

2009 Legislative Update

Condominium and Homeowners Associations

5/6/2009

James Ott, CMCA, LSM, PCAM, a member of the Pennsylvania Legislative Action Committee, presents the Committee's recent summary of the legislative briefing incorporating the issues facing condominium and homeowner associations in Harrisburg for the current legislative session.

2009 LEGISLATIVE UPDATE FOR CONDOMINIUM AND HOMEOWNERS ASSOCIATIONS

Below is a listing of currently active proposed new laws, seeking to govern various aspects of condominium and community associations.

TAX EQUALIZATION

HB 675 (2009) Association homeowners often pay taxes for services which are not provided to them. Glaring examples of this are private streets and storm water facilities, private sewer systems and often trash service. On the heels of Philadelphia Owners Association v. City of Philadelphia, Freedly Court Apartments v. Borough of Norristown, and Ramsgate Court Townhome Association v. West Chester Borough, (cases involving municipal trash collection which excluded private associations) recent legislation has been introduced to “equalize” the tax burden to association residents.

Most associations are already responsible for what would traditionally be considered municipal services. We mow our open space, perform snow removal and street maintenance, maintain and repair storm water facilities and sanitary sewer systems, and collect trash. In addition to these tremendous responsibilities, unit owners pay local and municipal taxes, which often cover services that would otherwise be provided to residents in homes outside community associations. In those cases, this constitutes double taxation, and is a fairness issue.

HB 675 seeks to address this inequity, by providing a state tax credit to unit owners in associations up to \$1,000 annually. Activity and movement toward tax equalization is very exciting. CAI has been working with the legislature in support of this effort. After its initial introduction, CAI drafted a resolution which would require a study to be performed of the financial impact such a law would have. We have obtained commitments from the bill’s sponsors to introduce the resolution. This study will require an inventory of condominium and homeowners associations within the state, and study the economic effect such a tax credit will have on State or local budgets.

Similar legislation has become law in the State of New Jersey, where municipalities are given the option of either performing the service, or paying a sum of money representing a portion of the cost to the association. Again, CAI is very excited about this bill, and will continue, with the help of its lobbyists, to push this legislation toward adoption.

ASSOCIATION RECORDS AND OPEN MEETINGS

Although Pennsylvania has an existing statutory scheme governing Condominium and Homeowners Associations (Uniform Condominium Act, 68 Pa.C.S.A. Section 3101), and Uniform Planned Community Act (68 Pa.C.S.A. Section 5101), the industry is generally self regulating. This means that compliance with the statutory framework is left up to private enforcement, there being (in contrast to the State of New Jersey) no government oversight. Nonetheless, legislation is periodically introduced in an effort to add additional “consumer protection” elements to both Acts, going so far as to provide penalties against Board members.

HB 1221 (2009), HB1250 (2009), SB 745 (2009) There are currently three separate bills seeking to address open meetings and open records. While the current statutory framework already provides for access to records, and requires at least one annual meeting, these bills seek to make certain “sunshine provisions” applicable to condominium and homeowners associations. An excerpt from CAI’s draft position paper on these issues is set forth below:

We fully agree that sharing of information and access to documentation are essential components to the proper functioning of community association governance. However, community associations are private corporate entities, governed in most instances not only by its founding documents (Declaration of Planned Community in accordance with the UPCA and Bylaws), but also non-profit corporation law. Section 5316 of the UPCA already guarantees to each Unit Owner access to association records. Moreover, the right to view and copy records is restated in virtually all community association documents. House Bill 1713 does not expand this right, but merely imposes a technical and cumbersome mechanism for responding to such requests. Likewise, Pennsylvania corporate law contains mechanisms for access to records and documentation. As such, CAI believes that the proposed amendment is not only superfluous, but will also strap associations with additional administrative burdens and over-technical compliance requirements, leading to what is anticipated to be nuisance litigation.

