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Association of Condominium, Townhouse, and Homeowners Associations

ACTHANEWS

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PALM IS A FOUR-LETTER WORD

By: Martin Stone, PCAM
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Yeah, yeah, just what you needed, another article on Palm, right? We've seen a lot of articles about Palm, mostly written by learned attorneys, some written by experienced Managers, and one, I'm told, that was written by an emu. The latter, unfortunately, was not as widely distributed or published as the others, which is a great tragedy, as I've heard emus have wonderful senses of humor as well as a flare for the dramatic.

In any case, what we haven't yet seen-or at least what I have not yet seen-is a very straight forward, no holds barred statement (rant?) from someone willing to go on record and give the whole Palm situation a big slap in the face (see what I did there?) So, here you are. I am your emu.

To clarify for those who have not read or heard the many lectures pertaining to Palm, "Palm" refers to a, now, infamous court ruling more formally known as *Palm v. 2800 Lake Shore Drive*. This court ruling establishes 'case law', which is the interpretation or reinterpretation of an existing statute. In this case, that existing statute was the Illinois Condominium Property Act, particularly Section 18(a)(9) which states (and always has stated) that the Board must conduct all Association business in an open meeting. And because the Common Interest Community Association Act or CICAA (the condo Act for non-condo associations) has the exact same language in it pertaining to Meetings, the Palm ruling affects CICAA the same way.

Up until 2014 BP (before Palm), the big question had always been: *What constitutes conducting 'business' at meetings?* Furthermore, the consensus (again, before Palm) had always been, quite simply: ***Voting***. Workshops, walkthroughs, emails discussing repairs or proposals, violations, exterior modification requests, etc… it was all just talking or addressing routine maintenance needs, not conducting business.

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Question of the Month: What's a Board to do About Abandoned Vehicles?

By: Michael DeSantis, Attorney
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Question: All homeowners in our townhouse complex have either a 1 or 2 car garage. In addition there is street parking and 2 small parking lots.

One homeowner is renting his unit and moved elsewhere approximately 2 years ago, but left a car parked in one of the lots. He claimed that he intended to fix up the car for sale. It has expired license plates and city sticker (which certainly means it is not insured), and flat tires. Neighbors have complained that this not only occupies a parking space, but is an eyesore. The car appears to be unlocked, potentially inviting homeless occupancy or children to play inside.

We have requested the homeowner to remove this vehicle, but he refused and claimed that his rights would be violated if we had it towed. I'm not sure what rights he has to leave an abandoned vehicle on our property. What options does the Board have?

Answer: The authority to tow a homeowner's vehicle must come from the association's declaration and covenants, bylaws, or the associations' rules and regulations. Many condominium associations' governing documents provide board members the express authority to tow vehicles from the common elements for any number of reasons: violation of parking restrictions, expired tags, the blocking of fire lanes, an inability to operate, etc. However, in the event an association's governing documents do not expressly provide a board the authority to tow a problem vehicle, a board can establish an express rule via its power to promulgate reasonable rules provided by the association's declarations.

When purchasing a condominium unit, homeowners agree to comply with the association's governing documents. In this case, if your association's governing documents do not provide you the explicit authority to remove the vehicle, the board may want to pass a rule prohibiting the parking of unregistered or inoperable vehicles from parking in the parking lot. Because homeowners agree to comply with association rules when one purchases a condominium, the association will not violate the homeowner's rights once you've given him or her proper notice that the vehicle will be towed.

It's a good idea to also establish a notice requirement for the association, so that homeowner's are given an opportunity to make arrangements to remove a vehicle and avoid sanctions. This will have the secondary effect of ensuring the association provides for a period of due process, so as to not run afoul of the rights afforded homeowners in the declaration or bylaws. Of course, this notice requirement may not be necessary when a vehicle needs to be moved on an emergency basis.

