

An Introduction To Illinois' Newly-Penned Common Interest Community Association (“CICA”) Act

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U ntil July 29, 2010, the effective date of Illinois’ newly-penned Common Interest Community Association Act, 765 ILCS 160/1 et seq., (the “Act”), condominium associations were subject to extensive regulation under the Condominium Property Act, 765 ILCS 605/1 et seq., whereas non-condominium homeowner’s associations (“HOA’s”) were left to piecemeal regulation from portions of statutes such as the General Not For Profit Corporation Act and case law.

With the passage of the Act comes a comprehensive set of regulations that now apply to HOA’s by identifying them as “Common Interest Community Associations” (“CICA’s”). All those affected by CICA’s, from residents, board members and officers, to attorneys representing either CICA’s or property owners subject to CICA’s, should learn all they can about the new statute. While an analysis of the full impact of the Act will surely fill more than one chapter of books and be the subject of numerous features, the purpose of this article is to: 1) explain the background of the Act; 2) highlight key provisions of the Act; 3) briefly identify ways the Act will affect CICA’s; and 4) raise important unanswered questions with regard to the applicability of the Act.

Background. The genesis of the Act can be traced to as early as 1963, the year Illinois enacted its first condominium

act, which was adopted from a model statute developed by the Federal Housing Authority.¹ From 1977 through 1981, the National Conference of Commissioners on Uniform State Laws (the “ULC”) promulgated the Uniform Condominium Act (1977), the Uniform Planned Community Act (1980), and the Model Real Estate Cooperative Act (1981) which offered states guidance in drafting statutes related to HOA’s. In 1982, the ULC promulgated the Uniform Common Interest Ownership Act (the “UCIOA”), which was designed to supersede the three prior acts to provide a single, comprehensive act to govern common interest communities, regardless of whether they

1 765 ILCS 605, Historical and Practice Notes-Introduction, by Ellis B. Levin.

were for condominiums, HOA's, or cooperatives.²

Two years later, the General Assembly amended Section 102 of the Forcible Entry and Detainer Act ("FEDA") by adding subsections 102(b) and 102(c), which defined (and then regulating for purposes of the FEDA) the term "common interest community" as "real estate other than a condominium or cooperative with respect to which any person by virtue of his or her ownership of a partial interest or unit therein is obligated to pay for maintenance, improvement, insurance premiums, or real estate taxes of other real estate described in a declaration which is administered by an association." Although individual sections of other statutes made references to and imposed some regulations upon common interest communities,³ the General Assembly neither adopted the UCIOA, nor promulgated a sister act to the Condominium Property Act, until this summer.

Although not expressly spelled out in the Act, there are at least five primary characteristics that most CICA's share: 1) they govern residential developments that are subject to a declaration recorded against all properties in the development; 2) unit owners share common interests, both in shared rights and shared property owned by the CICA for their benefit; 3) unit owners pay assessments for maintenance and other common interest expenses; 4) the CICA is typically an Illinois not for profit corporation; and 5) the CICA's are subject to a set of bylaws that govern their internal affairs. Although the Act expressly trumps certain provisions contained in declarations that conflict with it⁴,

the Act will generally govern CICA's alongside the CICA's declaration and bylaws.

Key Provisions of the Act. The Act is organized in fourteen key sections: 5) Definitions; 10) Applicability; 15) Interpretation; 20) Amendments; 25) Board of Directors; 30) Board Duties and Records; 35) Unit Owner Powers; 40) Meetings; 45) Finances; 50) Administration Prior to Turnover; 55) Fidelity Insurance; 60) Errors and Omissions; 65) Management Companies; 70) Use of an American Flag; and 75) Exemptions. Although the Act impacts CICA's in hundreds of ways, the key provisions of the Act are as follows:

Applicability. The Act generally applies to all CICA's⁵, which are defined as "real estate other than a condominium or cooperative" in which a person, by virtue of his or her ownership of a partial interest or unit therein, is obligated to pay the maintenance, improvement, insurance premiums or real estate taxes of common areas described in a declaration which is administered by an association.⁶ This definition is nearly identical to the definition promulgated in 1982 under the FEDA. Notably, the Act exempts CICA's incorporated under the General Not For Profit Corporation Act if they have 10 units or less, or if their annual budget is \$100,000.00 or less, unless a majority of their directors affirmatively elect to be governed by the Act.⁷

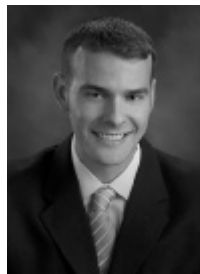
Declaration and Bylaws. A declaration and bylaws must be created and recorded, and the bylaws may be included in the declaration

or in a separate instrument attached to the declaration when recorded.⁸ Any amendments to the declaration or bylaws must also be recorded.⁹

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2 See Introduction to the Uniform Common Interest Ownership Act, National Conference of Commissioners on Uniform State Laws.