... Every association holds at least one annual meeting which is open to the members; many meet semi-annually, quarterly or more often. Imposing a requirement that board (perhaps even committees) hold open meetings will not solve the problem the Bill apparently seeks to address. Instead, it will discourage many homeowners from participating in governance of their associations. Although those outside of the industry seem to ignore this fact, condominium and homeowners associations are governed by volunteer board members. These individuals are not compensated for their services, and often devote all of their free time to the proper administration of a community. This commitment, coupled with the tremendous fiduciary responsibilities placed upon board members, has made it difficult for many associations to attract volunteers. Requiring that all meetings be held in a public forum will only add to the list of burdens, and discourage those who may otherwise serve. Moreover, very few associations have facilities on site able to accommodate public meetings. The proposed amendment would thus compel associations to locate and pay for offsite meeting facilities, potentially with great financial impact. Having to travel to another location, rather than perhaps walking to another board member's home, will also become yet another factor in discouraging association volunteerism.

ENFORCEMENT THROUGH UNFAIR TRADE PRACTICES

HB 579 (2009) Excerpt of CAI LAC Position Paper:

CAI strongly opposes the provisions of HB 579 which seek to specifically permit enforcement of the UCA or UPCA (together the "Acts") through the UTPCPL. Reference is initially made to Sections 3412 and 5412 of the Acts, already containing remedies for willful violations of their subparts, the declaration and bylaws. Likewise, the governing documents of most condominium and homeowners associations invariably address enforcement, often providing reimbursement of attorneys' fees to compensate the prevailing party. Furthermore, applicability of the UTPCPL will expose Associations to volumes of litigation, much of which is anticipated to be frivolous. The risk of having to defend such claims will not only have a chilling effect on board

member participation by volunteer homeowners, it will also impact the availability and cost to Associations for insurance coverage.

...However, condominium and homeowners associations do not sell or advertise what could be deemed "goods and services", nor are homeowners considered "consumers". To the contrary, associations are corporate entities charged with management of its own affairs. Its fiscal and administrative functions are carried out by a member-elected board of directors. Sections 3303 and 5303 of the Acts not only specifically require board members to stand in a fiduciary relation to the association, but also mandate that they perform their duties in good faith, in a manner they reasonably believe to be in the best interest of the association. Similar provisions are also contained in the governing documents of associations. A person becomes a member by virtue of ownership of a unit within the association. The purchase transaction is governed by Chapters 34 and 54 of the Acts, which set forth statutory schemes intended to assure full disclosure of the finances and restrictions applicable to associations. Accordingly, members receive not only statutorily mandated disclosures, but are furthermore protected by a Board's obligation to act as fiduciaries. Homeowners and associations are thus clearly on equal terms. This relationship is quite different from that between a seller and purchaser of household goods, where statutory intervention to prevent consumer fraud may be appropriate. However, the remedies available for predatory trade or commercial practices clearly have no place in the context of a condominium or homeowners association. ..

The addition of a potential UTPCPL claim against a condominium or homeowners association is thus unnecessary and duplicative. Similar remedies are already contained in the existing statutory scheme, specifically permitting an award of punitive damages in case of willful violations - not only of the Acts, but also of the governing documents (declaration and bylaws). It should also be noted that Sections 3412/5412 are specifically made retroactive to associations created prior to the effective date of the UCA and UPCA, thus protecting owners in older associations...

Availability of UTPCPL remedies will surely encourage additional litigation, enabling anyone seeking to challenge the actions of an association to invoke its punitive remedies. Ordinary breach of contract or declaratory judgment actions will turn into fraud and misconduct cases. To the extent coverage to defend these claims is available, the cost to purchase directors / officers liability policies will increase. Obtaining coverage will also become more difficult. However, as these policies generally do not cover claims for fraud or willful misconduct (allegations of which are necessary to sustain a claim under the UTPCPL), defending such claims will be at the expense of the association; or even worse, at the expense of the individual board member. Thus, whether frivolous or not, associations and board members will be required to incur attorneys fees and court costs in defending UTPCPL claims.

2008 CAI SUCCESS: CORRECTION OF SECTION 3315 OF THE UNIFORM CONDOMINIUM ACT

SB 2295 (2008) was drafted by members of the CAI Legislative Action Committee and introduced by Representative Pertrone. It sought to correct the typographical error contained in the Trilogy Amendments which left out a portion of Section 3315 governing the 6 months assessment super priority. This bill was amended to include a section permitting Unit Property Act communities to come into the Uniform Condominium Act by a vote of 67% of the Unit Owners (thus reducing the voting burden). It was signed into law in July of 2008.

Copies of all house and senate bills are available online at <http://www.legis.state.pa.us/cfdocs/legis/home/session.cfm>