

2020 Amendment to MCIOA Provides New Tools for Amending Old Documents

BY MICHAEL D. KLEMM

Minnesota Statutes Chapter 515B, the Minnesota Common Interest Ownership Act (“MCIOA”), has been amended to provide several new, practical alternatives for obtaining approval of amendments to the declaration, bylaws, or articles of incorporation of any common interest community in the state of Minnesota. The first section of this article provides a brief summary of how the Community Associations Institute Minnesota Legislative Action Committee (“LAC”) brought about this important change to Minnesota law. The rest of this article addresses the new alternatives for obtaining owner and mortgagee approval of amendments to association governing documents.

I. Background

In the fall of 2018, my law partner Joel Hilgendorf stopped by my office to discuss procedural hurdles that prevent many associations from updating and modernizing their governing documents. Prior to the adoption of MCIOA, it was common practice to require a large supermajority or even unanimous written consent of unit owners to amend an association’s governing documents. Many associations have been unable to update their governing documents because a small group of owners or even an individual owner decline to participate or oppose an important amendment. Joel suggested that the LAC propose an amendment to MCIOA to address owner approval requirements by creating a “deemed consent” provision or a court approval process.

In January 2019, the LAC decided to undertake this project for the 2020 legislative session, allowing one year for preparation. The LAC’s lobbyist, Patrick Hynes of Messerli Kramer, skillfully guided the process. After discussion and consideration of multiple versions of an amendment to MCIOA, the LAC provided the draft amendment to the Minne-

sota Common Interest Ownership Act Committee of the Real Property Law Section of the Minnesota State Bar Association (the “MCIOA Committee”) for review and comment. The LAC then provided the draft amendment to several real estate related interest groups. Finally, the LAC researched associations with compelling stories and identified legislators who could carry the bill through the legislative process.

Early in the 2020 legislative session, the bill drafted by the LAC was introduced in the Minnesota Senate and the Minnesota House of Representatives. Senator Mark Johnson (R-East Grand Forks) was the chief author of Senate File 3348, and Representative Andrew Carlson (DFL-Bloomington) was the chief author of House File 3274. Patricia Fisk, President of Old Shakopee Park North Condominium Association, testified before the Senate Judiciary Committee and the House Judiciary & Civil Law Committee, explaining that approval requirements made it nearly impossible to update her association’s documents and requesting the legislature’s help. Mr. Hynes provided further testimony to answer technical questions. The bill was approved by both committees and sent to the floor for final approval.

In March 2020, the coronavirus pandemic interrupted the legislative process, and the future of the bill became uncertain. Ultimately, the amendment to MCIOA was approved as part of a mini-omnibus bill during the last week of the regular legislative session and signed by Governor Walz on May 16, 2020, as Minnesota Session Laws 2020, Chapter 86, Article 3, with an effective date of August 1, 2020.

II. Deemed Consent of Owners

The 2020 amendment to MCIOA creates a new alternative for obtaining “deemed consent” of unit owners. This is intended to address the problem of amendments that fail due to lack of response from

unit owners who simply are not engaged in the process. Deemed consent of unit owners is addressed in a new subsection 515B.2-118(a)(7), as follows:

(7) If any provision of this chapter, the declaration, the bylaws, or the articles of incorporation requires the vote or consent of unit owners as a condition for the approval or effectiveness of an amendment to the declaration, the bylaws, or the articles of incorporation, the affirmative vote or consent of a unit owner is deemed to be granted if the association sends notice and a copy of the amendment, by certified United States mail, postage prepaid and return receipt requested, and (i) if a vote is conducted, the unit owner's vote is not cast against the proposed amendment, or (ii) if consent is requested, the unit owner's written refusal to consent is not received by the association within 60 days after notice is mailed. This subsection shall not apply to any amendment that would require execution by the association and certain unit owners pursuant to subsection (a)(2).

(Emphasis added.)