3 See e.g., 735 ILCS 5/15-1507(c)(1)(H)(2) (mortgage foreclosure); 765 ILCS 122/3(e)(3) (environmental covenants).

4 See e.g., 765 ILCS 160/1-15(c) (generally forbidding boards from prohibiting the display of the American flag or a military flag "notwithstanding any provision in the" community instruments).

5 765 ILCS 160/1-10.

6 765 ILCS 160/1-5.

7 765 ILCS 160/1-75(a).

8 765 ILCS 160/1-20(a).

9 765 ILCS 160/1-20(a).

Initial Election of Board Members. Prior to formation of the CICA, the original developer has all responsibilities the CICA has under the Act.¹⁰ However, the initial election of the board must be held no later than 60 days after the developer's conveyance of 75% of the units, or 3 years after recording of the declaration, whichever occurs first.¹¹

Board Composition; Terms; Meetings. There must be at least 3 board members: a president, a secretary, and a treasurer.¹² The board members' terms of office can be no longer than 3 years (though there are no term limits and a board member can run for re-election indefinitely).¹³ However, their terms must be staggered such

that at least one-third of their terms of office expire each year.¹⁴ The board must meet at least 4 times a year¹⁵, unless the CICA is exempt from the Act.¹⁶

Board Meetings. All board meetings must be open to the unit owners, except for any portion held: (i) to discuss probable or actual litigation filed by or against the association; (ii) to consider information regarding the appointment, employment, or dismissal of an employee; or (iii) to discuss violations of the CICA's rules or regulations, or a unit owner's unpaid share of common expenses.¹⁷ Any vote concerning "closed meeting" matters must be open to all unit owners.¹⁸

Board Members' Conflicts of Interest. A board member, or a corporation or partnership in which a board member or a member of his/her immediate family holds a 25% interest, cannot enter into a contract with the CICA unless the CICA gives 20 days notice of its intent to enter into such contract to the unit owners.¹⁹ Within 20 days after such notice, the unit owners are afforded an opportunity to file a petition for an election to approve or disapprove of such contract if

20% of the unit owners sign the petition.²⁰

Insurance Requirements. Unless exempt under Section 75(b), a CICA with 30 or more units must obtain fidelity insurance covering those persons who control or disburse funds of the association for the maximum amount of coverage available to protect such funds.²¹

Membership Meetings; Voting; Voting Rights. Unless exempt under the provisions of Section 75(b),

the unit owners must hold an annual meeting, a purpose of which must be to elect board members.²² Voting may be done in person, by mail, or by written proxy, and the association may adopt rules such that voting is

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done by secret ballot to verify unit ownership.²³ Contract purchasers under an installment contract with a seller other than the original developer will have the right to vote during such times as the purchaser resides in the unit, unless the seller expressly retains the right to vote in writing.²⁴

Notice Requirements. With regard to *membership* meetings, unless exempt under Section 75(b), all members must be given written notice of the time, place, and purpose of all membership meetings by mail or personal delivery within 10 to 30 days prior to each meeting.²⁵ Twenty percent of the unit owners constitute a quorum.²⁶ With regard to *board* meetings, for any meetings concerning the adoption of the proposed annual budget, regular assessments, or a separate or special assessment, the board must give notice to the unit owners within 10 to 30 days prior to the meeting by mail or personal delivery.²⁷ For all other board meetings, the board need only give 48 hours notice by mail, personal delivery, or posting copies of the notice in the entranceways, elevators, or other conspicuous places in the CICA.²⁸

Required Disclosures. Every year the board must provide to all unit owners an itemized accounting of all

10 765 ILCS 160/1-50(a).

11 765 ILCS 160/1-50(b).

12 765 ILCS 160/1-25(f).

13 765 ILCS 160/1-25(b).

14 765 ILCS 160/1-25(d).

15 765 ILCS 160/1-30(a).

16 765 ILCS 160/1-75(b).

17 765 ILCS 160/1-40(b)(5).

18 765 ILCS 160/1-40(b)(5).

19 765 ILCS 160/1-30(b).

20 765 ILCS 160/1-30(b).

21 765 ILCS 160/1-55.

22 765 ILCS 160/1-40(b)(2).

23 765 ILCS 160/1-25(h), (i).

24 765 ILCS 160/1-25(j).

