the items the reserve fund covers? Or both Board and residents?

For an association subject to MCIOA, neither the Board nor the members get to decide what the reserve fund must cover. Rather, the reserve fund for an associations subject to MCIOA must cover "those components of the common interest community which the association is obligated to replace by reason of ordinary wear and tear or obsolescence." These items are usually identified in the declaration. Note, though, that there are some exceptions to this. For example, an association subject to MCIOA is not required to reserve for replacement of building components with a remaining useful life of more than 30 years.

For an association that is not subject to MCIOA, the reserve requirements do not apply. For those properties, the Board generally has the power and authority to operate and manage the property, its budget and its reserve fund (if any), subject to any rights the homeowners may have under the governing documents. You should check with an attorney if you have questions regarding your specific property.

Finally, it is worth noting that all associations must disclose the components covered by the reserve fund to prospective purchasers in their resale disclosure statements.

Some states have outlawed proxy voting. Are there any plans to do that in Minnesota? If not, why not? Proxy voting leaves the door open to possible fraud by stuffing the ballot box.

There are no plans in Minnesota to outlaw proxy voting. Association boards have a duty to provide voting opportunities to all those entitled to vote on the business of the association, and often allow proxy voting to encourage member participation at meetings. Proxy voting gives homeowners who cannot attend meetings an opportunity to have their vote counted. And, more pragmatically, proxy voting helps associations establish quorum for their meetings.

Note that "proxy voting" refers to a homeowner's right to appoint a proxy (an individual or a group) to attend in his or her place. The proxy then attends the meeting and votes that person's vote. The proxy can be a fellow homeowner, a family member, a board member or even a random stranger. The proxy does not have to be a member of the association. The proxy

simply attends the meeting in the homeowner's place and votes in the same manner that the homeowner would have been able to had he or she attended the meeting.

Homeowners should carefully consider who they give their proxy to. Remember that if you appoints someone to be your proxy, you are not instructing that person how to vote. You are simply giving your vote to that person to vote as he or she wishes. Therefore, you should speak with the person you are appointing as your proxy so that they understand how you feel about an issue being voted on. But you are unable to require your proxy to vote a certain way. A proxy is not an "absentee ballot." A proxy is simply the giving of one's vote to another individual (or group of individuals) to vote as they see fit.

We have an opportunity to take advantage of the Ryder Cup this fall with rentals. What restrictions, if any, are there to renting for a short period of time?

Check your governing documents, as they may restrict or prevent you from renting your property. Homeowners who want to lease their units must comply with all requirements and restrictions contained in their declaration and rules and regulations, and may be fined if they fail to do so.

For example, if your declaration states that units are to be used exclusively as private residences and not for transient, hotel, commercial, business or other non-residential purposes, or if your declaration specifically prohibits short-term leases, then you cannot rent your unit for a short period of time.

Additionally, there may be unintended consequences for associations that allow short-term rentals. For example, HUD will declare an association to be ineligible for FHA financing if it allows short-term rentals. So short-term rentals may create long-term problems.

For brainstorming sessions, none voting, open, posted meeting…are notes required? No decisions are made; used for planning and updates.

Minutes should be kept for that board meeting, even if it was just a brainstorming session. Meeting minutes are a record of official board action, and reflect the substance of the meeting. Homeowners may want to refer to them to see what the board is talking about or doing on their behalf. That said, the meeting minutes do not need to be exhaustive. They should be as short as possible, as long as they highlight all key information.

Whose insurance covers when damage to a condo is caused by building failure?

It depends on the terms and conditions of the specific insurance policies that are in place.

Generally speaking, condominium associations have a "master policy" that usually covers the structure itself and the common elements. This may include building components such as the roof, exterior walls and siding, entryways, hallways, community rooms, swimming pools, and other shared facilities. Additionally, some master policies provide "all in" coverage for the units, including paint, drywall, wallpaper, paneling, floor covering and fixtures. But other master policies only cover the structure of the condominium unit, such as the bare walls, ceilings and floors.

Homeowners also may obtain HO-6 coverage for their specific units. A HO-6 policy is like a regular homeowner's policy, but for a condominium unit. HO-6 insurance policies generally cover the interior of the unit and personal property inside–commonly known as "studs in" or "walls in" coverage.

Of course, every insurance policy is different and the specific coverage afforded by your association's master policy and your HO-6 policy will depend on their specific language.

We would like to walk through our specific bylaws for understanding. How best to set that up?

