The Future is Now (cont.)

4. Internet Use and Security

In 2002, only 569 million people, or 9.1% of the world's population used the internet.[2] By 2014, more than 4 billion people, or more than 40% of the world's population, were internet users.[3] Given the rise of the internet, and most recently Wi-Fi, some condominium associations have started offering Wi-Fi to the co-owners in common areas such as the clubhouse or pool. However, many condominium associations have failed to create internet policies to protect against misuse. Associations that offer internet access should adopt rules and regulations to prevent hacking, illegal activities, obscenities, physical threats, sending viruses or spamming. Additionally, policies should be implemented to address the unauthorized use by fellow co-owners' Wi-Fi or internet access in order to prevent private co-owner information from being hacked or misused.

5. Smart Phones/Social Media

In 2002, smartphones did not exist, YouTube had yet to be invented and the largest social media network at the time, Friendster, had only 3 million users.[4] By 2014, more than 1.75 billion people use smart phones that are equipped with audio and video recording,[5] over 6 billion hours of video are watched on YouTube each month,[6] and Facebook is now the largest social media site with over 1.35 billion users.[7] While recording technology existed prior to the 2001 and 2002 amendments, the use of audio and video recording devices such as smart phones is ubiquitous. Almost every co-owner comes to an association meeting with the ability to record the meeting for later use on Facebook, YouTube or other social networking sites. While technology, if used properly, can be useful for documenting what happened at a meeting, many associations prefer not have meetings recorded because it chills the free exchange of ideas, the recordings can be easily manipulated and many recordings are later used for mudslinging or for political purposes. As such, condominium associations should amend their bylaws or create rules and regulations governing the recording and dissemination of any recording(s) of association meetings and board meetings—if the condominium association permits such recordings at all. Moreover, associations should also create rules regarding the use of smart phones in common areas to prevent co-owners from taking videos or pictures at the pool or inside of a co-owner's unit. With respect to social media, many co-owners create social media sites and/or webpages that may not be sanctioned by the association. Accordingly, a smartphone or social media policy may also restrict the creation of unauthorized social media pages and/or set forth policies governing the co-owners' use of an official association social media page or website.

6. Solar Panels

As of 2014, roughly half of the states in the United States enacted laws that prevented community associations from outright banning solar panels. While Michigan has not yet enacted such a law, it is likely that such legislation will come to Michigan in the near future. In states that do not allow outright bans on solar panels, the condominium association typically has the power to restrict the size and location of solar panels for aesthetic purposes. In addition, the condominium association may establish conditions regarding solar panel installation, maintenance and repair, indemnification, insurance and responsibility for liability.

While many condominium associations have not yet encountered the above issues, with the rapid evolution of technology, most if not all condominium associations will be forced to deal with some, if not all of the above issues in the near future. Accordingly, condominium associations should be proactive in amending their governing documents to account for technological advances. The money spent on updating the condominium documents will not only make your community more attractive to potential purchasers, but will also likely save your condominium association from future lawsuits.

[1]http://en.wikipedia.org/wiki/Electric_car_use_by_country
[2]http://venturebeat.com/2012/08/14/the-internet-2002-2012-infographic/
[3]http://www.internetlivestats.com/internet-users/
[4]http://venturebeat.com/2012/08/14/the-internet-2002-2012-infographic/
[5]http://www.emarketer.com/Article/Smartphone-Users-Worldwide-Will-Total-175-Billion-2014/1010536
[6]http://www.youtube.com/yt/press/statistics.html
[7]http://newsroom.fb.com/company-info/

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To commemorate CMDA's 50th Anniversary, every month throughout 2015 we are donating 50 items to a local charity. This month we are donating prepackaged and individual boxes of snacks to **The Guidance Center**, which helps abused children seek assistance through its *Kids Talk* program. Please stop by our Livonia office if you are interested in donating. Thank you for your support.

FEBRUARY

Donation: 50 Boxes of Snacks and Drinks (Granola bars, pretzels, fruit snacks, juice boxes, etc.)

Recipient: The Guidance Center's Kids Talk Program

Emotional Support Animals: *Are People Claiming Disabilities to Get Around Pet Restrictions?*


William Z. Kolobaric

In the past five years, community living associations, such as condominiums, co-operatives and homeowner associations are increasingly being inundated with requests for accommodations for emotional support animals. Many board members and co-owners feel their neighbors are claiming a disability simply to get around pet restrictions in their communities.

Unlike service animals, which are regulated under the Americans with Disabilities Act (ADA) where the law is strongly established, emotional support animals are governed by the Fair Housing Act (FHA). Service animals are trained and licensed. Emotional support animals are not trained or licensed, and you can simply pay a flat fee to obtain a license that qualifies an animal as an emotional support animal.

