

# ACKERLY & WARD

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## TESTIMONY OF WILLIAM W. WARD, ESQ. BEFORE THE JUDICIARY COMMITTEE MARCH 25, 2013

### REGARDING RAISED BILL NO. 1145 AN ACT CONCERNING REVISIONS TO THE COMMON INTEREST OWNERSHIP ACT AND THE CONDOMINIUM ACT

#### I. SUMMARY OF TESTIMONY:

Raised Bill No. 1145

- A. I oppose the provisions of Raised Bill No. 1145 (Section 1 C.G.S. Section 20-458 new (c)), which seeks to hold an association's board of directors liable for property manager's failure to comply with the association's bylaws and Chapter 825 (The Condominium Act) and Chapter 828 (The Common Interest Ownership Act).
- B. I oppose the provision of Raised Bill No. 1145 (Section 2 - C.G.S. 47-250(b)(5)), which requires 5 days prior notice of a Board meeting by removing the exemption for meetings held in accordance with a previously published schedule of meetings.
- C. I oppose the provision of Raised Bill No. 1145 (Section 3 - C.G.S. 47-252(c)), which obligates associates to provide proxies and to delete the name of the proxy holder from ballots.
- D. I support the provision of Raised Bill No. 1145 (Section 4 - C.G.S. 47-260(a)(1)), which requires detailed records or receipts and expenditures of reserve accounts.
- E. I oppose the provision of Raised Bill No. 1145 (Section 5 - C.G.S. 47-255(d)), which deletes the requirement that the association's master policy be the primary insurance in the event of a loss.
- F. I support the provisions of Raised Bill No. 1145 ((Section 6 - C.G.S. 47-253(e)) and (Section 7 - C.G.S. 47-68a)), which prohibit criminal prosecution of members of the Board of Directors unless they are acting outside the scope of their authority.

## ACKERLY & WARD

### II. BIOGRAPHY OF WILLIAM W. WARD:

William W. Ward is a graduate of Fairfield University (B.A. 1978 – magna cum laude) and the Columbus School of Law at The Catholic University (J.D. 1981), where he was a member of the Law Review. He clerked for the Honorable C. Murray Bernhardt in the United States Court of Claims (1981 – 1983). He was admitted to the bars of the State of Connecticut, State of Maryland, and District of Columbia and currently practices solely in Connecticut. He is a member of the Connecticut Bar Association, Fairfield County Bar Association, and the Federal Bar for the District Court for the State of Connecticut. He serves as a Special Master for the Connecticut Superior Court. He is currently a member of the Board of Directors for the Connecticut Chapter of the Community Association Institute. His practice concentrates on common interest communities, common interest community developments, and civil litigation.

Mr. Ward has lectured on legal issues involving community associations for the Connecticut Bar Association, Fairfield County Bar Association, Community Association's Institute, Connecticut Housing Finance Authority, and community associations. He has also published multiple articles concerning community association's legal issues for local and state publications.

Mr. Ward lived in a condominium for 10 years, served on its Board of Directors for 6 years, and has represented condominium associations, individual unit owners, and developers for twenty-nine years. Mr. Ward is a principal in Ackerly & Ward in Stamford, Ct, which provides legal services to over 150 community associations.

### BACKGROUND AND PERSPECTIVE

I am testifying today from a unique viewpoint. I lived in a 200-unit condominium for 10 years and was on the Board of Directors for 6 years. I represent individual Unit Owners in disputes with Associations, over 150 Community Associations, and developers in developing a 53 Unit project in Stamford and up to 600 Units in Moodus. Therefore, my opinion on the proposed legislation is based upon viewing the issues from all perspectives.

In my experience, as with any subset of the population, there are extremes. In my 29 years of dealing with Associations and Unit Owners there is a very small percentage of Unit Owners, who view their ownership of a Unit as having all of the rights that they would have if it were a single-family home, which creates tension between them and the Board. There are also some Boards, who do not enforce the documents, but make decisions based upon what they believe are reasonable. The vast majority, however, probably eighty-five to ninety percent (85-90%) of Unit Owners and Associations, operate within the prescriptions of the law and their rights and responsibilities under the condominium documents. Therefore, my opinion is that changes, which create more duties and responsibilities for the volunteers on the Board of Directors are unnecessarily burdensome and will result in qualified owners refusing to sit on the Board of Directors and needless disputes with unit owners.