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Whether a vote before an action was taken (voting at an April meeting to replace roofs in June), or voting to ratify a decision already made (voting at a June meeting to approve the plant replacements completed in April), so long as that voting was done at an Open Meeting, it was argued quite successfully for decades that the Board was being transparent and providing full disclosure of all business being conducted.

But then Palm happened, and now the definition of 'business' conducted at meetings has been expanded and redefined as any voting *or discussion* involving a quorum of the Board. In short, it means that any instance where a majority of the Board members discuss any association-related matter, whether by phone, electronically (email), or in person, for which the owners are **not** previously given notice and the opportunity to be present, the Board of Directors is breaking the law.

'But that's ridiculous!' we have all said. 'How do we avoid this?' we have all asked. As your trusted and faithful emu, I'm giving it to you straight, and I'm here to tell you that it is not only ridiculous, but complying with the Palm ruling is downright impossible.

Emus are nothing if not controversial in their opinions, but let me first say that Palm ruling was a good thing in that the Board of Directors that was sued was doing very naughty things, including but not limited to repeatedly voting in closed sessions and refusing to provide owners access to Association documents (minutes, contracts, etc.). This was clearly a Board that needed to be reprimanded for such bad conduct.

But, as mentioned, fully complying with the requirements set forth by the Palm ruling is not possible as it would mean that a Board of Directors would have to either a) have a meeting every 2 weeks or b) not talk to each other at all about anything Association-related except for those 4 times per year when they get together for a meeting. And face it, neither is the slightest bit realistic.

Even if an Association could find Board members willing to give up 2 nights per month for meetings, what facility short of an Association's own clubhouse would be available that frequently? Most Associations do not have clubhouses, so their Board meetings are held at libraries, village halls, community centers, and police stations. But if you took the number of community associations in any given city or village, and multiplied it by 2 meetings per month… you'd run out of availability pretty fast!

What's that you say… have the meetings in someone's driveway? What about November-March? What's that you counter… have it inside someone's garage? Okay, aren't we getting silly?

What do the Attorneys have to say about all this? I've spoken to many attorneys ever since Palm happened, mostly venting my incredulity, but also trying to wrap my head around how to help my associations adapt to this new world order.

Let me just say, Attorneys are very good at pointing out all of the things that would constitute a *violation* of the Palm ruling, but they seem just as flummoxed as I when it comes to the question, how does a Board comply with Palm? Here are the most straight-forward suggestions that I've heard:

#1: Assign more spending and decision-making authority to Management. This will eliminate micromanaging by the Board and allow the manager to make judgment calls and decisions consistent with the policies and procedures adopted by the Board.

I love and admire the attorney who suggested this, but I must admit, I laughed out loud when I heard this one. The Board of Directors giving their Manager cart blanche when it comes to maintaining the property is just not going to happen for 2 reasons:

1) Boards don't trust their manager to this extent, nor are they able to give up this much control over where the money goes. Speaking from personal experience as a Manager with a $1,500 spending authority in most of our Management Agreements, I still get questioned by a Board when I cut a $1,300 check for roof repairs without checking with them first, or asked why I couldn't find someone cheaper. Can I justify my actions? Absolutely.

But do I really want to spend all my time doing that if my spending authority was increased to, say $5,000? Would it really make anything easier? No.

2) This suggestion essentially puts Managers in a position of *decision maker*. And most Managers do not want to be (nor should they be) decision maker because, while a Board member cannot generally be held personally liable for their actions (i.e. decisions), a Management company most certainly *can be*. And why would a Manager take on additional risk and liability? A manager, first and foremost, carries out the decisions and directives of the Board, who can delegate tasks, but cannot delegate responsibility.

<u>#2: Assign more decision-making authority to the Board president or another designated Director, and eliminate unnecessary Board discussion.</u>

Second verse, same as the first. While there are some Boards out there whose directors are more than happy to sit back and let that designated Director call most of the shots, the majority wish to be involved in the decisions making process. So I strongly believe this suggestion would fail for much the same reasons the first suggestion would... most Board members aren't going to give up all the control to someone else, whether it's another Board member or their Manager.

