

AGENDA

NAVIGATING *PALM II*: A DISCUSSION OF KEY TOPICS AND BEST PRACTICES FOR ILLINOIS ASSOCIATIONS

- I. Introduction to the *Palm II* Case
- II. Key Concepts of *Palm II* and Important Major Topics
 - Open Meetings -- Closed Sessions, Workshops and Quorums
 - Breach of Fiduciary Duty
 - Following the Statutes and Association Documents
 - Delegation of Authority
- III. What *Palm II* Held
- IV. What We Think Associations Need to Do
- V. What We Recommend Associations Should Do
- VI. Final Thoughts on *Palm II*

- iv. Must resolve in open session to take all action, including resolve to take action produced from closed session deliberation and meetings.
 - v. Avoid committee composition with a quorum of board members and prevent committees with board members equaling a quorum, even if there are multiple other committee members that are not board members.
- b. The Court found a potential for personal liability for breach of fiduciary duty against individual board members.
- i. Transacting business improperly may be grounds for breach of fiduciary lawsuits or claims in a pending action.
 - ii. Whether such action is an actual breach of fiduciary duty is mostly a factual inquiry and something decided by a court or a jury, but owners now have a roadmap towards a colorable claim to make that may survive a motion to dismiss.
 - iii. Liability may be individual and personal to board members found in breach of fiduciary duty.
 - iv. Breach of fiduciary duty claims may not be covered by insurance in some situations and can be costly to defend or to pay.
- c. The Court required a stringent and strict reading of community documents and the Acts that govern them.
- i. Mailing or delivery of notices for meetings, must follow documents to the exact letter. The Condominium Property Act provides for mailing or delivery, non-condo associations may depend on the documents.
 - ii. Sufficiency and function is no longer a valid justification after the fact, courts may now look to



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Lake Shore Drive Condo. Ass'n., 2014 IL App (1st) 111290, P. 51, 2014 Ill. App. LEXIS 292 (Ill. App. Ct. 1st Dist. 2014). (internal citations omitted)

ii. Boards may not conduct canvassing or voting via email messages. Any item of business that would be part of an open meeting must be at an open meeting. *Palm v. 2800 Lake Shore Drive Condo. Ass'n.*, 2014 IL App (1st) 111290, P. 64-68, 2014 Ill. App. LEXIS 292 (Ill. App. Ct. 1st Dist. 2014).

b. The Court defines "conducting board business" for the purpose of determining what constitutes a meeting as follows:

i. "'Conducting board business," as used in the definition of a board meeting in 765 ILCS 605/2(w) (2004), encompasses discussion of association matters by the board in workshop and executive sessions. ... Although the board may discuss and consider the three excepted subjects in closed meetings, it is still required to vote on these matters at a meeting or portion thereof open to any unit owner. The plain language of this section leads to the conclusion that, not only must all board voting occur at meetings open to unit owners, so must all board discussion or consideration of association matters, except for discussion or consideration of the three specified exceptions." *Palm v. 2800 Lake Shore Drive Condo. Ass'n.*, 2014 IL App (1st) 111290, P. 53-55, 2014 Ill. App. LEXIS 292 (Ill. App. Ct. 1st Dist. 2014).

c. The Court holds that resolving to take action on litigation should also be finalized by vote in an open meeting:

i. "The question of whether to assert or defend a lawsuit and, necessarily, whether to expend association funds and resources on such litigation is

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- clearly a question involving the business of the association. Although Illinois Condominium Property Act § 18(a)(9), 765 ILCS 605/18(a)(9) (2004), provides an exception allowing the board to discuss litigation matters in closed sessions, it specifically provides that the board must vote on any litigation matter at meeting open to all unit owners.” *Palm v. 2800 Lake Shore Drive Condo. Ass’n.*, 2014 IL App (1st) 111290, P. 87, 2014 Ill. App. LEXIS 292 (Ill. App. Ct. 1st Dist. 2014)
- d. The Court holds that mailing or delivery of all notices of meetings is required; this depends on the governing Act’s language (Condo Act, CICA, etc.).
- i. “Illinois Condominium Property Act § 18(a)(9), 765 ILCS 605/18(a)(9) (2004), provides that notice of board meetings shall be mailed or delivered at least 48 hours prior thereto, unless a written waiver of such notice is signed by the person or persons entitled to such notice.” *Palm v. 2800 Lake Shore Drive Condo. Ass’n.*, 2014 IL App (1st) 111290, P. 126-127, 2014 Ill. App. LEXIS 292 (Ill. App. Ct. 1st Dist. 2014).
- e. The Court holds that failure to follow declarations and Acts may be grounds for breach of fiduciary duty lawsuits if the Board fails to exercise due care:
- i. “The fiduciary duty owed by board members of a condominium association to unit owners requires that board members act in a manner reasonably related to the exercise of that duty, and their failure to do so results in liability for the board and its individual members. However, when a board properly exercises its business judgment in interpreting its own declaration, a court will not find the board’s interpretation a breach of fiduciary

