

## **Act 17: New Changes to Dispute Resolution for Common Interest Communities**

By: Erik M. Hume<sup>1</sup>

The Legislature continued its tradition of making incremental changes to Pennsylvania's common interest community ("CIC") laws with the passage of House Bill 595, now known as Act 17 of 2018. Other recent amendments have had a significant effect on common interest communities. Will Act 17, which primarily focuses on dispute resolution, continue that trend?

Pennsylvania's common interest communities—condominiums, cooperatives and planned communities— are governed by their own similar, yet distinct, acts. Somewhat surprisingly, none of the three acts (the Uniform Condominium Act, the Real Estate Cooperative Act and the Uniform Planned Community Act) address dispute resolution in depth; instead, the drafters appear satisfied allowing disputes to be addressed under existing law and whatever procedures a declarant could conjure in the community's governing documents. Moreover, except in limited circumstances involving planned communities, the Legislature did not include a role for the Bureau of Consumer Protection of the Office of Attorney General. Again, the Legislature appeared content allowing the parties and the courts to settle their differences.

Enter Act 17. Signed into law by Governor Wolf on May 4, Act 17 amends all of the CIC statutes in three ways. First, the Act incorporates alternative dispute resolution requirements; second, it expands the role of the Bureau of Consumer Protection to include all CICs, albeit in limited circumstances; and finally, it provides for the possible awarding of attorneys' fees when litigating disputes.

The addition of alternative dispute resolution to the CIC statutes is an interesting choice. Act 17 requires that all new communities include ADR provisions in their governing documents, and further permits existing communities to amend their bylaws to add ADR concepts. (The drafters chose bylaws amendments since bylaws are generally easier to amend than recorded

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declarations.) While Act 17 does not specify what methods of ADR may be employed, it does set specific limits on their use. First, ADR may only be mandated for use in disputes between unit owners or the association and a unit owner. ADR is not required for disputes involving declarants or other third parties. Second, ADR is not required to be mandatory nor binding. While communities will be required to provide the option, either party may opt out, and the existence of an ADR option does not impair the right of a party to pursue a private cause of action. Finally, the costs of ADR are to be borne equally by the parties.

Interestingly, ADR was never prohibited under the CIC statutes. In fact, some commentators have strongly suggested that practitioners include ADR provisions in their community documents. (See, for instance, *Pennsylvania Community Association Law and Practice*, Section 8.09(f)). Thus, ADR is a concept already in place in several associations. What remains to be seen is what effect, if any, the provisions of Act 17 will have on any ADR provisions in existing community documents.

Despite the inclusion of ADR provisions, the primary purpose for HB 595 was expanding the role of the Bureau of Consumer Protection. Previously, the Bureau had a role in disputes concerning the financial records only of planned communities. Act 17 changes that. Now, aggrieved unit owners in all three types of CIC's may file a complaint with the Bureau in certain circumstances.

There are several limitations on the Bureau's ability to intervene. First, complaints may only be filed concerning violations of enumerated CIC statute sections involving meetings, quorums, voting and proxies, and association records. Second, only "unit owners in good standing" (defined as unit owners current in payment of assessments and fines, unless non-payment is directly related to the dispute) can file complaints. Third, if an ADR option exists under the community documents, then that route must be exhausted before elevating the dispute to the Office of the Attorney General. Finally, Bureau review is limited to disputes between a unit owner and either a declarant or the association. Disputes among unit owners are not covered.

Act 17 does not identify how the Bureau is to address disputes, nor does it specify if the Bureau has standing to bring legal action to enjoin questionable behavior. The Bureau's authority to act on behalf of consumers arises primarily under the Unfair Trade Practices and Consumer Protection Law. Improper behavior by a community association does not clearly fall under the conduct prohibited by the UTPCPL. Therefore, it remains to be seen how the Bureau will respond to complaints, beyond attempting to mediate disputes.

The final change effected by Act 17 is the addition of fee shifting provisions to the CIC statutes. Previously, the CIC statutes permitted a court to award punitive damages in the event a declarant or other person subject to the CIC statutes "willfully violated" the applicable law or community documents. In all three instances, a court can now award costs and attorneys' fees "if appropriate."

To fully understand Act 17, one should look at its history. Like most legislation, Act 17 is a product of the proverbial sausage-making process where the final product is significantly different than its original draft. Act 17 began as House Bill 1774 in the 2015 — 2016 session, introduced by Representative Rosemary M. Brown of Monroe County. The original bill, as introduced, merely provided that the Bureau of Consumer Protection "shall investigate or mediate" any complaint from a unit owner against an association for violations of the respective acts or community documents. *HB 1774 (2015-2016 Session), PN 2702*. Later revisions of HB 1774 added (and then revised) the ADR provisions, reduced the jurisdiction of the Bureau and incorporated the fee shifting provisions. HB 1774 was adopted by the House of Representatives in the 2015 — 2016 session, only to die in the Senate. Reintroduced as HB 595 during the current session, in the same form as previously passed the House, it passed both chambers and became law upon signing by the Governor.

What will be the practical effect of Act 17 on common interest communities? I expect the effect to be limited. Practitioners who have not been including ADR provisions in their form documents will need to add such provisions. Ronald B. Glazer, Esq. includes model language in his *Pennsylvania Community Association Law and Practice* that would be a good starting point

for any practitioner. As ADR provisions proliferate, I suspect there will be a slight uptick in their use, but the fact ADR is neither binding nor mandatory will likely temper the demand for it.

Likewise, I do not foresee a great burden being placed on the Bureau of Consumer Protection, due to the limits imposed on its jurisdiction to hear CIC complaints. The Legislature got this one right. Disputes over meetings, voting and access to association records affect the fundamental rights of unit owners. Considering the quasi-governmental role associations play, it seems appropriate to have a watchdog ensure that a unit owner's right to vote and monitor association governance is honored. Had the scope of the original draft of HB 1774 been maintained, the Bureau would be inundated with complaints over assessments, fines and use restrictions. Regardless of their value or merit, the Bureau would have had to address these complaints. The courts already provide an adequate forum to handle these types of disputes.

In my opinion, the addition of fee shifting is the most interesting aspect of Act 17, and will likely play a role in all manner of disputes involving CICs. The broad language of the relevant sections effectively make all disputes involved CIC issues subject to the fee shifting provisions. While an award of fees and costs is not mandatory, any party to a suit involving a CIC will certainly make a demand for them. All litigants will need to consider such costs in litigation strategy. Furthermore, while the inclusion of fee shifting would seem to help accomplish the original goal of the legislation, which was to empower unit owners where the association acted improperly, it can also be implicated in disputes between unit owners.

There is other pending legislation affecting CICs, the most notable of which is House Bill 1499, which would address certain governance and common element issues in CICs. As CICs rise in importance and residential development continues to become more complex, I believe the trend of frequent revisions to the CIC laws will continue.