Although a request for having a service animal and an emotional support animal both surround a claim of disability, a service animal typically deals with a known or visible disability, such as a Seeing Eye dog or Hearing dog. A request for an emotional support animal deals with unseen disabilities, such as emotional and/or mental suffering. That is wherein the difficulties lie with emotional support animal requests.

An emotional support animal is a companion animal that provides a therapeutic benefit to an individual designated with a mental, psychiatric or emotional disability, such as depression, bipolar disorder, panic attacks or anxiety. While only dogs and miniature horses can be officially designated as service animals, emotional support animals can be cats, snakes, birds, pigs or spiders. An emotional support animal does not require specific training, so long as the presence of the animal mitigates the effects of the disability and the owner of the animal has a verifiable disability as defined by the FHA.

Not all denials of requests for emotional support animals will be deemed discrimination. Generally, a simple pet restriction in the governing documents is not discrimination itself. The FHA defines discrimination as "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled] person equal opportunity to use and enjoy a dwelling." 42 U.S.C. §3604(f)(3)(B). Therefore, an individual requesting an emotional support animal must establish their disability and that the emotional support animal is necessary and reasonable to afford them an equal opportunity to use and enjoy a dwelling. 42 U.S.C. §3604(f)(3)(B). The reasonable requirement limits accommodations to those who do not impose an "undue hardship" by causing excessive financial burdens to the homeowner or condominium association or by fundamentally altering the nature of the subdivision or condominium project.

In most instances, a member of the condominium, co-operative or homeowner association who is faced with a pet restriction in the governing documents will provide a written request to be able to keep the pet and will include a letter from their doctor. The doctor's letter does not need to be notarized, as long as the letter is on the doctor's stationary. Further, the letter does not need to state the member's disability, but that the person is disabled and the life functions that are limited by the disability. However, the doctor must explain why the requested accommodation is necessary and the member must demonstrate a relationship between their ability to function and the companionship of the animal.

The United States Department of Housing and Urban Development has taken the position that if an animal qualifies as an emotional support animal, an across the board breed prohibition would not stand up. An association can prohibit vicious animals from being kept as emotional support animals, but only on a case-by-case basis as to the specific animal and not generally based on the breed. A recent Florida District Court held that a condominium association could not deny a member's request for an emotional support animal simply on the basis that there is a local dangerous breed ordinance since the FHA supersedes local ordinances.

No government agency keeps track of such figures, but in 2011 the National Service Animal Registry, a commercial enterprise that sells certificates, vests, and badges for helper animals, signed up 2,400 emotional support animals. In 2013, it registered 11,000 emotional support animals.

Because of services that allow individuals to simply pay a flat fee to get a license that qualifies the animals as an emotional support animal and, based on the above, associations should take the initiative in adopting emotional support animal policies and procedures before the next request. For example, once a person has been allowed an emotional support animal, the association may, within a reasonable time from the original accommodation, request the member to provide a letter from his or her doctor re-certifying their need for an emotional support animal.

Failing to properly accommodate a disabled person's request can lead to an expensive and time consuming lawsuit, which can award attorney's fees and costs to the disabled person. Associations can avoid pitfalls by seeking the assistance of professionals when receiving such a request.

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Transitioning from Developer Control to Nondeveloper Co-owner Control: *Five Practical Steps Every Condominium Should Take*


Joe Wloszek

Every community association in Michigan undergoes a transition or "turnover" phase whereby the control of the community association changes from developer control to owner control. In Michigan, the transition process for condominiums is governed by the Condominium Act. There are five practical steps each new board of directors should take before, during and after the transition from developer control to nondeveloper co-owner control within a condominium project. While the transition process may, at times, be somewhat complicated, the successful transition from developer control to owner control is crucial to the future success of a community association in Michigan.

Era of Developer Control

When a condominium is initially constructed, the developer commits significant resources and capital to construct the project, amenities and infrastructure. During the initial construction phase of the condominium, the developer and its appointees serve as members of the board. MCL 559.152(1). The board must act as fiduciaries to the community association by acting "in good faith and with the degree of diligence, care, and skill that an ordinarily prudent person would exercise under similar circumstances in a like position." MCL 450.2541.

Unfortunately, there is an inherent conflict of interest when certain decisions may benefit the entire community association, but those decisions have a negative impact on the developer's bottom line. The developer is primarily concerned with building and selling units as quickly as possible in order to maximize its profits. Due to the recent economic downturn, many developers have further problems with tighter budgets, less liquidity, reduced access to commercial markets, reduced workforces, and related problems that also may impact the quality of the construction work. Given this inherent conflict of interest, the transition to nondeveloper co-owner control has a heightened importance for co-owners.

