

MICHAEL C. KIM & ASSOCIATES

Attorneys at Law
19 South LaSalle Street
Suite 303
Chicago, Illinois 60603

Michael C. Kim
E-mail: mck@mkimlaw.com

Telephone: (312) 419-4000
Facsimile: (312) 419-4008

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Board of Directors
River Bank Lofts Condominium
c/o The Building Group
550 N. Kingsbury
Chicago, Illinois 60610

Re: River Bank Lofts Condominium Association
Board of Directors Status

Dear Members of the Board:

At your request, we have reviewed the situation involving the prior annual meetings/elections of the Board going back to 2006 and issue this opinion with regard to the status of the current and prior Boards.

It is our understanding that in some prior years, despite the absence of a quorum, the Board conducted the annual meeting/election which was uncontested (in other words, the number of candidates did not exceed the number of director positions up for election). The Board took such action upon the recommendation of its Management Agent. In retrospect, if there was an absence of a quorum, the annual meeting/election should have been re-scheduled and attempts made to achieve a quorum at a subsequently scheduled annual meeting/election. Apparently, there was also a misunderstanding that when a vacancy on the Board is filled by appointment by the remaining directors on the Board, that appointment only lasts until the next annual meeting or a specially called election meeting. The annual meeting and election of the Association was scheduled originally for December 14, 2009, but has been rescheduled for January 7, 2010.

The questions posed by the Board to us are (1) What is the status of the current and prior Boards of Directors? and (2) What is the legal effect of decisions made and actions taken by the current and prior Boards of Directors on such matters as contracts with third parties, adoption of budgets and assessments, etc.?

We note that the Association is an Illinois condominium association and also a not-for-profit corporation organized under the General Not-For-Profit Corporation Act of 1986. Apart from the Declaration of Condominium Ownership and By-Laws for the Association, the Association is governed by both the Condominium Property Act and the Not-For-Profit Corporation Act.

Section 108.10(d) of the Not-For-Profit Corporation Act provides that “despite the expiration of a director’s term, he or she continues to serve until the next meeting of members entitled to vote on directors at which directors are elected.” In addition, Section 108.10(e) provides that “each director shall hold office for the term for which he is elected and until his successor shall have been elected and qualified.” These provisions are consistent with general corporate practice whereby a director continues to serve as a director, despite the technical expiration of his/her term of office, until such time as his/her successor is duly elected and qualified. The practical purpose for such statutory provision and general corporate practice is to not leave a corporation bereft of directors automatically on the date of expiration of term of office, when a successor director has not yet been duly elected and qualified. Otherwise, there could be chaos and a potentially detrimental interruption of corporate governance.

Article V, Section 5.06(a) of the Declaration provides that the Board is to be comprised of five members, with staggered terms of office, which each term being two years. Thus, in any given year either three or two director positions would be up for election. Section 5.04(a) of that Article specifies a 20% quorum, which is also in accordance with the Condominium Property Act. Finally, Section 5.04(b) of that Article provides that the annual meeting is to be held on the second Tuesday of November at 7:30 p.m., or at such other reasonable time or date as may be designated by written notice of the Board.

We have identified a number of judicial decisions that are particularly applicable to this situation:

In Adams v. Meyers, 250 Ill.App.3d 477 (1993), the Illinois Appellate Court concluded that failure to take legal action with regard to a questionable election renders such a challenge to be moot by the occurrence of a subsequent election. In other words, if a unit owner wishes to challenge the propriety of an election, that unit owner must bring his/her action prior to the occurrence of a subsequent election (typically annually) or else such challenge is rendered moot and no longer subject to judicial review.

In Board of Directors of General Apartment Corporation Condominium v. Gans, 340 NYS 2d 826 (1972), the Civil Court of the City of New York ruled that assessments paid by unit owners to a board of directors precluded a subsequent challenge by certain unit owners as to the elected status of that board. The New York court noted that the unit owners should have sought equitable legal action to address the validity of the election and those unit owners could not retroactively challenge assessment levied and

collected by the board of directors. In addition, the court upheld the board of directors as being a "de facto board".

