On Law

A Monthly Publication from CMDA

April 2017

Cummings • McClorey
CMDA
Davis & Acho, P.L.C.
Attorneys and Counselors At Law

Transparency Breeds Legitimacy:

Tips for your Condominium Association to a Avoid Lawsuit

Kevin M. Hirzel

Many condominium board members volunteer to serve their condominium association for altruistic purposes. While often well intended, it is not uncommon for board members to not have any training that would make them aware of potential pitfalls that commonly entangle a condominium association in litigation. In other instances, co-owners may have self-interested motives for serving on a board that cloud their business judgment. Under either scenario, a condominium association can be subject to a lawsuit if it is not operated properly. The three most common reasons for a lawsuit against a condominium association related to a lack of transparency are outlined below.

Failing to Prepare Adequate Financial Statements

One of the most common sources of angst for co-owners is not knowing how their assessments are being spent. Accordingly, the first step to keeping co-owners happy is to prepare financial statements on an annual basis and have them audited or reviewed. MCL 559.157 requires a Michigan condominium association with annual revenues in excess of $20,000 to have its financial statements independently audited or reviewed by a certified public accountant on an annual basis. A condominium association may opt out of having a CPA perform an audit or review of the books, records and financial statements if a majority of the co-owners approve not having the CPA perform the audit or review. However, unless such a vote is conducted, a condominium should ensure that an audit or review is performed, and not just a compilation.

Additionally, MCL 559.154(5) of the Michigan Condominium Act and MCL 450.2901 of the Michigan Nonprofit Corporation require a condominium to prepare a financial statement for the preceding fiscal year and distribute the same at least once a year. While MCL 559.154(5) indicates that the contents of the financial statement can be defined by the condominium association, MCL 450.2901 requires the statements to include, at the very least, an income statement, year-end balance sheet, and a statement of the source and application of funds. When condominium associations fail to prepare financial statements, and have them audited or reviewed by a CPA, this often creates concern and suspicion amongst the co-owners. Accordingly, complying with the above requirements demonstrates that the condominium association is being operated in a transparent manner and is recommended to avoid a lawsuit.

Failing to Respond to Requests to Inspect Books and Records

Another common problem for co-owners is not being able to see how their money is spent. MCL 559.157 of the Michigan Condominium Act requires that the "…books, records, contracts, and financial statements concerning the administration and operation of the condominium" be available for examination by the co-owners at convenient times. MCL 450.2487 of the Michigan Nonprofit Corporation Act also allows for a co-owner, either in person, by attorney, or through another agent to inspect the books and records of the condominium association after providing a written demand. The written demand must describe a proper purpose for the inspection and specify the records that the co-owner desires to inspect. If the request is made by an attorney, or agent of the co-owner, the written demand must include a power of attorney or other writing that authorizes the attorney or agent to perform the inspection. In the event that the condominium association does not permit an inspection within five business days after a demand is received, a co-owner may file an action in the circuit court to compel an inspection of the books and records of the association. A condominium association may place reasonable restrictions on an inspection. However, if a court orders an inspection, a court may also order the condominium association to pay the co-owner's costs, including reasonable attorney's fees, unless the association can demonstrate that it had a good faith reasonable basis for the denial. Accordingly, it is extremely important for a condominium association and/or its managing agent to provide a timely response to a request for inspection of records. While inspections can be denied in certain circumstances, it is not uncommon for condominium associations that completely ignore requests to inspect the books and records to be sued.