You should contact your property manager and ask to schedule a board training session. Gassen provides board training for its clients, including an overview of the governing documents.

Collections: lien in place, mortgage too much for foreclose on, no visible means of employment. What to do? 1980 construction, no super lien.

Associations have a duty to collect assessments from all homeowners and to pursue collection action against homeowners who are in arrears on their assessments. Timely collection of assessments is vital since assessments fund the operation of the community. When some owners do not pay assessments, the financial shortfall falls onto the other owners, since assessments are generally the sole source of funding. Therefore, associations have a compelling reason to remove delinquent homeowners and get that home to someone who will pay assessments.

In past years, when the real estate market was booming and home values were increasing, the response to a delinquent homeowner was relatively easy: the association would foreclose its assessment lien. Generally, the delinquent homeowner would end up paying the association to avoid foreclosure and, in the rare cases when a homeowner did not pay, the association would own the property and could then sell it to pay off the first mortgage and recover its money. In today's market, however, the answer isn't always so easy, particularly with the decrease in property values and the rise in mortgage foreclosures.

Notwithstanding the market difficulties, we still usually recommend moving forward with foreclosure because it puts the association in a position where it can generate positive cash flow from the unit. If an association forecloses its lien and the debtor does not redeem the property, then it will acquire title to the property subject to the first mortgage plus any federal or state tax liens. It can then market and sell the Property, satisfy the first mortgage and the tax liens, and collect any excess to satisfy its lien. And even if there is no excess with which to satisfy its lien, the association may also be able to lease the property and generate positive cash flow.

If an association acquires a property but does not sell it and satisfy the first mortgage, then the first mortgage holder will eventually bring its own foreclosure action. This is not necessarily a bad thing, as the first mortgage holder will then be required to pay assessments while it owns the property. Again, this will generate positive cash flow in the form of future assessments for the Association.

Is there a legal process, up to and including a sheriff's sale, for the collection of delinquent association dues? Or is this a process that is established by the management company?

In associations governed by MCIOA, homeowners are absolutely and unconditionally liable to pay assessments and assessments are a lien against the property. Associations governed by MCIOA also have the right to recover their reasonable collection costs, including attorney fees, from delinquent homeowners. And associations governed by MCIOA have the right to foreclose their assessment liens by advertisement.

In older associations that are not governed by MCIOA, the association's collection rights will be controlled by the governing documents (usually the declaration). Those typically include rights similar to those found in MCIOA – a lien against the property for unpaid assessments, the right to recover collection costs from the delinquent homeowner, and may include the right to foreclose an assessment lien by advertisement.

That said, there are generally two ways for an association to collect past-due assessments from a delinquent homeowner: (i) personal judgment and collection; or (ii) property lien and foreclosure.

If an association decides to pursue the delinquent homeowner personally, then it can obtain a judgment against the delinquent homeowner for the amount due. If the amount owed is less than $15,000.00, then the association can bring the claim in conciliation court (small claims court). If the amount owed is more than $15,000 (hopefully a rarity!), then the association will have to bring the claim in district court. If the association can establish the amount of the debt and the delinquent homeowner's liability for the same, then the court will enter a judgment against the delinquent homeowner. Once the association has a judgment against the delinquent homeowner, it can then attempt to collect the debt by garnishing the delinquent homeowner's wages, levying the delinquent homeowner's bank account, and other such actions.

The other option for collecting from a delinquent homeowner is to foreclose the association's assessment lien against the property. Depending on the applicable law and the governing documents, this can be done either by *advertisement* (advertising notice of a foreclosure sale and selling it at a sheriff's sale) or by *action* (filing a lawsuit with the court). Most foreclosures of association liens are foreclosures by advertisement. The requirements for a foreclosure by advertisement are specified by Minnesota law and require the filing, service and publication of certain legal notices. It is a complicated and highly regulated practice, and associations should enlist the aid of an attorney to assist them with this process.

How does an HOA operate pre MCIOA? (1968-1969 incorporation)

All associations are required to comply with applicable laws and their governing documents.

Since associations are nonprofit corporations, they must comply with the Minnesota Nonprofit Corporation Act (Minn. Stat. 317A). This state law provides general guidance and authority for most actions of nonprofit corporations unless otherwise provided by another law. MCIOA may also apply if the association is a condominium. Certain portions of MCIOA apply to all condominium associations, even those created under the old Minnesota Condominium Act (Minn. Stat. 515) or the old Uniform Condominium Act (Minn. Stat. 515A). But MCIOA does not apply to townhome associations that were created before MCIOA became law on June 1, 1994.

