

An Overview of the Common Interest Community Association Act (CICAA)

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On July 29, 2010, the Illinois Common Interest Community Act¹ (“CICAA”) was signed into law. CICAA governs common interest communities which it defines 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 a unit therein is obligated to pay for the maintenance, improvement, insurance premiums or real estate taxes of common areas described in a declaration which is administered by an association” and may include “an attached or detached townhome, villa, or single-family home or master association.”²

This definition generally encompasses all homeowner associations, master associations, umbrella associations and townhome associations which are not subject to the Condominium Property Act. While CICAA establishes regulation of common interest community associations where none existed before, many of its provisions overlap with other existing laws. In particular, most of the associations now governed by CICAA are also still subject to Section 18.5 of the Illinois Condominium Property Act (“CPA”)³. Although there are many similarities between CICAA and Section 18.5 of the CPA, there are some disparities. Until the legislature corrects this problem, associations should be careful to comply with both statutes.

This article provides an overview of a majority of the provisions of CICAA and attempts to point out areas of concern, especially those due to overlapping regulations.

Applicability of CICAA:

CICAA covers all common interest community associations, whether or not incorporated as a not for profit corporation, except those:

¹ 765 ILCS 160/1 et seq.

² 765 ILCS 160/1-5.

³ Section 18.5 of the CPA applies to all common interest community associations which are subject to provisions of Section 9-102(a)(8) of the Forcible Entry and Detainer Act. The Forcible Entry and Detainer Act utilizes the same definition for “common interest community” as CICAA, but has different exceptions. It includes all common interest community associations except those: (a) not organized under the General Not for Profit Corporation Act; (b) that do not allow unit owners to attend meetings of the board; or (c) with declarations recorded prior to 1985, that have not elected to have the provisions of the Forcible Entry and Detainer Act apply to the association. See 735 ILCS 5/9-102(b) and (c).

- Incorporated under the General Not for Profit Corporation Act with less than 10 units; or
- Incorporated under the General Not for Profit Corporation Act with annual budgeted assessments of \$100,000 or less.

Associations which fall into either of these exceptions may elect to be covered by CICA by a majority of its board and unit owners.

Controlling Provisions:

One difference between CICA and Section 18.5 of the CPA is that, unlike the CPA, CICA does not contain an affirmative statement that if a particular provision in an association's declaration conflicts with CICA, that provision in the declaration is void as against public policy and ineffective. Rather, various sections of CICA specifically provide that if a particular provision in an association's declaration or bylaws conflict with CICA, the association's declaration or bylaws control⁴. Until a court of law rules otherwise, it appears that the absence of this language in other provisions means that CICA controls if those other provisions conflict with an association's declaration or bylaws.

General Provisions:

- Every common interest community association must have a recorded declaration and bylaws and any amendment to the declaration or bylaws must be recorded to be valid. Associations that do not currently have a recorded declaration or recorded bylaws should act promptly to record them or risk being precluded from enforcing them.
- The association can only have one class of membership unless the declaration or bylaws of the association provide otherwise.
- The board has the power, after providing notice and an opportunity to be heard, to levy and collect reasonable fines from unit owners for violations of the declaration, bylaws and rules and regulations of the association. Associations that previously did not have the authority to levy fines should consider adopting a fining policy so that it may take advantage of this new power.

⁴ The provisions of CICA which specifically provide that an association's declaration or bylaws control if there is a conflict are the following: (a) If the association's declaration or other community instruments define terms differently than CICA, the association's definitions will control (Section 1-15(a)); (b) The members of the board shall serve without compensation unless the community instruments indicate otherwise (Section 1-25(c)); (c) Proxies will not be valid for more than 11 months after the date of execution unless the community instruments or the proxy itself provide otherwise (Section 1-25(h)(1)); (d) the association may only have one class of membership unless its declaration or bylaws provide for more than one class (Section 1-30(f)); and (e) an amendment to a declaration to correct an error, omission or a scrivener's error requires a vote of two-thirds of the board or a majority of the members unless the association's declaration requires a greater percentage to adopt such an amendment (Sections 1-60(a) and (b)).

- The bylaws shall provide for the maintenance, repair and replacement of the common areas and payment thereof, including a method of approving payment vouchers.
- The provisions of CICA, the declaration, bylaws, other community instruments⁵, and rules and regulations are deemed to be incorporated into any lease executed or renewed after July 29, 2010.
- For any lease entered into after July 29, 2010, the unit owner is required to provide the board with a copy of the signed lease or, if the lease is oral, a memorandum of the lease, no later than the date of occupancy or 10 days after the lease is signed, whichever occurs first.
- If an association that currently permits leasing amends its declaration to prohibit leasing, it must allow Section 501(c)(3) non-profit unit owners that are leasing at the time of the amendment to continue to lease until the unit owner sells the unit.
- Errors, omissions and scrivener's errors in declarations and other community instruments may be corrected by an amendment to the document approved by two-thirds of the board or by a majority of the unit owners.

