FAQ

Community Association FAQs: LEGAL EDITION

By Jonathan H. Katz, Esq.

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As you would probably expect, attorneys get asked a lot of questions. One of the first things they teach you in law school is how to answer every legal question with the standard response: "It depends." As it turns out, that is one of the most valuable lessons you can learn as a fledgling attorney, that the answer to any legal question will depend on the specific factual circumstances, the relevant law, and – most importantly – how that law is applied to those factual circumstances. So, in answering any legal question, it really does depend on all of those things to arrive at the correct answer.

Understanding that every situation is different, attorneys who are presenting to a group or answering a question for a friend or colleague often give what is referred to as a standard legal disclaimer. Simply put, that disclaimer is that, even though we are talking about issues that are legal in nature, the answer to your specific question will depend on the facts, law, and application of both, so the recommendation is always to speak to your own attorney for an actual legal opinion. The same holds true here; even though this article deals with general legal issues, you should still seek the opinion of your community association's counsel. Because the answer to your legal question, especially from an attorney who does not represent you or your association, should most always be, "It depends."

There are some common legal questions that community associations attorneys get more than others, especially recently. Again, while the specific answers to these frequently asked questions will depend on a variety of factors, including what is in your association's governing documents, below are four, frequently asked, non-COVID related questions and general (legal disclaimer included) answers:

1. Question: Can my community association switch to electronic voting?

Answer: Yes! The Radburn legislation, which was signed into law on July 13, 2017, specifically authorized electronic voting in community associations: (1) when the

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board determines to allow voting by such means; and (2) when an association member consents to casting a vote electronically.[i] Please note, however, that electronic voting does not mean that an association can just accept ballots by e-mail, facsimile, or other electronic means. Rather, ballots must be cast on-line or through another electronic system and be delivered directly to an association through a website or other secure service. In addition, authorizing electronic voting in an association will require implementing a specific electronic voting procedure, which may necessitate amending an association's by-laws and/or adopting a resolution to allow voting by electronic means, as well as allowing those members who do not want to vote electronically to vote using traditional paper ballots.

Additionally, the Department of Community Affairs, (DCA), issued regulations regarding the Radburn legislation, which were made effective on May 18, 2020. These regulations now require that all voting in community association elections must be conducted in an anonymous manner. Since these regulations are now controlling, it is important to note that the Radburn regulations specifically address and authorize electronic voting so long as the election process is administered by a "neutral third party" so as to maintain anonymity.

2. Question: Do the new Radburn regulations affect how our community association meetings must be conducted?

Answer: Yes! As noted above, the DCA issued regulations regarding the Radburn legislation, which went into effect on May 18, 2020. While many of these regulations dealt with election procedures, the DCA also included new requirements related to community association board meetings.[ii]

Some of these new requirements are as follows: notice of open board meetings must be: (1) prominently posted in at least one location on the community's property accessible to owners at all times; and (2) posted on the association's website and included in any association newsletter or personally delivered to each member or designee by mail, hand delivery, or electronic means. In addition to the post-

ed meeting schedule, adequate notice of any scheduled meeting must be provided at least seven (7) days prior to the meeting date. This notice must provide the time, date, and location of such meetings, as well as agenda items "to the extent known."

By-laws of all community associations must now include a requirement that meetings of the association's executive board where a binding vote is to be taken must be open to attendance by all members. Association boards must provide a brief explanation for the basis of, and cost entailed of, any binding vote taken. This explanation must be included in the meeting minutes. Associations may still exclude members from portions of the meeting that discuss certain topics (such as litigation or contract negotiations); however, while boards may conduct such closed (executive session) meetings and discuss those subjects, boards may not take any binding votes on those issues at any closed meeting – any vote taken at a closed meeting will not be binding. If any such matter requires a binding vote, it must be taken at a subsequent open meeting "in a manner that does not disclose any confidences."

Further, associations must take legible minutes of all open meetings that shall include: (1) board members present and their titles; (2) clear identification of any matters addressed; and (3) clear identification of any matters voted on, including a record of the votes and an explanation regarding the basis for and cost entailed for each vote taken. Minutes of each open board meeting must be made available to association members in a "timely manner" before the next meeting and may be identified as "draft" or "unapproved.

3. Question: Should my community association be receiving reimbursements from our township for snow removal and other services?

