Case Note: CAI Challenge to DCA Regs Super Ct App Div A2241-21

Analysis by Ed Hannaman, C-IHC President

On February 23, 2024, the Superior Court Appellate Division issued a decision in response to an objection to Election and Open Meeting Regulatory provisions filed by the Community Assoc Institute (CAI). CAI challenged the obligation to offer ADR after notification of not being in good standing. The DCA agreed to eliminate that requirement if the owner had already been offered ADR. Although the court upheld most of the provisions (including secret ballots), it modified or removed several. Following is our analysis of the decision.

Changes for Alternative Dispute Resolution (ADR)

The court found that if an owner was offered ADR in a matter affecting good standing, that owner need not be offered it again before an election. Notably, the court provided no guidance on any time limit on how long previously the ADR would have been offered, whether it was a legitimate ADR offer under the law or governing documents, or even whether the owner actually received the offer.

Proxy and Absentee Ballots Not Required for Bylaw Voting

In contrast to board elections, in bylaw voting an association need no longer provide either a proxy or an absentee ballot. Fortunately, the court rejected the objection that the voting for bylaw amendments should not be anonymous. (Note, this does not preclude an owner from requesting an absentee ballot, unless they are forbidden by the governing documents, which you can bet will be done unless owners object.)

Affordable Housing Board Seats

The court unexpectedly rejected a mandatory reservation of a board seat to represent interests of a community's affordable units. Why? Because the existing statute naively allowed it to be an option. (One can safely bet that 99.9999 percent of associations will immediately drop this minimal benefit to ensure that those in affordable units have a voice on the board.) Low-income owners in a community tend to be a small minority who can never elect a board member to represent their interests (but yet must subsidize market rate costs for amenities they lack). Owners, associations or boards that understand the importance of not effectively denying [disenfranchising] these owners a voice on the board can always seek to amend their bylaws do justice for these members.

Notably, this regulation did not require that a person owning an affordable unit sit on the board, simply that affordable unit owners could elect an owner to one seat to represent their interests. There was never a chance that one seat would ever control the board.

Binding Votes in Closed Board Sessions

The court applied what can only be described as bizarre reasoning in order to completely destroy any transparency on board actions. For over 30 years regulations required that all binding votes had to occur in open meetings. In fact, the requirement was that the open vote not disclose any legitimate confidentiality. Now that is gone. The court's reasoning was that the Open Public Meeting Act (which does not apply to associations) said a board could "discuss" matters in closed session that are "conference" or "working sessions." The court determined that this precluded voting on such matters in the closed session.

The PREDFDA language governing common-interest associations authorizes the exclusion of members from meetings where the board is "dealing with" four types of matters. To the court, that use of "dealing with" meant binding votes can be taken in secret and naturally never disclosed or reflected in minutes available to owners. The court stated, "The statute does not forbid binding votes from being taken at all closed meetings, as the regulation does. (p.21) Notably, the statute does not authorize it either. Despite the court being conversant with the broad discretion given to regulations, it felt that because the statute didn't specifically forbid secret binding votes, they must be allowed and the regulation could not forbid them.

The four areas now decided in total secrecy are essentially as follows:

1. Any unwarranted invasion of individual privacy;
2. Pending or anticipated litigation or contract negotiations (aside, since when does a negotiation require a binding vote…);
3. Matters within the attorney-client privilege to the extent confidentiality is required for an attorney to exercise ethical duties. (The burden is on the attorney to not disclose client confidentiality, not the client.) This is illogical and would more properly be phrased to prevent, e.g., disclosure of information that would adversely affect the association in adversarial proceedings
4. Any matter involving employment, promotion, discipline or dismissal of an officer or employee. (PREDFDA NJSA 45: 22A-46a). Significantly, for 30 years there was no problem for associations "dealing with/discussing" handling, etc. these matters in secret and then taking a binding vote on them at an open meeting.

Just as with the effective barring of affordable unit owners from a voice on the board, it is a safe bet that associations will use this misguided decision to bar owners from observing every consequential and/or underhanded action. If owners don't believe that their association attorney can shoehorn every action they want into one of the incredibly broad and subjective secret vote categories, they are sorely mistaken.

It is incredible that the court removed transparency essential to democracy based on the legislature's use of the words "dealing with" instead of "discuss" for those four categories (which

essentially include everything with the possible except of things like pool hours or carpet colors). Owners can expect that the vote on every suspect board action will be taken in a closed meeting, never disclosed and obviously not reflected in minutes.

Legislation Must Be Airtight

What this case proves is that unless statutes giving owners rights or protections from board abuse are written so incredibly clearly that no one can possibly distort the meaning, a court can be persuaded to eliminate them. Thus, when seeking legislative protection owners must emphasize that nothing can be left to any conceivable misinterpretation – otherwise it risks a court eliminating the protection. Thus, for example, when demanding a statute that requires all binding votes be taken only at open meetings (for which proper notice was given…), it must be repeated over and over in as many ways as possible both positively and negatively (board must, board cannot, etc.).

It is a shame that courts show no regard for the democratic process in associations simply because the board is not "discussing" a matter but "dealing with" it. Owners whose boards follow this decision in order to hide actions are advised to work with their fellow owners at the next election to change that board and reinstate transparency (at least until the law can be fixed).

Owners who wish to restore their right to know what their board is doing and how it is spending their money should inform their legislators that the law must be made so clear that no court can misinterpret it. The law must unequivocally state that NO binding votes can be taken in secret. ALL binding votes must be taken at an open meeting, with NO exceptions. Binding votes at any meeting that is not open to all owners should be forbidden and invalid.