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Failing to Elect Co-Owner Directors

MCL 559.152 provides a formula for electing directors when control of the condominium association is transitioned from the developer. MCL 559.152 provides in pertinent part:

> *(2) Not later than 120 days after conveyance of legal or equitable title to nondeveloper co-owners of 25% of the units that may be created, at least 1 director and not less than 25% of the board of directors of the association of co-owners shall be elected by nondeveloper co-owners. Not later than 120 days after conveyance of legal or equitable title to nondeveloper co-owners of 50% of the units that may be created, not less than 33-1/3% of the board of directors shall be elected by nondeveloper co-owners. Not later than 120 days after conveyance of legal or equitable title to nondeveloper co-owners of 75% of the units that may be created, and before conveyance of 90% of such units, the nondeveloper co-owners shall elect all directors on the board, except that the developer shall have the right to designate at least 1 director as long as the developer owns and offers for sale at least 10% of the units in the project or as long as 10% of the units remain that may be created.*
>
> *(3) Notwithstanding the formula provided in subsection (2), 54 months after the first conveyance of legal or equitable title to a nondeveloper co-owner of a unit in the project, if title to not less than 75% of the units that may be created has not been conveyed, the nondeveloper co-owners have the right to elect, as provided in the condominium documents, a number of members of the board of directors of the association of co-owners equal to the percentage of units they hold and the developer has the right to elect, as provided in the condominium documents, a number of members of the board equal to the percentage of units which are owned by the developer and for which all assessments are payable by the developer.*

Often times a new condominium association will not elect directors in compliance with the timelines set forth above. Moreover, even after control of the association is transitioned from the developer to a co-owner board, co-owners do not always hold regular elections despite being required to do so. MCL 450.2402 provides as follows:

> *A corporation shall hold an annual meeting of its shareholders or members, to elect directors and conduct any other business that may come before the meeting, on a date designated in the by-laws, unless the shareholders or members act by written consent under section 407 or by ballot under section 408 or 409….If the annual meeting is not held on the date designated for the meeting, the board shall cause the meeting to be held as soon after that date as is convenient. If the annual meeting is not held for 90 days after the date designated for the meeting, or if no date is designated for 15 months after formation of the corporation or after its last annual meeting, the circuit court for the county in which the principal place of business or registered office of the corporation is located,…may summarily order that the corporation hold the meeting or the election, or both...*

In certain circumstances, whether due to co-owner apathy or a desire to maintain control, boards will not have annual elections or will not have fair elections. Accordingly, having regular and fair elections is another good way to keep the co-owners happy and for condominium associations to avoid a lawsuit.

Conclusion

Preparing proper financial statements, responding to co-owner requests to inspect the books and records and having regular elections is essential for a condominium association to run smoothly. While it is certainly possible for co-owners to abuse the above processes, transparency is typically the best policy as it not only keeps the co-owners happy but also keeps the condominium association's legal fees down.

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New Law Expands Protections for Municipalities in Premises Liability Lawsuits

Michigan Governor Rick Snyder recently signed into law an amendment to the Governmental Liability for Negligence Act. MCL 691.1402a. This statute describes the extent of municipal duties and liability in claims relating to sidewalk maintenance.

Municipalities are required to maintain sidewalks in reasonable repair and are not liable for the failure to maintain sidewalks unless a plaintiff proves the municipality knew, or should have known, of the defective sidewalk more than 30 days before the occurrence. A municipality is presumed to have maintained the sidewalk in reasonable repair. This presumption is rebutted only upon a showing that the proximate cause of injury was (1) a vertical discontinuity of two inches or more or (2) a dangerous condition in the sidewalk itself other than a vertical discontinuity.

Prior to its amendment, municipalities were limited as to the defenses they could assert. The amended statute permits municipalities to assert any defenses available under the common law with respect to premises liability claims. The amended statute specifically mentions the open and obvious defense, which protects landowners from liability if an average user of ordinary intelligence would have been able to discover the condition upon casual inspection. Landowners are under no duty to warn about open and obvious conditions.

The amendment may place plaintiffs in a precarious position. If the plaintiff presents evidence of a vertical discontinuity greater than two inches in order to rebut the presumption that the sidewalk was in reasonable repair, the plaintiff is also presenting evidence that may support a finding that the vertical

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discontinuity was open and obvious. See eg *Eaton v Frontier Communications*, unpublished opinion of the Court of Appeals dated Feb. 9, 2016 (Docket No. 324499).

Attorneys in our municipal law practice group are able to assist should you have any questions regarding this recent amendment or any municipal law issue.