Additionally, associations must operate according to their governing documents (i.e., their Articles of Incorporation, Declaration, and Bylaws). Associations must act consistent with the powers and authority granted to them by these governing documents unless MCIOA or another applicable law allows them to do otherwise.

Is a resident liable for the illegal drug use of a dependent child? (Resident is harboring a child who is a known drug user.)

MCIOA and most association's governing documents specify that homeowners are responsible for the acts of their family members, tenants and invitees. This means that if a resident's child occupies the unit and violates the association's governing documents and/or rules and regulations, then the resident is liable for that conduct. The association can fine that homeowner for those violations as permitted by MCIOA, the governing documents and/or the rules and regulations, and take steps to collect those fines.

But the association can only hold the resident liable for conduct that violates its governing documents and rules and regulations. The association cannot fine a homeowner for conduct that does not violate the governing documents or rules and regulations.

That said, an association may also have certain legal claims against homeowners who engage in or who permit their family members, tenants and/or invitees to engage in illegal or unsafe activity. Minnesota law defines nuisance as "[a]nything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." A nuisance lawsuit may be brought by any

person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance. Under this standard, an association may have a claim against a resident who permits a family member, resident or tenant to engage in illegal conduct at the unit. But the association would have to establish that the illegal conduct interferes with their ability to use and enjoy the property. This will depend on the particular facts at issue, and we would be happy to discuss this issue further.

At a recent board meeting, the board members were told that all falls on common property must be reported to management. None of us had heard this before. Is this something that should be made known to all owners/residents?

Tony's Response:

There is no legal requirement that falls on common property be reported to management.

Notwithstanding this fact, insurance companies generally require their policyholders to promptly notify them of potential claims. And insurance companies may not provide coverage for claims that are not promptly reported to them. A reporting policy may help an association meet its obligation to promptly notify its insurance carrier of a potential claim.

Additionally, associations should also be mindful of their duty to maintain the property and keep it free of hazardous conditions that might injure people. Encouraging homeowners to report falls or other accidents on common property to the board or the management company may help the association identify and repair potentially hazardous condition.

But associations should also be mindful that any documentation created by it or its management company regarding falls or other accidents on common property may also be used against it if the injured party decides to sue the association. In a civil lawsuit, the association and its management company will almost certainly be required to turn over all documents regarding the fall or accident. And if these documents contain admissions of fault or other potentially incriminating statements, they will almost certainly come back to haunt the association. Accordingly, an association should carefully consider whether documenting falls or other accidents on common property is warranted and the content of any such documentation.

Nancy's response:

This is a double-edged sword. If a report is made, the Board then of course has knowledge and, if a dangerous condition is allowed to exist after gaining that knowledge, it can result in issues for the Association. If no report is made, it can compromise the Association's ability to make timely insurance claims. If someone sees a fall – not merely hears about a fall—then that should be reported.

When planning to request placing a restraining order on one or more Association members what are the key considerations to be contemplated beforehand?

The first consideration is whether the association should be involving itself in the matter. Usually restraining orders arise out of personal disputes. An association should not involve itself in a personal dispute between residents.

If the matter involves the association (such as harassment of a board member for matters involving association business), then the second consideration is whether the association has exhausted all other ways to resolve the situation. Has the offending homeowner violated the governing documents or the rules and regulations? If so, has the association sent the homeowner a violation letter and imposed a fine? Has the association attempted to meet with the homeowner to address the conduct at issue? These are all steps that should be taken before seeking a restraining order.

Finally, the association should consider whether it has a valid legal basis for obtaining a restraining order. Minnesota law allows restraining orders to be issued to stop someone from harassing someone else. Minnesota law narrowly defines harassment as any of the following:

- a single incident of physical or sexual assault;
- repeated incidents (more than one) of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security or privacy of another (*e.g.*, repeated phone calls, following a person, repeatedly coming to the petitioner's home after having been asked not to do so);
- targeted residential picketing; OR
- a pattern of attending public events after being notified that their presence is harassing to another

This means that courts are not going to grant a harassment restraining order simply because the offending party may be rude or unpleasant. The conduct must be more than that, and must threaten the safety, security or privacy of the requesting party. This is a difficult threshold to reach, especially when homeowners have a right to attend board meetings and disagree with board decisions.

But regardless of whether an association can obtain a restraining order, homeowners should not be afraid to report conduct that threatens their safety and security to the police. They are trained and skilled in responding to and resolving safety and security concerns.