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Association of Condominium, Townhouse, and Homeowners Associations

ACTHANEWS

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DECEMBER-JANUARY 2013

Inside this issue:

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DISTRESS SIGNALS: Condominium Act Section 14.5 Could Force Drastic Change for Associations

By James Arrigo of Tressler LLP

What would you think if someone told you that the town where your condominium is located could appoint someone to run it instead of the Board? What would you think if that person told you that your municipality could have the condominium dissolved, have all of your tenants' rent and your assessment payments collected, make you jointly responsible for all of the condominium's debts, liabilities and expenses, and can even sell the condominium's property? As farfetched as it may sound, Section 14.5 of the Illinois Condominium Property Act (the "Act"), 765 ILCS 605/14.5, allows all of the above and more, if the condominium development can be considered a "distressed condominium property."

What is a "Distressed" Condominium Property?

Under section 14.5, a municipality in which a condominium development is located can file a court action under Sec. 14.5 if a condominium has become a "distressed condominium property." The definition of distressed property under section 14.5(a)(1) is a property "operated in a manner or hav[ing] conditions which may constitute a danger, blight, or nuisance to the surrounding community or to the general public." A condominium property will meet this definition if it has just two or more of the conditions listed under subsection 14.5(a)(1), which are: (A) fifty percent (50%) or more of the units are not occupied by persons with a legal right to be there; (B) the condominium development has serious building code or zoning violations; (C) at least sixty percent (60%) of the units are in foreclosure or have had a foreclosure judgment entered against them within the last 18 months; (D) the recorded condominium instruments list more units than physically exist; (E) any utility service to the condominium parcel or to forty percent (40%) of the units has been shut off or has been threatened with shut-off; or (F) at least sixty percent (60%) of the units are delinquent on property taxes.

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TIP OF THE MONTH

A Small Step for Condo Associations Becoming Green

As environmental awareness continues to grow, condo decision makers may want to start considering green initiatives for their condo associations. Of course, as the decision makers, they will need to weigh the overall project pros and cons and the cost effectiveness of any green project. Large projects such as wind energy, solar panels, or green roofs can be overwhelming in scope and the return on investment may remain largely unknown.

A manageable way to start the "greening" of a condo association might be to start small by introducing the association to green initiatives with green cleaning supplies. Many would agree that the list of unpronounceable chemicals is seldom read on the back of cleaning products. Wording such as *"may be fatal or cause blindness if swallowed"* might be met with a shrug of the shoulders and/or little thought given to if the chemicals are transmitted via air and water into the environment. Contrast this to a greener alternative that is free of harsh chemicals, biodegradable, and toxin-free and the benefits may become clear to the condo decision makers.

Many commercial green cleaning companies will offer a free evaluation of a condo association's current cleaning program and make recommendations for their services that may include using green cleaning products, a HEPA filter vacuum cleaner, assisting with recycling programs, etc. A newly introduced green cleaning program can enhance the reputation of the condo association while possibly reducing health problems or allergens to chemicals.

A well-maintained and efficient building tends to be efficient from top to bottom. Condo associations that have in the past made deferred maintenance a routine, may want to "reboot" their association with a small step toward becoming greener and work their way up to the larger projects that have been deferred.

By taking control and having success with a small project such as using a green commercial cleaning service the association can build on their new confidence and develop a new direction for their condo association. In time, the deferred projects can be revisited with an eye not only on the bottom line but also on the impact to the environment. Several ways to consider green initiatives in construction projects might include: recycling concrete and stone during façade restoration projects, avoiding lead paint in fire escape and balcony painting projects, incorporating reflective coating in any repair or new roofing project, and taking the time to source local products as much as possible to reduce the construction project's carbon footprint. In time, hopefully the enhanced condo association reputation is a breath of fresh air for all concerned.

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ACTHA'S 2013 NEW YEAR RESOLUTIONS

1. ***ACTHA resolves to continue providing outstanding educational programming***—you can view the seminars ACTHA will offer at the Spring Conference on March 16. ACTHA's Learn and Lead series begins February 28 and now that the holidays are coming to a close, we will go back to offering monthly seminars in January.
2. ***ACTHA resolves to continue offering the best deal in town***—that means affordable membership with no increase in 2013. And remember! Once your association is a member <u>all residents are considered members</u> and may sign up for ACTHA communications electronically and attend ACTHA events at the <u>member rate</u>.
3. ***ACTHA resolves to build on our commitment of serving community association residents***—that means a continuing presence in Springfield through a full-time lobbyist, which your association will now have the opportunity to support through a minimal annual (optional) fee of $10 and once again offering your association the chance to receive the newsletter via mail.

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While this may seem to be a hard standard to meet, the current state of the condominium market could make it easier than it may at first appear. For example, a development in a struggling community might reach the 60% foreclosure rate, since it would include even refinanced and short sale units that had been the subject of foreclosure as much as a year and a half earlier. Moreover, if a condo development is at or near those foreclosure rates, it is conceivable that it might also have a comparable rate of utility and/or tax delinquency and could be struggling to collect sufficient assessments to fund the upkeep necessary to satisfy local building codes. Additionally, the language of subsection (a)(1) indicates that conditions other than the six listed may also meet the definition of "distressed." The statute gives no hint of what these "other" conditions might be and no court in this State has offered any guidance on that question.