In Rotary Club of Chicago v. Harry F. Shea & Company, 120 Ill.App.3d 988 (1983), the Illinois Appellate Court dealt with a dispute between rival directors and officers of a private organization. The Court noted that the challengers to the election did not follow the required method for challenging the election; thus, the challenged board's decision as to the validity of the election was never properly contested. The Court referred to an Illinois Supreme Court decision in Waterman v. Chicago & I.R. Co., 139 Ill. 658 (1892).

In the Waterman decision, the Illinois Supreme Court discussed the factors relevant to establish a de facto board of directors (as opposed to a de jure board of directors – that is, a board of directors that was legally and properly elected in accordance with applicable requirements). The Illinois Supreme Court stated that "a de facto officer is distinguished on one hand from a mere usurper of an office, and on the other hand from an officer de jure. He is one who has an actual possession of an office, under claim and color of an election or appointment, and is in the exercise of its functions and the discharge of its duties. . . . " 'an officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.' . . . 'in order to make a person an officer de facto the law requires that he should in some way be put in the office and that he would also have secured such a holding thereof as to be considered really in peaceable possession, and actually exercising the functions of an officer". In that case, since the challenged board was neither qualified as a de facto board nor as a de jure board, the actions of that board were invalid and did not have any binding legal effect.

Subsequently, in Howard v. Burke, 248 Ill. 224 (1910), the Illinois Supreme Court dealt with the claims of competing elected school boards. In that case, the Court again addressed the qualifications of a de facto board/officer, stating "there must be at least a fair color of right or an acquiescence by the public in his official acts so long that he will be presumed to act as an officer either by right of appointment or election . . . Color of title to an office has been defined to be 'that which in appearance is titled but which in reality is no title' . . . Color of authority (which is usually considered synonymous with color of title) to an office as held to be authority derived by an election or appointment, however irregular or informal, so that the incumbent is not a mere volunteer". In that case, the Court found that, despite not being properly elected, one of the school boards had in fact assumed the functions and actions of the properly elected board (even though they were not) and upheld the de facto board's levy of taxes. The Court noted that "judicial decisions are practically a unit in holding that acts of officers de facto, so far as they affect third parties or the public, in the absence of fraud, are as valid as those of officers de jure".

Based upon the foregoing case law, if there were any irregularities with regard to prior Boards of Directors but those prior directors were put in office by election or

appointment (even though such election or appointment was irregular), those prior Boards would be deemed de facto boards of directors and their actions would be legally effective and binding.

The de facto concept would be further reinforced by the Illinois Appellate Court ruling that unless an election is challenged before the holding of a subsequent election, any such challenge is rendered moot and would not be judicially heard.

In conclusion, with respect to the particular situation involving the Association at this time, it is our opinion that the prior and current Boards are de facto Boards and actions of the prior and current Boards are legally effective, valid and binding. Furthermore, it is our opinion that the irregularities with respect to any election prior to 2009 have been waived and that no challenge can be made at this time to the results of those annual meetings/elections. With regard to a challenge to the current (2009) Board, such challenge must be legally instituted before the conduct of the next annual meeting.

With respect to the conduct of the next annual meeting, it would be appropriate at a minimum to have the two positions (that would be up for election at this time) plus the position filled by vacancy (for the remaining one year of that term) be put before the unit owners for election. To the extent that the Board, in its discretion, wishes to put all five positions up at the next annual meeting/election, such action would not be legally necessary but would serve to eliminate any doubt and would establish the thus elected board fully as a de jure board, apart from being a de facto board.

I trust the foregoing is responsive to your inquiry and useful to the Board in its consideration of this matter. If the Board has any questions or wishes to discuss any aspect of the foregoing, please let me know.

Very truly yours,



Michael C. Kim

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