<u>#3: Have monthly Board Meetings, and Board members should refrain from any discussions of any kind outside of said monthly meeting.</u>

While this suggestion comes closest to plausible, it doesn't quite hit the mark. Though some associations have monthly meetings, most do not. Whether it's because they aren't able or willing to give up more of their free time to have more meetings, or that it's simply too difficult to coordinate all the different Board members' collective personal schedules in order to do so, monthly meetings just aren't going to happen for many Associations. And if the solution isn't applicable to *all* Associations, then it isn't an effective solution.

So, what *do* you do? How do you comply with the Palm ruling? More accurately, how can you avoid violating Section 18(a)(9) of the Condo Act now that it has been filtered and interpreted by the Palm ruling? First, let's keep in mind the following:

1) There is no Board of Review or governing body that enforces Palm or issues fines for violations. "There is no Palm Police," says Dawn Moody of Keough & Moody, but adds quickly with a chuckle "…at this time."

Therefore, in order to be found in violation of Palm, someone would have to be so disgruntled that they sue you *and* a judge would have to rule that you are indeed a stinker.

2) Since this type of case would not be for personal damages, no attorney would take the case for a percentage of a monetary judgment, because there would not be any monetary award or judgment. Meaning, the disgruntled owner would have to flip the bill if he wanted to sue. According to Stuart Fullet of Fullet, Rosenlund, Anderson, the first year of litigation will cost $25,000 -$50,000, and that's on the low side, meaning a 14-year litigation would cost somewhere in the neighborhood of $400,000. You know anyone willing to cough up $400,000 because you ratified the Board's approval of the sealcoating contract a month after the parking lot was sealed?

3) In said lawsuit, in order to be entitled to monetary damages, said disgruntled owner would have to prove that they suffered a loss by the Board's alleged non-compliance with Palm. I don't see how ratifying the renewal of your Lawn Maintenance contract can cause anyone a loss, but maybe I'm being insensitive.

4) The Association's Directors & Officers insurance policy would generally cover the cost of the Association's or Board's defense in the event that the Board is sued for violating the Act. In other words, the Plaintiff needs a whole heck of a lot more money than the Defendant would.

5) "Palm" was the end result of a 14-year lawsuit, filed by an Association member by the name of Gary Palm (who happened to be an attorney), against his Association and its Board of Directors for what were ***clearly*** violations of the Condo Act. This was not a Board that signed a snow removal contract in late October and waited until their November Board meeting to ratify the approval. This was a Board that repeatedly had closed sessions at which they did all their voting and stonewalled Gary Palm when he requested copies of Association records the Act clearly entitled him to examine. And Mr. Palm (now deceased, by the way) was not an individual who spent hundreds of thousands of dollars of his own money, which 14 years of litigation would most certainly have cost him. .

PALM is a Four-Letter Word

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This was a disgruntled owner who happened to be a lawyer with time and energy to handle the suit himself. So, keeping these things in mind, what should you do about Palm? Now we come to the most controversial part of the article. My suggestion…Do nothing.

To confirm, this is just one Manager's opinion, and I don't necessarily expect too many others to share it. But I am nothing if not brutally honest and blunt. And it is with that honesty and bluntness that I say to my Boards: If you're truly not doing anything wrong or inappropriate, what can anyone do to you? Form everything I've seen and heard over the past 2 years since we all got smacked with Palm (see? I did it again), the answer is 'nothing.' So, to the question, 'What should we do about Palm?'… I give the same answer: *Nothing*. Again, just one fed up Manager's opinion.