Board and Board Member⁶ Provisions:

One of CICA's provisions that has been criticized by some members of master associations is the requirement that the board members be elected at large. Many master associations were organized to require board participation by members of each of their underlying associations. By requiring the board to be elected at large, there is no guarantee that the underlying associations will be equally represented in a master association. CICA further provides:

- An association must have at least three board members and three officers including a president, secretary and treasurer.
- Board members cannot be elected to a term of more than three years but they can succeed themselves.
- At least one third of the board members' terms must expire each year.
- Board members must be unit owners of the association.
- If there are multiple owners of a unit, only one owner may serve on the board at a time.
- Board members must be elected at large.
- The board must meet at least four times annually.

⁵ "Community Instruments" are defined by CICA to include "all documents and authorized amendments thereto recorded by a developer or common interest community association, including, but not limited to, the declaration, bylaws, plat of survey, and rules and regulations.

⁶ "Board Member" is defined by CICA to be either a member of the board of managers of an unincorporated common interest community association or a member of the board of directors of a common interest community association incorporated under the General Not For Profit Corporation Act.

- Board members serve without compensation unless the community instruments provide otherwise.
- Vacancies can be filled by the vote of two-thirds of the remaining board members until the next annual meeting. CICA also provides a procedure for unit owners to fill a vacancy for the balance of the term.
- A board member may be removed by a two-thirds vote of the unit owners at a duly called special meeting.
- A board member may not enter into a contract with a current board member or entity in which the board member or his or her immediate family has 25% or more interest without providing notice to the unit owners and giving them an opportunity to vote on the contract as further provided in Section 1-30(b) of CICA.

Meeting Provisions – Board Member Meetings:

One significant provision in CICA that is not in the CPA is that the board of a common interest community association must reserve a portion of the board meeting for comments by the unit owners. While this provision appears to encourage communication between the board and unit owners, the amount time allotted to unit owner comments and the order in which it occurs during the meeting are within the sole discretion of the board. CICA also provides:

- Notice of all board meetings must be sent by mail, by personal delivery or by posting in conspicuous places at least forty-eight hours prior to the meeting. In contrast, Section 18.5 of the CPA only allows notice to be mailed or delivered and then requires notice also be posted in conspicuous places at least forty-eight hours prior to the meeting. Section 18.5 of the CPA also permits notice to be waived if a waiver is signed by the person entitled to notice prior to the meeting.
- For meetings concerning the adoption of the proposed annual budget, regular assessments or a separate or special assessment, both CICA and the CPA require notice by mail or by personal delivery not less than ten days or more than thirty days prior to the meeting.
- Meetings of the board shall be open to the unit owners except for those portions held to discuss (a) litigation; (b) employment issues; or (c) violations or assessment delinquencies. Although not in CICA, Section 18.5(c)(4) of the CPA allows unit owners to record open meetings subject to reasonable rules of the board.

Meeting Provisions – Unit Owner Meetings:

- Notice of unit owner meetings, such as the annual meeting, must be mailed or delivered no less than ten days or more than thirty days prior to the meeting and must provide the time, place and purpose of the meeting.

- Special meetings of the unit owners may be called by the president, the board or by 20% of the unit owners.
- Twenty percent of the unit owners will constitute a quorum unless the association's governing instruments provide otherwise.

Election and Voting Provisions:

- If an election is not held within 90 days of the date specified in the association's bylaws, twenty percent of the unit owners may bring an action to compel compliance with the election requirements.
- Unit owners can vote by proxy, in person or by sending their ballot by mail or other means authorized in the declaration or bylaws.
- A unit owner present at an election is entitled to cast all votes for that unit.
- The association can conduct a secret ballot if they have adopted appropriate rules for it, including the verification of the status of a unit owner issuing a proxy or casting a ballot.
- Candidates or their representatives have the right to be present at the counting of the ballots.

Financial Provisions⁷:

- Each unit owner shall receive a copy of the proposed annual budget at least thirty days prior to its adoption.
- Except for assessments for emergencies, there is a procedure for the unit owners to reject a budget or separate assessment that will result in an increase of more than 115% of the sum of the previous year's assessments.
- Assessments for additions and alterations to the common area not included in the adopted budget are subject to the approval of two-thirds of the unit owners.
- The board may adopt assessments payable over more than one year.
- The board must annually supply to all unit owners an itemized accounting of the common expenses of the preceding year.

Record Keeping and Production Requirements:

CICAA's record production requirements are very similar to those of Section 18.5 of the CPA. CICAA requires the Board of an association to maintain certain records of the association and make them available for examination and copying at convenient hours of weekdays by any unit

⁷ CICAA does not have a comparable provision to Section 18.5(g-1) of the CPA, which became effective July 14, 2010, and allows a common interest community association to collect six months of assessments from the purchaser, other than the mortgagee, of a unit sold in foreclosure.

owner. It also allows the Board to charge a reasonable fee for the cost of retrieving and copying properly requested records.⁸

If the Board receives a written request for records and does not respond within thirty days, it is considered a denial. If the association denies a request or does not make available properly requested document within thirty days, the unit owner may seek relief in court. If the court finds that the documents were not provided due to the acts or omissions of the board, the owner will be entitled to an award for their attorneys' fees.