III. Deemed Consent of Mortgagees

MCIOA has provided for deemed consent of mortgagees since 2010. See Minnesota Statutes section 515B.2-118(a)(5). However, until now, this has only applied to common interest communities that are subject to MCIOA. The 2020 amendment to MCIOA revised Minnesota Statutes section 515B.1-102(g) to provide that section 515B.2-118(a)(5) shall apply to all common interest communities located in Minnesota—including those communities not otherwise governing by MCIOA—as follows:

(5) If any provision of this chapter, the declaration, the bylaws, or the articles of incorporation requires the consent of a secured party holding a security interest in a unit as a condition for the approval or effectiveness of an amendment to the declaration, the bylaws, or the articles of incorporation, the consent is deemed to be granted if the secured party's written refusal to consent is not received by the association within 60 days after the secured party receives from the association notice and a copy of the amendment, by certified United States mail, postage prepaid and return receipt requested. If the secured party has not otherwise provided to the association an address for notice, the association shall send the notice to the address, if any, set forth in the recorded instrument that

evidences the security interest. This subsection shall not apply to an amendment that affects the priority of a secured party's security interest or the ability of a secured party to foreclose its security interest. In such cases, the number or percentage of secured parties whose consent is required by the instrument to be amended must consent to the amendment in writing.

(Emphasis added.)

IV. Petition and Court Approval Process

The 2020 amendment to MCIOA also creates a new subsection 515B.2-118(d) to establish a framework for court approval of an amendment notwithstanding failure to obtain approval by the minimum percentage of votes or consents required by the governing documents. For example, if a declaration provides that any amendment must be approved by 100% of the unit owners, and if one owner votes against the amendment, the association could seek court approval of the amendment. This detailed framework was carefully designed to provide a practical alternative for associations while giving due process to owners and mortgagees.

Minnesota Statutes section 515B.2-118(d) is lengthy and contains many technical requirements. This article provides a brief summary, focusing on the content of the petition and the standards for court approval.

A. Content of Petition

Minnesota Statutes section 515B.2-118(d)(1) authorizes an association to petition the district court for an order reducing the percentage of affirmative votes or consents necessary for an amendment to the declaration, bylaws, or articles of incorporation, as follows:

The petition shall describe the reason for the amendment, the approval requirements based on the governing documents and applicable law, the effort that has been made to solicit approval of the association members, the number of affirmative votes or consents actually received, the number of negative votes or denials actually received, the number or percentage of affirmative votes or consents required to effect the amendment, and other matters the petitioner considers relevant to the court's determination. The petition shall also contain, as exhibits thereto, copies of all of the following: (i) the governing documents; (ii) the complete text of the amendment; (iii) copies of any notice and

solicitation materials utilized in the solicitation of member approvals; and (iv) any other documentation that the petitioner believes will be useful to the court in deciding whether to grant the petition.

B. Standards for Court Approval

Minnesota Statutes section 515B.2-118(d)(4) provides that the court may grant the petition if it finds all of the following:

1. Each association member was served with a copy of the petition, excluding the exhibits, and notice of the hearing date not less than 15 days prior to the date of the hearing, or waived service.
2. Each secured party that is entitled to notice of the proposed amendment either consented to the amendment, is deemed to have consented to the amendment, or received a copy of the petition, excluding the exhibits, and notice of the hearing date not less than 15 days prior to the date of the hearing.
3. The association conducted a vote or requested the consent of the members regarding the proposed amendment in accordance with the governing documents, MCIOA, and any other applicable law.
4. A reasonably diligent effort was made to permit all eligible members to vote, or to grant or deny consent, regarding the proposed amendment.
5. The amendment was approved by the affirmative vote or consent of unit owners of units to which at least 67 percent of the votes in the association are allocated, or if all of the

units are restricted to nonresidential use, by the affirmative vote or consent of unit owners of units to which a majority of the votes in the association are allocated.

6. The amendment is reasonable.

7. Granting the petition is not improper for any reason stated in Minnesota Statutes section 515B.2-118(d)(6).

V. Applicability

The new alternatives for obtaining approval of amendments apply to all common interest communities located in the state of Minnesota. Specifically, the 2020 amendment to MCIOA revised section 515B.1-102(g) to provide that “section 515B.2-118, subsections (a)(5), (a)(7), and (d), shall apply to all common interest communities.”

The 2020 amendment to MCIOA will become effective on August 1, 2020. Associations may draft amendments prior to August 1, then request approvals on or after August 1, 2020, based on the revised statute.

Associations that desire to update their governing documents should consult a qualified attorney for assistance drafting amendments and navigating the new approval requirements and alternatives.

Michael D. Klemm is a partner in the law firm Hellmuth & Johnson with almost 20 years' experience in the areas of real estate development, real estate transactions, and community association law. He is an MSBA Certified Real Property Law Specialist, chairman of the Community Associations Institute Minnesota Legislative Action Committee, and a member of the MCIOA Committee of the Real Property Law Section of the MSBA.