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Supreme Court Opinion Released

Fry, IDEA, FAPE and Administrative Remedies

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A school district refuses to allow the service dog of a student with disabilities into the classroom because the student was assigned a one-on-one instructional aide by the school district, rendering the service dog superfluous. The parents remove their child from the school district and ultimately sue the school district and the school's principal for violations of Title II of the American's With Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504). The parents did not sue the defendants under the Individuals with Disabilities Education Act (IDEA), nor did they allege in their lawsuit their child was denied a Free Appropriate Public Education (FAPE) under the IDEA. The question remains: **Do the parents have to satisfy the administrative requirements of IDEA, even though they are not alleging an IDEA violation?**

In this case, the Supreme Court said yes. On February 22, 2017, the Supreme Court published its ruling in *Fry et vir, as Next Friends of Minor E.F. v. Napoleon Community Schools et al Fry* 580 U.S. __ (2017), in which the court sought to clear up confusion about how the IDEA, ADA, and Section 504 interact. Five justices signed off on the majority opinion, with Justices Alito and Thomas writing a separate concurrence.

The court's opinion dealt with the confusion that occurs when a violation of a disability right is alleged in the educational setting. In addition to the IDEA, in 1986 Congress passed the Handicapped Children's Protection Act, 20 U.S.C. §1415(l), establishing a "carefully defined exhaustion provision" indicating that a person seeking relief under the ADA, Section 504 or similar laws available under the IDEA must first exhaust IDEA's administrative remedies. The issue in *Fry* was when does §1415(l) actually come into play. *Fry* helps clear up when the IDEA administrative remedies must be satisfied.

First, where the gravamen of the lawsuit does not involve a denial of a FAPE under the IDEA, there is no requirement to satisfy the IDEA's administrative requirements. If the lawsuit alleges the student was denied a FAPE, then IDEA's administrative requirements apply, even if the lawsuit is brought under the ADA or Section 504 – and does not cite an IDEA violation.

The court noted that there is some overlap between the statutes. It is important to look at the central issue of the case, and the nature of relief being sought. The court offers a suggested diagnostic test in the form of two hypothetical questions to determine whether the IDEA and FAPE are at play. First, could the plaintiff have brought the same claim against another public facility that was not a school? Second, could an adult at the school have brought essentially the same claim? If the answer is yes to these questions, it is unlikely the complaint involves a claim under the IDEA.

In addition, the court notes that prior actions by the plaintiff should be considered. If the IDEA administrative remedies were pursued earlier in the process, those efforts may be, in the court's words, "strong evidence that the substance of the plaintiff's claim concerns a denial of FAPE, even if the complaint never explicitly uses that term." *Fry* at Page 3 ¶1(b).

The partial concurrence by Justices Alito and Thomas gives an insight into how plaintiffs may attempt to counter the holding in *Fry*. Justices Alito and Thomas disagree with the majority's suggested diagnostic test. The hypothetical questions are based on a claim that there may be some overlap between the IDEA, ADA, and Section 504. Justices Alito and Thomas do not see any overlap, therefore there is no need for the diagnostic test, and, accordingly, plaintiffs may seek to challenge any associated analysis. Secondly, Justices Alito and Thomas note parents may begin the investigation process thinking they should pursue an IDEA cause of action, only to learn they are going down the wrong path towards relief or decide they want a different form of relief, something the IDEA does not provide.

Justices Alito and Thomas' concern about using pre-litigation efforts to establish whether a case's core issues involve a FAPE violation under the IDEA is reasonable. There does, however, appear to be interconnections between the IDEA, ADA, and Section 504 from the way the term "disability" is defined to the way the laws interact. For example, Section 504 addresses the concept of FAPE, which the IDEA and the 1986 Handicapped Children's Protection Act build upon.

No solution is perfect, but the *Fry* decision does give defense attorneys a stronger hand when faced with education-related lawsuits that try to avoid the administrative requirements outlined under the IDEA.

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Cummings, McClorey, Davis & Acho, P.L.C.

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