duty. The business judgment rule defeats breach of fiduciary duty claims where the board's actions were not permitted under the condominium declaration. Under the business judgment rule, absent evidence of bad faith, fraud, illegality, or gross overreaching, courts are not at liberty to interfere with the exercise of business judgment by corporate directors. The purpose of the rule is to protect directors who have been careful and diligent in performing their duties from being subjected to liability from honest mistakes of judgment. However, if board members have failed to exercise due care, then they may not use the business judgment rule as a shield for their conduct." *Palm v. 2800 Lake Shore Drive Condo. Ass'n.*, 2014 IL App (1st) 111290, P. 111, 2014 Ill. App. LEXIS 292 (Ill. App. Ct. 1st Dist. 2014).

- f. The Court holds that this "Due Care" standard can be satisfied by obtaining a legal opinion:
 - i. "One component of due care is that directors must inform themselves of material facts necessary for them to properly exercise their business judgment. To that end, if a board seeks legal advice before reaching its decision and relies on that advice in reaching its decision, it will be found to have properly exercised its business judgment." *Palm v. 2800 Lake Shore Drive Condo. Ass'n.*, 2014 IL App (1st) 111290, P. 112, 2014 Ill. App. LEXIS 292 (Ill. App. Ct. 1st Dist. 2014).
- g. Attaching personal liability to board members, even if the outcome is not improper, may be possible for breach of fiduciary duty claims: reaching the right result may not save a Board from taking the wrong path to get there.

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make a clear record. Move to act, obtain a second, vote on the action, and record each step in your board minutes.

- d. Resolutions delegating to managers, committees, or other designees regarding day to day management, emergency management, and collection actions will help to alleviate some of the strain of frequent meetings.
- e. Waiver of notice may avoid problems with mailing if owners agree to waive notice for other delivery means.
- f. Board action on the record regarding litigation is a careful subject. This creates a real difficulty for the minds of attorneys because we prefer to avoid, at all cost, any potential waiver of attorney-client privilege or disclosure of information communicated within that attorney-client privilege. The *Palm II* case can be read narrowly to specify that the decision to initiate or defend a piece of litigation should be entered on the open record. This can be read to mean only the decision to start a case or defend a case, and not each step as the case goes along. It is probably safe to record the decision to settle or terminate a piece of litigation on the open record as well.
- g. The Court didn't state this, but it is possible that the *Palm II* board could have insulated itself by obtaining a legal opinion. Had the board obtained a legal opinion that approved of its closed workshops, notice procedures, and actions taken, it may have been able to rely on the business judgment rule. Relying on the advice of a qualified professional does not mean taking this seminar to heart or relying on a newspaper article about HOA law, it means that the board obtains a legal opinion from its counsel on the specific issue *before* taking the action in question.
- h. Though not part of the decision, beware of the parties

behind the case. The Plaintiff here is a retired law professor and was likely not deterred by the cost of litigation against the Board while representing himself.