Finally, what about all of those 'illegal' email discussion threads among the Directors that eventually end with a Board consensus? (shrugs) The world is different than it was 14 years ago, when Gary Palm first got his britches twisted enough to file suit. There were no smart phones. Email in offices wasn't as prevalent as it is now. Faxing was the quickest way to put printed word in someone else's hand and now faxing is an antiquated joke. Many offices are completely paperless! The result… People are now accustomed to and therefore demanding of instant gratification. So to try to tell a Board of Directors to deny themselves that instant gratification, and to keep it all bottled up until the next meeting … you'd have better luck trying to put lipstick on an emu.

Editor's Note: Since this article was written, recent changes have been made to Palm. See next page for details.

Private Communications Now Permitted for Board Members Outside of Open and Executive Session

By: Nicholas Bartzen, Howard Dakoff, and Patricia O'Connor, Attorneys
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On July 15, 2016, Governor Rauner signed a bill which became Public Act 99-0567. The new law amends the Illinois Condominium Property Act ("Act") and the Illinois Common Interest Community Association Act ("CICAA") to allow board members of both condominium associations and common interest community associations to meet and discuss certain association business outside of open meetings and executive session (in private gatherings, workshops or even via phone or e-mail).

Whereas boards have been restricted due to the 2014 Illinois Appellate Court Palm II decision, which prohibits boards from having certain discussions outside of open and executive sessions, this new law expands those topics which the board can discuss in a number of different forums, thus significantly moderating the restrictive effects of the Palm II decision.

By way of refresher, the Palm II decision prohibited "working sessions" and discussions by board members over e-mail or phone in condominium associations as well as casual discussions where more than a quorum of board members met to discuss topics related to association governance outside of the designated executive session of a properly noticed board of directors' meeting. Moreover, Palm II limited those topics which the board was permitted to discuss during executive session to: (i) pending or potential litigation, (ii) issues related to employment, and (iii) issues related to unit owners' violations of governing documents.

The amendment to the Act and CICAA, which will become effective on January 1, 2017, will greatly enhance the board's ability to work effectively and efficiently outside of the confines imposed by the Palm II decision. After January 1, 2017, board members may privately discuss the following topics without providing notice to unit owners (private discussions may be conducted in person, via phone or via electronic communication):

(i) pending or probable litigation;

(ii) third party contracts or information regarding appointment, employment, engagement or dismissal of any employee, independent contractor, agent or any other provider of goods and services;

(iii) to interview any potential employee, independent contractor, agent or any other provider of goods and services;

(iv) violations of rules and regulations of the association;

(v) discussion of any association members' unpaid share of common expenses; or

(vi) consultation with the association's legal counsel.

Finally, the new law not only allows boards to meet outside of executive session or open session to discuss the above issues, but it also gives boards the power to close any portion of a noticed meeting in order to discuss the aforesaid issues. These amendments are welcome changes and will enhance the board's ability to effectively manage its association.

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South Expo
Saturday, Sept. 24
8am—1pm
Tinley Park Convention Center

- How to review/amend your Declarations & Bylaws
- Overview of the Common Interest Community Association Act and how it differs from the Illinois Condominium Property Act
- Everything you need to know about collecting assessments
- The PALM decision today: why it's still a hot topic

North Expo
Saturday, Oct. 15
8am—1pm
Renaissance Chicago North Shore (Northbrook)

- Introduction to The Illinois Condominium Property Act
- Managing your Association's winter checklist
- Understanding rules & regulations
- How to fund your next project

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South Expo
Saturday, Sept. 24
8am-1pm
Tinley Park Convention Center

North Expo
Saturday, Oct. 15
8am-1pm
Renaissance Chicago North Shore (Northbrook)

Schedule:

8-9am	Education Sessions
9-11:30am	Trade Show featuring 40+ Exhibitors & Mini-education Sessions
11:30am-1pm	Education Sessions

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Which Expo will you be attending? ☐ Tinley Park 9/24 ☐ Northbrook 10/15 ☐ Both

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Full registration – Both Expos (includes Sept/Tinley Park and Oct/Northbrook)	_____	x	$40	=	$ 0.00
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