

Condo Board Obligations for Closing Sessions

July 30, 2018



On June 14, 2018, the Illinois Appellate Court published a ruling in a case called *Boucher v. 111 East Chestnut Condominium Association* holding that a condominium board may have improperly fined a unit owner for violating the association's declaration by refusing to provide the evidence that served as the basis of the fine. The *Boucher* decision clarifies board requirements in connection with violation notices and fine hearings, which are considered below.

Case Background

In the *Boucher* case, the board issued a violation notice to a unit owner for yelling profanities at management. The unit owner and his attorney appeared at the violation hearing in response to the allegations. After the board levied a fine, the unit owner requested documents relating to the accusation and a copy of the recording of the hearing, which the board refused to provide. The unit owner filed suit, alleging that the board (i) violated the Illinois Condominium

Property Act (the "Act") by penalizing the unit owner for expressing his opinion about management and refusing to provide the record of the hearing, and (ii) breached its fiduciary duty by failing to disclose the evidence against the unit owner that served as the basis of the violation.

The *Boucher* trial court ruled in favor of the defendant board, but the appellate court reversed the trial court's ruling and held that the unit owner sufficiently alleged that the board violated the Act and breached its fiduciary duty to the unit owner.

Takeaways

I. Boards Must Now Keep Minutes of Closed Sessions (including Fine Hearings) if More than a Quorum of the Board is in Attendance

Section 19 of the Act states that boards must keep minutes of board meetings and that unit owners are entitled to "inspect, examine and make copies" of such records. Under the *Boucher* decision, if a quorum of a board is present fine hearing (even if conducted in closed session) minutes must be kept. Said another way, the *Boucher* decision requires that boards keep minutes of fine hearings and allow unit owners to inspect, examine and make copies of such minutes - even though

no decisions are being made which is the trigger for minutes.

Tips of Closed Session Minutes

- Under the *Boucher* case, audio or video recording of a closed session fine hearing (at least in the absence of written minutes) constitute "minutes" that must be turned over to a unit owner; however, it is strongly recommended never to audio or video record a closed session;
- Minutes of closed session fine hearings should include (i) that the meeting took place; (ii) a list of those in attendance; (iii) the reason for the session; and (iv) that the closed session meeting qualifies for one of the exceptions to the open meeting requirement under Section 18(a)(9)(A) of the Act (e.g., "discuss violations of rules and regulations of the association" or "consult with the association's legal counsel"). The content of discussions should not be recorded in the "minutes";
- As a reminder, any board vote on matters that are discussed in closed session must be done in open session.

II. State the Specific Section Allegedly Violated and Offer to the Evidentiary Basis of the Allegation

It is well settled that boards have a fiduciary

duty to unit owners, but the specific contours of the fiduciary duty are far less certain. The *Boucher* decision makes clear that a board's refusal to share evidence that served as the basis of an alleged violation (e.g., a written complaint from management or another unit owner) *may* constitute a breach of the board's fiduciary duty of candor to the offending unit owner.

In addition, the business judgment rule, which presumes that a board made a decision on an informed basis and in good faith will not protect a board that refuses to share evidence of the alleged violation with the offending unit owner.

Tips for Violation / Fine Notices and Hearings:

- Violation / Fine Notices must contain (i) what provisions of the association's governing documents the unit owner is alleged to have violated; and (ii) an offer to provide a copy of the complaint or evidence submitted to the board that serves as the basis of the accusation; and
- Only acts listed in the complaint may serve as a basis for a fine. The fact that a unit owner acted poorly in the past (but no violation notice was issued for such behavior) cannot factor into a board's decision on violations or fines.

III. Be Aware of a Potential "First Amendment" Defense

Section 18.4(h) of the Act prohibits a board from imposing or enforcing rules that "impair any rights guaranteed by the First Amendment to the Constitution of the United States[.]" In *Boucher*, the appellate court interpreted this provision of the Act as prohibiting boards (even if they are not "state actors" / governmental entities) from adopting or enforcing any rules that prohibit free speech, peaceable assembly or the exercise of religion (i.e., First Amendment-type rights). For example, a unit owner who yells profanities at management or another unit owner *may* (or may not) be protected against a violation / fine from the board, as enforcing a rule against this type of conduct may violate the offending unit owner's rights and Section 18.4(h) of the Act.

Tip:

- Be aware that a unit owner is entitled to some level deference for free speech and if the board does decide to bring a violation based on a unit owner's speech, keep a record of exactly how the conduct violates the rules (e.g., profanities, excessive noise, etc.).

As always, please feel free to contact us with

any questions.

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