V. What we recommend

- a. Have an opinion letter drafted to get your association’s attorney’s opinion on what is best. The business judgment rule still protects boards and may provide some needed insulation if *Palm II* questions arise in the future.
- b. Have a resolution to management, committee, or proper designee regarding emergencies, collections, and general activities.
- c. Be careful with what makes a meeting – any quorum of board members discussing board business is a meeting.
- d. Contracts must be approved by a full board vote or the authority to make contracts should be delegated to a property manager; at no time may a contract be approved by less than a majority of the board.
- e. Check your documents for a quorum: every association may set a higher quorum, but the minimum quorum under the Condo Act is a majority (18(a)(14)) and will be set by community documents for CICAA and NFPCA properties.
- f. Email with caution: emailing regarding substantive matters is not allowed and board members may not deliberate by email. We assume that ministerial emails such as reminders regarding meeting times are acceptable, but the *Palm II* case did not go into this detail.
- g. Notice of board meetings is proper for Condo Act and CICAA properties on forty-eight hours notice. For Condo Act properties, this is mailed notice and posted in the

commons. For CICAA properties, this will be per 1-40(b)(4), and will use a “prescribed delivery method or by posting in entranceways, etc,” plus what is required in the association’s documents. NFPCA properties will be different depending on their bylaws.

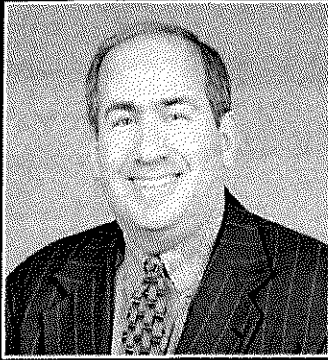
- h. Delegate what you can: Generally, boards may delegate their obligations to a property manager, but those obligations usually are limited to the upkeep and maintenance of the property, the collection of assessments, and keeping of records. The board still retains a “final say” in how the property is operated. Directors should be careful to hold their required meetings, still, and keep full records even if the property manager has taken care of most business as delegated.
- i. Delegate what you want: Ultimately, a board may delegate as much or as little to a property manager as it would like. The decision rests with the board: some boards opt to delegate bookkeeping and collections items to their manager, while others have full-service managers. At a minimum, it may be useful to delegate collections, emergency, and maintenance responsibilities clearly in resolution form to allow for more fluid and timely responses to day-to-day operations and crisis situations.
- j. Waiving Notice: Boards may wish to consider having waivers of notice signed by owners on file to allow for more flexible meeting notice procedures. Though the *Palm II* case does not allow this specifically, an owner does have the right to waive notice of a meeting which functions as their surrender of any objection to how the meeting was called or through what notice. This could be a workable way to avoid the increased mailing costs associations may face in the wake of the *Palm II* decision.

SUPPLEMENT TO *PALM* // HANDOUT

New Language in Section 18.4 of the Condo Act Permits Electronic Notice to Consenting Owners

A bill recently passed and signed by Governor Quinn, officially enacted as Public Act 98-735, will permit condominium associations to adopt rules authorizing electronic delivery – including via email -- of notices and other association communications that are required under the Illinois Condominium Property Act (the “Act”). This statute, effective January 1, 2015, creates a new subsection (s) to Section 18.4, which includes the new terms as well as some language formerly in subsection (r).

Section 18.4 of the Act spells out powers and duties that the Act grants to association boards. The new language will permit boards to draft or amend rules and regulations that allow for electronic notices to each unit owner who: 1) gives the association written authorization to do so; and 2) provides the association with an electronic address for such communications. In addition, the provision authorizes unit owners to designate an electronic address, a U.S. Postal Service address, or both, as that owner’s address on the association’s official list of contact information. The January effective date should provide sufficient time for associations to prepare and adopt the necessary rules and procedures. Contact Tressler’s Condo Law attorneys if you need assistance.



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Practice Areas

- Condominium & Common Interest Community Association Law
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- Employment & Labor Relations
- Finance & Taxation
- Licensing & Permitting
- Litigation, Liability & Insurance
- Planning, Zoning, Annexation & Land Use
- Regulatory & Administrative Law
- Tax Increment Financing Districts, Redevelopment Districts & Incentive Agreements
- Local Governmental Law
- Open Meetings Act & Freedom of Information Act Compliance

Education

- J.D., Widener University School of Law, Delaware
- B.A., Georgetown University

Bar Admissions

- Illinois, 1988
- Pennsylvania, 1983
- New Jersey, 1983

Practice Focus

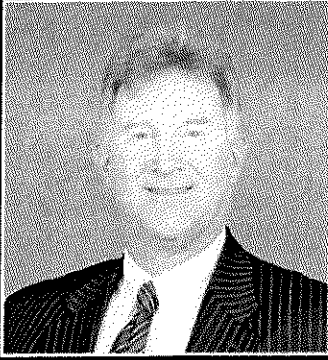
David focuses his practice on condominium law, municipal and local governmental law including cities, villages and park districts, land use and zoning, real estate and litigation.