Era of Nondeveloper Co-Owner Control

In a perfect world, the transition away from the developer takes place gradually and smoothly and any issues are resolved cooperatively and efficiently. Pursuant to MCL 559.110(7), the transitional control date means the "date on which a board of directors for an association of co-owners takes office pursuant to an election in which the votes that may be cast by eligible co-owners unaffiliated with the developer exceed the votes which may be cast by the developer." MCL 559.152(2) outlines the specific timing requirements for how the transition must take place including specific milestones at 25%, 50%, 75% and 90% of the units conveyed to nondeveloper co-owners. MCL 559.152(2) states:

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.

While the statute provides for various other requirements, the basic premise is as the project progresses, more and more control is given to the co-owners. In the real world, a gradual and smooth transition is not always possible and problems during this crucial phase can reverberate throughout the community association for years to come.

The co-owners should take control of the board as quickly as possible so that the association can focus on the co-owners' interests instead of the developer's interests. Below are five essential steps each board should immediately take upon transition of control:

1. Perform an Initial Audit of the Documents Provided By the Developer. The board should have all association books and records including, but not limited to, the following: 1) any original, recorded documents such as the Master Deed and Bylaws; 2) any declarations or disclosure statements; 3) the Articles of Incorporation and any amendments; 4) a complete set of the board's meeting minutes; 5) any and all Rules and Regulations; 6) all accounting information including any audits performed by the developer; 7) any and all escrow accounts or funds; 8) a current operating budget and all previous operating budgets; 9) any and all banking accounts and safety deposit boxes; 10) all state and federal tax returns; 11) any and all insurance policies; 12) any and all contracts entered into by the developer; 13) a complete list of all current owners with addresses and any other contact information; 14) any and all site plans including any as-built drawings; 15) a list of all contractors, manufacturers, subcontractors, suppliers involved with the project and any and all warranty information pertaining to same; 16) any documents by the local municipality pertaining to compliance with state statutes and local ordinances; 17) any and all documents related to any past or pending claims and 18) the tax identification number. If the board does not have this information, it should work cooperatively with the developer to obtain all of the above documents/information. If the developer is not cooperative or is slow to respond, it may be a sign of additional underlying problems.

continued on page 5

Transitioning Control (cont.)

2. Retain a Competent Certified Public Accountant. Critically important to a successful condominium association is an initial review of the condominium financials by a certified public accountant or an independent auditor competent in auditing community associations. First, the board should analyze all income and expenses during the developer's control. Typically, assessments are kept artificially low and do not adequately fund the condominium for the long term. Second, MCL 559.205 and Administrative Rule 511 require a condominium association to maintain a minimum reserve fund that is equivalent to 10% of the association's current annual budget on a noncumulative basis. Every condominium should make sure this line item is included and often 10% is inadequate to fund capital improvements. Third, consideration should be given as to whether the developer permitted co-owners to become significantly delinquent in paying association dues including the developer itself, if applicable. The board should immediately establish a comprehensive collection policy and uniformly enforce the policy to avoid a claim for selective enforcement.

3. Hire a Professional Property Management Company. The board should review whether the existing property management company—hired by the developer—is appropriate for the Association. Pursuant to MCL 559.155, the board may void the management contract with the developer or affiliates of the developer within 90 days of the transitional control date or with 30 days' notice at any time thereafter for cause. Typically, the management company remains the same after the transition and there are benefits for continuing to utilize the same property management company, however this should be reviewed on a case-by-case basis.

4. Hire a Professional Engineer. The board should hire a professional, licensed civil engineer or other qualified professional to analyze and inspect all of the common elements of the project including readily apparent construction defects, but also hidden defects such as collapsing retaining walls resulting from improper installation; cracking in the foundation or drywall caused by concealed foundation issues; electrical wiring that is not properly installed within common element walls; flooding caused by improper installation of the underground storm water drainage system; heaving or cracking of concrete porches, driveways or sidewalks due to poor drainage; leaks, mold and other water issues caused by improperly installed roofing, siding, flashing and/or windows; noise related to insufficient insulation and poor sound protection; pipe bursts that result from a failure to insulate common element pipes; premature road failure resulting from failing to test and/or account for soil conditions, improper use of base course materials or drainage issues, and missing or improperly installed trusses, which compromise the structural integrity of the roofing and/or building.

The engineer will prepare a report outlining any construction defects, the cause of the defects, a proposed fix, whether any problems are covered by warranty and the estimated cost to fix the problems. The engineering report will assist the board and the condominium association's attorney in evaluating the scope of the problems and determining the best course of action. As part of the engineer's report, the engineer should perform a reserve study which identifies the current status of the association's financial health and the project's physical condition. The reserve study informs the property manager, the board, the Association at large and prospective purchasers of anticipated major expenses in the future. Based on the information from the reserve study, the board can create a budget to reflect these anticipated costs thereby helping the association plan for the long term. A condominium association should have a reserve study performed every three to five years to ensure that major problems do not arise. In addition, given that the common elements will eventually need to be repaired and/or replaced, frequent reserve studies also ensure that the association's contractors have not caused construction defects.