The following documents are the ones that the Board must maintain and make available for examination and copying:

- Declaration, bylaws and other community instruments
- Articles of incorporation
- Annual reports
- Rules and regulations
- Detailed and accurate records in chronological order of the receipts and expenditures affecting the common areas, specifying and itemizing the maintenance and repair expenses of the common areas and any other expenses incurred
- Contracts, leases and other agreements entered into by the board
- Minutes of all meetings of the board for the last 7 years

Under CICAA, if the unit owner provides a written statement of a proper purpose, the Board must also available to unit owners for examination and copying ballots and proxies and any other corporate accounts and records not listed above.

In the event of any resale of a unit in a common interest community association by a unit owner, the board is obligated to make certain documents available for inspection to the prospective purchaser. While this provision is similar to the disclosure requirement of Section 18.5(g) of the CPA, it differs in that it puts the burden of providing documents to a prospective purchaser on the board rather than owner. Although eliminating the owner as the middleman in the production process may speed things up, it creates new concerns because the board now has to answer to third party "prospective purchasers". Boards should communicate with the owners regarding such requests, especially considering CICAA allows the board to charge the unit seller the out-of-pocket cost of copying and providing the requested information. CICA requires the board to furnish the following the information to a prospective purchaser within thirty days after receiving a written request:

⁸ Section 18.5(d)(3) of the CPA only allows the board to charge a fee for the cost of copying.

- Declaration, other instruments and any rules and regulations
- A statement of account of the unit including any unpaid liens, assessments or other charges
- A statement of any capital expenditures anticipated by the association within the current or succeeding two fiscal years
- A statement of the status and amount of any reserve for replacement fund and any portion of such fund earmarked for any specified project
- The statement of financial condition of the association for the last fiscal year for which such a statement is available
- A statement of the status of any pending suits or judgments
- A statement setting forth what insurance coverage is provided for all unit owners by the association
- A statement that any improvements or alterations made to the unit, or any part of the common areas assigned thereto, by the prior unit owner are in good faith believed to be in compliance with the declaration of the association

Fidelity Insurance and Property Manager Provisions:

CICAA requires associations with thirty or more units and their management companies to maintain fidelity insurance⁹. However, common interest community associations are also governed by the Community Association Manager Licensing and Disciplinary Act¹⁰ (“CAMLDA”) which requires community association managers to maintain fidelity insurance for associations they manage with more than *ten* units. Association boards should be sure to comply with both Acts.

CICAA and CAMLDA also both address some of the functions of management companies. For example, they both provide that a management company that provides services for more than one association must maintain separate, segregated accounts for each association. It may not commingle the funds of an association with its funds or the funds of another association. However, both CICAA and CAMLDA provide exceptions to this rule, but their exceptions differ slightly.

CAMLDA allows management companies, with the consent of the associations, to combine all the funds of the associations in a single account, provided they separately account for the funds of each association. CICAA, on the other hand, allows management companies, with the consent of the associations, to combine all their operating funds of the associations in a single

⁹ Fidelity insurance protects associations from loss of money resulting from crime such as fraud and embezzlement.

¹⁰ 225 ILCS 427/1 et seq.

operating account, and, with a contract, to combine all their reserve funds in a single reserve account for the purpose of investment. As with CAMLDA, the management companies must separately account for the funds of each association in each such combined account. Both CAMLDA and CICC provide that the accounts are custodial and shall be in the name of the respective associations. CAMLDA, however, also allows the accounts to be in the name of the community association manager or management company as the agent for the association.

Other Provisions:

- Several provisions of CICC only apply to associations that record their declarations after July 29, 2010, such as the application of CICC to a developer prior to the election of the initial board.
- A provision in the declaration limiting ownership, rental or occupancy of a unit to a person 55 or older will not violate the Illinois Human Rights Act.
- A board may not prohibit the display of the American flag or a military flag, or both, or the installation of a flagpole for such flags, on or within the limited common areas and facilities of a unit owner or on the immediately adjacent exterior of the building in which the unit of a unit owner is located. A board, however, may adopt reasonable rules regarding the placement and manner of display of the flags and the location and size of flagpoles.

CICC may have been enacted to provide guidance in the governance of common interest community associations, however, it is also likely to cause some confusion due to the fact several provisions overlap with other laws. Additionally, sections of CICC are not very clear and open to interpretation. Boards attempting to comply with CICC and reconcile CICC's provisions with other Acts, should consult with an attorney. Additionally, common interest community associations that have declarations and/or bylaws that conflict with any of CICC's provisions should consider amending their governing documents.

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