Answer: Maybe! New Jersey's Municipal Services Act requires cities and towns to provide certain services to community associations within their borders.[iii] In short, the law requires that every municipality in New Jersey must either provide certain services – including the removal of snow and ice, collection of leaves, trash, and recyclables, and lighting of roads and streets – to qualified private communities "in the same fashion" as the municipality provides

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such services along public streets or, in the alternative, the municipality may opt to reimburse these communities for such services.

The purpose of the act is simple – to eliminate the double payment for some services residents of these associations now pay through both property taxes and association fees. With respect to the amount of reimbursements, community associations are only entitled to reimbursement in the amount it would cost the municipality if it were to provide that service itself. Associations are generally not entitled to reimbursement for services above and beyond what the municipality normally provides to other residents. For example, while it may cost an association significantly more to hire a private contractor to plow its roadways, the reimbursement required by law is only the cost to the municipality were it to provide such service, which in most cases is less than the cost to the association. However, this general rule does have a caveat. If, for example, the nature of an association's roadways make them more difficult to plow than normal public roads and streets, the association may be entitled to a greater reimbursement than the township's normal cost per mile.[iv]

Although the law went into effect almost thirty years ago, many qualified community associations still fail to take advantage of having their municipality provide these services (or reimbursements) simply because they are unaware of the law. If your association is not receiving the benefits of the Municipal Services Act, please contact your community association attorney.

4. Question: Is my community association responsible for personal injuries when someone slips and falls?

Answer: It depends! If your governing documents contain a provision which provides for tort immunity, the answer may be no. New Jersey has a tort immunity statute that allows associations to shield themselves from liability for certain types of injuries caused to unit owners or their spouses due to the association's negligence. This immunity is applicable so long as the association has certain language in their governing documents or takes the proper steps to amend their documents.

Specifically, the statute[v] states:

Where the bylaws of a qualified common interest community specifically so provide, the association shall not be liable in any civil action brought by or on behalf of a unit owner to respond in damages as a result of bodily injury to the unit owner occurring on the premises of the qualified common interest community.

Nothing in this act shall be deemed to grant immunity to any association causing bodily injury to the unit owner on the premises of the qualified common interest community by its willful, wanton or grossly negligent act of commission or omission.

Put simply, a tort immunity provision would prevent an association from being liable for personal injury or other damages suffered by a

unit owner (or their spouse) due to the association's own negligence. However, it is important to note a few things. First, the immunity applies only when the injury is to a unit owner or

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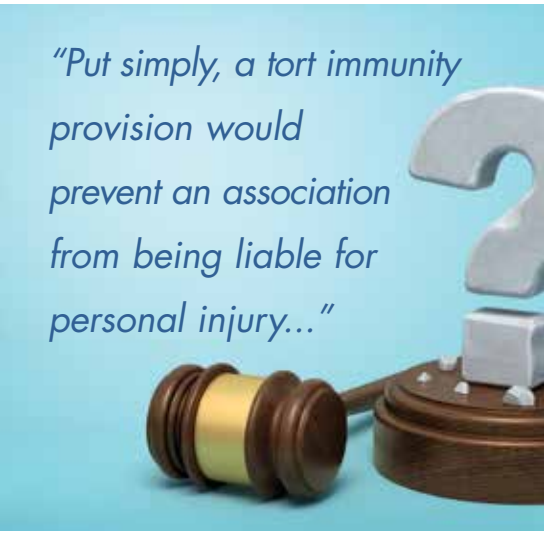

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that person's spouse; the immunity will not apply to other family members, tenants, or guests.[vi] Further, the immunity does not apply where the association is found to have been willful, wanton, or grossly negligent act of commission or omission that leads to an injury. Finally, any amendment to an association's governing documents regarding tort immunity must be approved by at least two-thirds (2/3) of the owners and cannot be accomplished by the Radburn "reverse" amendment process.[vii] ■

END NOTES:

i See N.J.S.A. 45:22A-45.2(c).

ii See N.J.A.C. 5:26-8.12.

iii See N.J.S.A. 40:67-23.2.

iv Stonehill Prop. Owners Ass'n v. Township of Vernon, 312 N.J. Super. 68 (App. Div. 1998) (holding that because the municipal roads could be plowed more efficiently than the association's roads, which were curvy, winding and steep, the township was required to pay additional amounts by way of reimbursement for what the Court considered a "difficulty factor" over and above what the actual cost to the Township would be for providing these services).

v See N.J.S.A. 2A:62A-13.

vi See N.J.S.A. 2A:62A-12.

vii See N.J.S.A. 2A:62A-14.