5. Retain a Community Association Attorney. Typically, the board will consult with a community association attorney prior to the transitional control date. Once the transitional control date takes place, the board then hires the attorney on behalf of the association. MCL 559.276 provides an association with three years from the transitional control date or two years from the date that a claim accrues to pursue a construction defect claim arising out of the development or construction of a condominium. A claim for breach of contract against a contractor for a defect that arises from the repair or replacement of a construction defect typically has a six year statute of limitations. While the statute of limitations could be extended through various theories, such as fraudulent concealment, among others, an association's odds of success are greatly increased by vigilance of the board. In addition, a developer or contractor often defends a construction defect claim by arguing that the defect was caused by natural wear and tear or improper maintenance by the association. Accordingly, the sooner the association takes action, the better the chance of success.

In addition, the attorney will analyze any additional issues with the developer; determine whether the master deeds, bylaws and rules and regulations need to be revised; review the collection policy and determine whether collection actions are necessary against delinquent co-owners; review contracts with vendors and address other transitional control issues which may arise. As a practical matter, the first set of governing documents for the new condominium project was created by the developer, for the developer. Thus, reviewing and revising the condominium documents is an important first step for any new board. With the appropriate professional team in place, transitioning from developer control to nondeveloper co-owner control can be a seamless process, even when problems arise. Having an educated board with qualified professionals assisting in the transition process, a condominium has a greater likelihood for a smooth transition which is crucial to the future success of the condominium.

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On Law

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The Future is Now: *Is Your Condominium Association Prepared to Handle Technological Advances?*

Kevin M. Hirzel

The last significant revisions to the Michigan Condominium Act took place in 2001 and 2002. While many Michigan condominium associations have amended their governing documents to address amendments to the Michigan Condominium Act, those amendments often fail to account for the technological advances that have arisen after those revisions. When amending condominium documents, associations should consider various cutting-edge issues pertaining to condominium associations, including the following technological advances that many condominium associations are not prepared to handle.

1. Drones

For as little as $40, a co-owner can purchase a mini quad rotor drone with a camera. Drone usage in condominiums poses noise, privacy and safety concerns. Many co-owners throughout the United States have already reported drone sightings outside of their windows, balconies or community pools. In Michigan, MCL 559.172b and the condominium documents generally provide a condominium association with the authority to regulate common element air space. Accordingly, the bylaws should indicate whether drone use is allowed in the common areas by the co-owners including commercial deliveries. If an association allows drones, it should take appropriate precautions to protect the co-owners by restricting the locations that drone use is allowed, restricting the time periods for drone use, identifying landing and take-off locations and adopting other policies that protect the co-owners' privacy and safety. Finally, any policy that is created regarding drone use should also account for the fact that drones, when used properly, can be very useful to boards and property managers in establishing bylaw violations or by co-owners for commercial deliveries in certain areas of the country.

2. Electric Vehicles

As of 2014, over 260,000 electric vehicles have been sold in the United States.[1] This number continues to grow annually and some states, such as California and Hawaii, have passed laws that require condominium associations—provided that certain requirements are met—to allow electric vehicle charging stations. While Michigan does not currently have any laws requiring associations to allow electric vehicle charging stations, Michigan condominium associations need to be prepared to deal with co-owners who drive electric vehicles. Condominium associations should amend their bylaws or create rules and regulations that 1) regulate the location(s) of electric vehicle charging stations, 2) address payment responsibilities for the electricity usage, 3) assign responsibility for maintenance and 4) allocate responsibilities for repair of the electric vehicle charging station. Additionally, an association should ensure that the co-owner maintains insurance for an electric vehicle charging station and agrees to indemnify the association with respect to any potential liability, unless the charging station is a general common element that any co-owner is permitted to utilize.

3. Electronic Voting and Remote Meeting Participation

In 2008, significant amendments were made to the Michigan Nonprofit Corporation Act. MCL 450.2405 and MCL 450.2521 now allow for remote participation in association meetings, by methods such as Skype or GoToMeeting, so long as the articles of incorporation or bylaws do not restrict remote participation. MCL 450.2441 permits electronic voting at association meetings if allowed by the bylaws. For those that are unable to attend meetings, MCL 450.2421 allows for proxies to be electronically submitted to a condominium association. Finally, MCL 450.2407 indicates that the articles of incorporation may allow for the co-owners to take action by an electronic vote without holding a meeting if the articles of incorporation allow for an action without a meeting. MCL 450.2525, likewise, allows a board of directors to take action without a meeting via electronic transmissions unless prohibited by the articles of incorporation or bylaws. Accordingly, Michigan condominium associations should review their governing documents to determine if they need to be updated to allow for remote participation in meetings, electronic voting, electronic proxies and electronic consent to actions taken without a meeting.

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in this **issue**