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II. ANALYSIS:

A. Board Members Ensuring Compliance by Managers

Section 1. Section 20-458 of the general statutes is amended by adding subsection (c) as follows (*Effective October 1, 2013*):

**“(NEW) (c) An association's board of directors, as defined in section 47-68a, or executive board, as defined in section 47-202, shall ensure that any community association manager under contract to provide association management services to an association provides such services in full compliance with the association's bylaws, as well as the provisions of chapters 825 and 828, as applicable.”**

My objection to the proposed amendment is making it an obligation of the Board of Directors to “ensure” compliance by the property managers. Managers are obligated to comply with the law and bylaws pursuant to the terms of their management contracts already. As an agent of the association, the manager is only empowered to act in accordance with the directives of the Board. The Board can delegate duties, but not responsibility. Therefore, the managers must remain responsible for complying with the applicable statutes and association documents.

Furthermore, it is increasingly difficult to encourage owners to volunteer to serve on the Board of Directors. This would create a new duty, and potential liability, without any guidance as to the consequences for the Board of Directors if a manager does not comply. That would only serve to dissuade owners from serving on the Board of Directors.

Finally, 20-450(b)(2) prohibits a management contract from including a covenant or agreement to indemnify a manager for loss or damage resulting from negligence or willful misconduct. That provides sufficient protection to owners because it holds the managers accountable to failing to comply with the bylaws or applicable statutes already, therefore, my opinion is that this provision is unnecessary and unduly burdensome.

B. Five Days Notice Required for All Board Meetings.

Sec. 2. Subdivision (5) of subsection (b) of section 47-250 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2013*):

**(5) Unless [the meeting is included in a schedule given to the unit owners or the] a meeting is called to deal with an emergency, the secretary or other officer specified in the bylaws shall give notice of each executive board meeting to each board member and to the unit owners. The notice shall be given at least five days before the meeting and shall state the time, date, place and agenda of the meeting, except that notice of a meeting called to adopt, amend or repeal a rule shall be given in accordance with subsection (a) of section 47-261b.**

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I oppose the provision of Raised Bill No. 1145 (Section 2 - C.G.S. 47-250(b)(5)), which requires 5 days notice of all Board meeting by removing the exemption for meetings held in accordance with a previously published schedule of meetings.

As stated previously, the overwhelming majority of associations run effectively and without controversy. Many associations, to save time and money, utilize the current exception, which allows Associations to publish a schedule of Board meetings annually instead of mailing a notice five days before a Board meeting to all owners. Everyone knows that the Board meets the second Tuesday or the third Monday of every month. Adding additional administrative work and expense when the current statute provides adequate notice provisions is simply unnecessary.

C. Mandatory Proxies and Deleting Proxy Holder's Name from Ballot

**“Sec. 3. Subsection (c) of section 47-252 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2013*): (c) Except as otherwise provided in the declaration or bylaws, the following requirements apply with respect to proxy voting: (1) Votes allocated to a unit may be cast pursuant to a directed or undirected proxy duly executed by a unit owner; (2) The association shall provide a proxy form to any unit owner who seeks to vote pursuant to a directed or undirected proxy; (3) If a vote is taken by ballot, any ballot cast by a directed or undirected proxy holder shall not include the name of the proxy holder;”**

I oppose the provision of Raised Bill No. 1145 (Section 3 - C.G.S. 47-252(c)), which obligates associates to provide proxies and to delete the name of the proxy holder from the ballot.

Connecticut law does not provide for a mandatory proxy form. In fact, the requirements are simple: the unit owner must identify himself/herself; identify the person being appointed to vote on behalf of the owner; the proxy must be dated; and the proxy must be signed by the unit owner (electronic signatures valid).

There are multiple types of proxies, however, which may or may not be applicable to a specific meeting. Current law allows directed proxies, undirected proxies, and partially directed proxies. Associations do not know what type of proxy an owner wishes to use nor should Associations be making that decision for them. Though some Associations do issue proxies with the meeting notice, their use is voluntary. Making it mandatory will increase the cost and administrative time without any guarantee that the form provided by the Association will be of use to the owners.

I oppose Section 3, which prohibits the name of the proxy holder to be included on the ballot, because I am unaware of any good faith reason to delete the name of the proxy holder from the ballot. A proxy allows another person to vote for the owner. Many associations vote in accordance with the percentage ownership interest of each unit

ACKERLY & WARD

owner. Therefore, it is essential to know what unit's ballot is being counted. If that unit is voting through a proxy, then it is necessary to confirm that the person submitting the ballot is the duly appointed proxy holder. Putting the proxy holder's name on the ballot allows the inspectors of election or of the vote to ensure the vote was cast in accordance with the terms of the proxy especially if issues arise after the vote.