Memberships & Affiliations

- Illinois State Bar Association, *Member*
- Chicago Bar Association, *Member*
- DuPage Bar Association, *Member*
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Publications & Presentations

David is a frequent lecturer on various municipal topics including the Open Meetings Act and the Freedom of Information Act.



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Education

- J.D., DePaul University College of Law, with honors
- B.A., Journalism, University of Illinois at Urbana-Champaign

Bar Admissions

- Illinois, 1994

Court Admissions

- U.S. District Court (N.D. of IL)
- U.S. District Court (C.D. of IL)
- U.S. District Court (S.D. of IL)

Practice Focus

Jim Arrigo is an attorney in our condominium and common interest community association practice group. Jim's practice involves all aspects of condominium and common interest association representation, including advising clients on their rights and responsibilities under applicable statutes, interpreting and applying their governing instruments and litigating all manner of association matters, from injunctions to collections. Jim also handles cases on behalf of local governmental entities and commercial clients.

Jim has litigated a wide range of issues on behalf of condominium and common interest community associations, as well as municipalities and commercial and individual clients. Jim brings years of experience in association matters to bear in counseling clients and resolving problems both in and out of court.

Professional Background

Prior to joining Tressler LLP, Jim successfully defended physicians and hospitals in medical malpractice actions from 1999 to 2004, represented corporations in the petroleum and metals industries in asbestos actions and handled federal multi-district litigation involving medical products.

Memberships & Affiliations

- American Bar Association, *Member*
- DuPage County Bar Association, *Member*
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- Commercial
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Education

- J.D., Case Western Reserve University School of Law, 2007
- B.A., Political Science, University of Chicago, 2004

Bar Admissions

- Illinois, 2008

Court Admissions

- Illinois Supreme Court
- U.S. District Court (N.D. of IL)
- U.S. District Court (N.D. of IN)
- U.S. District Court of Colorado

Practice Focus

James Stevens represents condominium and homeowners associations in litigation, collection and transactional matters. He also represents business and individual clients in commercial litigation disputes, real estate litigation matters and real estate transactions.

His experience includes representing condominium associations and common interest community associations in a variety of areas, including rule enforcement, interpretation of governing documents and collection of assessments. Additionally, he provides advice to clients on their rights and responsibilities under the Illinois Condominium Property Act, the Forcible Entry and Detainer statute, the Illinois Business Corporations Act and Not for Profit Corporation Act, and the Common Interest Community Association Act. He has assisted condominium associations, from small to large, in developer turnover matters, construction defect lawsuits, defense of boards of directors in unit owner lawsuits, and day-to-day operational concerns.

Professional Background

James joined Tressler LLP as Senior Counsel in March 2013. Previously he was an associate with Nielsen, Zehe & Antas, P.C. where he practiced in condominium and homeowners association law, commercial litigation, and insurance subrogation and recovery. Before, he was an associate in the commercial litigation practice group of Connelly Law Group, now Rock Fusco & Connelly LLC, also representing community association, individual and business clients.

He has been admitted *pro hac vice* in various jurisdictions and is currently admitted to practice in the State of Illinois and the United States District and Bankruptcy Courts for the Northern District of Illinois, Northern District of Indiana, and District of Colorado.

While in law school at Case Western Reserve University School of Law, James was a member of the school's moot court team, received the CWRU Leadership Award, and participated in the Milton Kramer Law Clinic. He earned his undergraduate degree from the University of Chicago, which has honored him with a Howell Murray Alumni Association Award and Young Alumni Service Citation. While at the University of Chicago he was a member of the Maroon Key Society, the College's honorary society.

Memberships & Affiliations

- American Bar Association, *Member*
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- DuPage County Bar Association, *Member*
- Illinois State Bar Association, *Member*
- American Constitution Society for Law and Policy, *Past Member – Board of Directors*

Publications & Presentations

James frequently presents to local organizations, local government offices, and community groups on community association related topics, including developer turnover, condominium assessment collections, and other areas.