25 765 ILCS 160/1-40(a).

26 765 ILCS 160/1-40(b)(1).

27 765 ILCS 160/1-40(b)(4).

28 765 ILCS 160/1-40(b)(4).

expenses paid for the preceding year.²⁹ Prior to adoption of a proposed annual budget, the board must provide a copy of the proposed annual budget to all unit owners at least 30 days prior to adoption.³⁰

Records Retention Requirements. The board must maintain a number of records and make them available for inspection, including: the declaration, bylaws, rules and regulations, and other community instruments; detailed records (in chronological order) of the receipts and expenditures for the common areas; copies of all contracts, leases, or other agreements entered into by the board; minutes of all board meetings for the preceding seven years; ballots, proxies, and written statements of purpose for any election held within the preceding year; all records as are available for inspection under the General Not For Profit Corporation Act; and written designations as to who is authorized to vote on behalf of a unit owner.³¹

Availability of Records to Prospective Purchasers. If a unit owner other than the original developer sells a unit, upon demand, the board must make available for inspection to the prospective purchaser, without limitation, the declaration, rules and regulations, any statements of unpaid assessments for the unit, a statement of the financial condition of the association, and a statement of the status of any pending suits or judgment in which the association is a party.³²

Age; Leasing Restrictions. With regard to age restrictions, the declaration may impose a minimum age restriction limiting ownership, rental, or occupancy to persons 55 years or older and such restriction will not constitute age discrimination under Article 3 of the Illinois Human Rights Act.³³ However, if a person (or the immediate family of such person) who owns, rents, or occupies a unit is less than 55 years old at the time such restriction is created, such person will not be deemed to be in violation of the restriction so long as he or she continues to own or reside in the unit.³⁴ Once that person ceases to own or reside in such unit, the minimum age restriction will apply to the unit.³⁵ With regard to leasing, the association may validly prohibit the leasing of units.³⁶ However, if a not for profit corporation owns and is leasing a unit at the time the association amends the declaration or bylaws to prohibit leasing, such prohibition will not apply to such unit until the not for profit corporation voluntarily sells the unit.³⁷ The Act,

the declaration and bylaws, and all rules and regulations shall also be deemed to be incorporated into any lease for a unit.³⁸ The unit owners must also deliver a written copy of the lease, or if oral, a memorandum of the lease, to the association no later than the date of occupancy or 10 days after the lease is signed, whichever occurs first.³⁹

Display of an American or military flag. The Act generally prohibits CICA's from prohibiting the display of, or installation of a flagpole for the display of, the American and/or a military flag.⁴⁰ However, an "American flag" or "military flag" can only be made of paper, cloth, or fabric, and not any other type of materials, and must be displayed from a staff or flagpole or in a window.⁴¹ Moreover, the association may adopt reasonable rules and regulations regarding the placement and manner of displaying such flags.⁴²

Potential Liability For Costs and Attorney Fees. In various places, the Act provides that either a unit owner or third person is entitled to recover its costs and reasonable attorneys' fees in any action to compel the association to do certain acts or provide certain information.⁴³

How Is the Act Most Likely to Affect CICA'S? Of the myriad of ways the Act will significantly impact CICA's, the most glaring issues relate to *existing* CICA's. The authors are of the belief that as of the effective date of the Act, there was likely not a single existing CICA in Illinois with declarations and bylaws that fully complied with the Act. Unlike condominiums with declarations and bylaws that were drafted in conformity with existing requirements of the Condominium Property Act—the very act that created condominiums—existing CICA's were created before the Act existed, and their declarations and bylaws were drafted without reference to the Act's requirements. With the Act applying to existing CICA's on the effective date of July 29, 2010 with neither a "grandfathering clause" nor a grace period to allow existing CICA's to amend declarations and bylaws to conform to the Act, CICA's would be wise to review their existing declarations and bylaws and make necessary changes in an expeditious manner, especially given the provision for attorney fees for violations of the Act.

Aside from the need to amend declarations and bylaws, the Act will require a significant commitment, new to many CICA's, to institutional organization. While these requirements are for the protection of unit owners, they do not come without cost in terms of money, time, and other

29 765 ILCS 160/1-45(b).

30 765 ILCS 160/1-45(a).

31 765 ILCS 160/1-30(i).

32 765 ILCS 160/1-35(d).

33 765 ILCS 160/1-15(c).

34 765 ILCS 160/1-15(c).

35 765 ILCS 160/1-15(c).

36 765 ILCS 160/1-20(c).

37 765 ILCS 160/1-20(c).

38 765 ILCS 160/1-35(a).

39 765 ILCS 160/1-35(a).