D. Mandatory Records for Reserve Accounts

**“Sec. 4. Subdivision (1) of subsection (a) of section 47-260 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2013*):**

**(1) Detailed records of receipts and expenditures affecting the operation and administration of the association and other appropriate accounting records, including, but not limited to, records relating to reserve accounts;”**

I believe this provision is unnecessary given that the statute already requires detailed records of receipts and expenditures affecting the operation and administration of the association. That, by definition, should be interpreted to include the reserve account. If, however, the legislature believes that the language needs clarification so that Associations understand it also applies to reserve accounts I have no objection to the proposed language.

E. Deleting the Current Requirement That Master Association's Insurance Policies Provide Primary Coverage In he Event of A Loss.

**Sec. 5. Subsection (d) of section 47-255 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2013*):**

**(d) Insurance policies carried pursuant to subsections (a) and (b) of this section shall provide that: (1) Each unit owner is an insured person under the policy with respect to liability arising out of his interest in the common elements or membership in the association; (2) the insurer waives its right to subrogation under the policy against any unit owner or member of his household; and (3) no act or omission by any unit owner, unless acting within the scope of his authority on behalf of the association, will void the policy or be a condition to recovery under the policy. [; and (4) if, at the time of a loss under the policy, there is other insurance in the name of a unit owner covering the same risk covered by the policy, the association's policy provides primary insurance.]**

I strongly oppose the provision of Raised Bill No. 1145 (Section 5 - C.G.S. 47-255(d)), which deletes the requirement that the association's master policy be the primary insurance in the event of a loss.

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The Common Interest Ownership Act currently obligates the Association to carry a master policy of insurance, which covers losses to common elements and, in some circumstances, units as well. If there is damage or destruction, which is covered by the master policy and an individual unit owner's homeowner's policy, then the master policy is primary and the homeowner's policy can be used to supplement the coverage.

The benefit of the current provision is that it reduces the disputes between the insurers as to coverage of such losses. If C.G.S. Section 47-255(d)(4) is deleted, it will increase the cost to Associations significantly because Associations will be caught in the middle of disputes between the two insurers. It will force Associations into court just to determine which insurer must pay. Those costs are not recoverable under either policy and will lead to significant delays in making repairs. It may also force Associations to accept "settlements" with insurers less than the cost of the losses in order to avoid the delay and expense incurred in fighting the insurers. The current provision has a certainty of result with minimal delays or expense. Therefore, the proposed amendment should not be adopted.

F. Prohibiting Criminal Prosecutions of Members of Condominium Board of Directors or Executive Boards of Common Interest Communities.

**"Sec. 6. Section 47-253 of the general statutes is amended by adding subsection (e) as follows (*Effective October 1, 2013*):**

**(NEW) (e) No member of the executive board or officer of the association shall be criminally liable for any conduct performed on behalf of the association, provided the conduct is within the scope of such member's or officer's authority.**

**Sec. 7. (NEW) (*Effective October 1, 2013*) No member of a board of directors, as defined in section 47-68a of the general statutes, or officer, as defined in section 47-68a of the general statutes, shall be criminally liable for any conduct performed by the member on behalf of the association of unit owners, as defined in section 47-68a of the general statutes, provided the conduct is within the scope of such member's or officer's authority."**

I have been practicing condominium law for 29 years. During that time I have never had a Board Member arrested solely because they were the President of a condominium association - until 2010. The President of the Association had to appear in criminal court on nine separate occasions and the Association incurred legal fees of over \$40,000 before the charges (failure to correct a health code violation) were ultimately dismissed.

If there are criminal violations – housing, building, health, fire code, etc. – Associations – not individual Board members - can be charged in a criminal action. In those cases the state cites the Board of Directors – the legal representative of the Association - and monitors the progress made in correcting the violations. Upon satisfactory completion

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and verification from the appropriate inspector that the repairs are satisfactory, the criminal charges are dismissed.

It is already very difficult to find enough qualified Owners to undertake the responsibility of being a Board member. Allowing criminal prosecutions of Board Members acting within the scope of their authority will make it virtually impossible to obtain qualified owners to serve on the Board of Directors. As proposed, Board members would be insulated only if they are acting within the scope of their authority. Volunteers fulfilling their duties as Board members and dedicating their time to the operations of their community association should not have to worry about being charged criminally by the state nor have their personal reputations and/or professional licenses jeopardized.

Thank you for the opportunity to testify concerning this bill. If you need additional information or assistance, which I am able to provide, please contact me.

Respectfully Submitted,

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