40 See 765 ILCS 160/1-70(a).

41 765 ILCS 160/1-70(b).

42 765 ILCS 160/1-70(a).

43 See, e.g., 765 ILCS 160/1-25(g); 765 ILCS 160/1-30(i)(4).

resources. These costs will almost certainly be passed on to the unit owners in the form of assessments.

Unanswered Questions. While the Act codifies and organizes many aspects of the laws that apply to CICAs, it does leave a number of questions unanswered on a variety of topics so numerous that one can expect future commentaries and articles to expound on these questions and answers. Here, the authors will limit this discussion to three issues concerning applicability of the Act.

Does the Act Apply to Some Condominium Associations? Although the Act's definition of a Common Interest Community expressly states that it is real estate "other than a condominium", the term Common Interest Community includes "master associations".⁴⁴ A "master association" is defined as a CICA "that exercises its powers on behalf of one or more *condominium* or other common interest community associations[.]"⁴⁵ This inconsistency begs the question of whether the Act applies to condominium associations subject to master associations and, if so, to what extent, if any, does it supplant the Condominium Property Act. Given that the definition of a CICA expressly excludes condominiums, the likely answer is "no" and this inconsistency is likely nothing more than a drafting oversight. Nonetheless, this is the language passed by the legislature and courts must attempt to give meaning to all language of a statute such that no language is rendered meaningless.⁴⁶ How courts will resolve this issue is subject to debate.

Will Decreases In Annual Budgeted Assessments Make The Act Inapplicable? Non-profit CICAs with annual budgeted assessments of \$100,000.00 or less are exempt from the Act.⁴⁷ What is the effect if a non-profit CICA has annual budgeted assessments of more than \$100,000.00 in one year, but \$100,000.00 or less in a subsequent year? Does the Act apply in those years in which there is a drop below \$100,000.00? How courts resolve this issue is also open for debate, but for the sake of clarity and consistency, it is the authors' opinion that the Act should have been drafted to apply *in toto*, or not at all. Triggering the application of the Act in this manner may lead to frustration and confusion over the extent of a non-profit CICA's legal obligations, for over time, as assessments rise due to inflation, more CICA's will begin crossing the \$100,000.00 threshold. Moreover, non-profit CICAs with annual budgets around \$100,000.00

may deem compliance with the additional requirements imposed by the Act as too costly and purposefully seek to reduce their *budgets* under \$100,000.00 to avoid application of the Act, even if they end up *collecting* more.

How Should Courts Address Provisions In CICA Declarations That Conflict With The Act? As previously noted, the Act only *expressly* invalidates conflicting CICA declaration provisions with regard to flags. This is in stark contrast to how conflicting declaration provisions are addressed under the Condominium Property Act, for 765 ILCS 605/2.1 expressly provides that "any provisions of a condominium instrument that contain provisions inconsistent with the provisions of this Act are void as against public policy and ineffective"⁴⁸. There is no similar provision in the Act.⁴⁹ Other than those provisions that deal with flags, how are provisions in CICA declarations that conflict with the Act to be handled given the fact that both acts include a section entitled "Applicability" that begins with a virtually identical first sentence but only the Condominium Property Act includes a second sentence that makes a blanket invalidation of any conflicting provisions? The point is further underscored by the fact that the General Assembly expressly invalidated inconsistent provisions with regard to flags.

If the General Assembly intended the Act to trump inconsistent provisions in CICAs, it could have included a blanket provision like it did in the Condominium Property Act. Perhaps it concluded that general principles of statutory construction or case law alleviated the need for a blanket prohibition, although if it did, why would it have included a specific provision with regard to flags knowing that courts are to construe statutes so as to not render any provision superfluous⁵⁰? It is the authors' belief that these issues are the result of drafting errors by the General Assembly, and that provisions in CICA declarations that conflict with the Act will be invalidated notwithstanding the points raised above.

Conclusion. While the Act effectively addresses, codifies, and clarifies the governance of CICAs, it does leave a number of issues open for debate. Through this introduction to the Act, those involved with CICAs should be better able to read, study, and analyze the Act in order to better understand its application and future impact. □

44 765 ILCS 160/1-10.

45 765 ILCS 160/1-10 (emphasis added).

46 *Solon v. Midwest Med. Records Ass'n, Inc.*, 236 Ill. 2d 433, 440-41, 925 N.E.2d 11113 (2010).

47 765 ILCS 16001-75(a).

48 765 ILCS 605/2.1.

49 Compare 765 ILCS 605/2.1 with 765 ILCS 160/1-10.

50 *Solon*, 236 Ill.2d at 440-41.