Under subsection 14.5(a)(3) each mortgage holder and similar non-owner party, such as lien holders and judgment creditors, are "other parties in interest."

Procedure for Action Against Distressed Property.

A municipality can commence a court action against a distressed condominium in the county in which the property is located. After filing, the municipality must serve all unit owners and notify all other parties in interest. Presuming that the complaint specifies how the property fits the "distressed" definition, section 14.5(b) provides that the court hearing to follow is to be expedited ahead of other kinds of cases.

Court Appointment of a Receiver.

If the judge finds that the condominium is distressed, the court will almost certainly appoint a receiver for that property. This receiver has full power and authority under Sec. 14.5(e) to prudently operate, manage, and conserve the property. Along with any other powers the judge may grant, the receiver can have the property cleaned and secured, obtain insurance, hire attorneys, managers, janitors and other help, pay taxes, provide for utilities, make needed repairs, obtain tenants, sign leases for vacant/ foreclosed units. To fund these activities, the receiver has the right under subsection 14.5(f) to collect and use assessments and unit rents even if the right to the rent has been assigned to someone else by a unit owner.

With the court's permission, the receiver can also pay maintenance, management, repair or sale expenses, as well as the receiver's own fees and expenses, by issuing and selling receiver's certificates. The certificates may be sold in exchange for money, services, materials or labor for the property and bear interest as set by the court. When sold by the receiver, these certificates become a first lien that has priority over every assignment, existing lien and encumbrance on the property except taxes. Though no court has expressly said so, this would even appear to give receiver's certificates priority over mortgages on units and on the common property. The statute even allows those certificates to be foreclosed upon if not paid when due. The priority given these certificates suggest that in the event foreclosed certificates go through judicial sale, even mortgages on units might not be paid in full. That could leave unit owners on the hook for the difference.

Court –Ordered Dissolution or Sale of Condominium Property.

In addition to appointing a receiver, if the judge also finds that "the property is not viable as a condominium," he can also declare that the property is no longer a condominium (per sec. 14.5(c)(2)) and can deem the condominium property to be owned in common by all unit owners based upon their percentage of ownership in the common elements per the condominium's declaration. As a result, all owners would then become personally responsible for liens against the common property as well as their own units. A court order dissolving the condominium or declaring it not viable must be recorded against each unit and the general property. This recording provides notice to anyone considering purchasing, insuring or accepting a mortgage on a unit.

In addition, if the condominium is not viable, the court may also authorize the receiver to sell the entire property on behalf of its owners. All of the receiver's costs, fees and expenses would be paid first from the sale proceeds. All remaining funds would be placed in an escrow and allocated to the unit owners based upon their respective percentage of ownership of the property. The escrowed funds would automatically be applied first to pay each unit owner's share of any taxes on the property, then the liability for any liens properly attributable to that unit and finally, to the unit

of condominium ownership under the Act and would take on all of the liabilities of a joint owner of the entire development property. Though sec. 14.5 does not explain in detail, as a practical matter, such a sale would appear to leave banks holding unit mortgages without the property that secured their loans, while likely paying the unit owners less than they may need to pay off those loans. Given these prospects, owning a unit in a failing condominium development could quickly become a tremendous financial burden if the local city, town or village asks a court to deem it "distressed."

Unanswered Questions.

No court in Illinois has yet ruled on any aspect of section 14.5, its meaning or effect. As a consequence, section 14.5 raises questions for which there are no definitive answers.

First, when a judge declares a property to no longer be a condominium, what (if any) effect does that ruling have upon the condominium's recorded declaration and by-laws? After the recording of notice that the condominium is dissolved, does the declaration continue entirely in force or only partially in force? And if only parts remain, how do the members of the (former) condominium association know which still apply? Because the declaration and by-laws are recorded against the property and its units, it is possible that most of their express provisions survive dissolution of the condominium. But to the extent the Act fills in required terms that are not stated in the declaration or by-laws, it is anyone's guess what would happen if the property is no longer a condominium at all.

Another issue that section 14.5 leaves unaddressed regards the potential liability of the condominium association's board members in the event a judge finds the property to be "distressed," or worse yet, declares it not to be viable. As the Act provides, a condominium association's directors are fiduciaries of the association and its members as a matter of law. (See section 18.4 of the Act.) Does the fact that the property is in a condition that the courts deem distressed or non-viable give members grounds to sue the board members? Could such actions hold board members personally liable for losses? Can or must a receiver pursue legal action against the directors in that event? Again, there is no court decision that provides any guidance.

Conclusion

In short, under section 14.5 of the Act, a judge could declare that an association – which is almost certainly a not-for-profit corporation existing under Illinois law – is no longer a **condominium** that is subject to (and both protected and governed by) the Act. In that case, however, it could and likely would remain an "association" and a corporation – but one in which the rights, responsibilities and financial obligations of its units' owners could be drastically altered in ways those owners may or may not like.

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and state as the purpose for such request their need for the information in order to call the special meeting. Under the Illinois Condominium Property Act, the board would be required to give access to the requested records within 30 days of the request. If the Board failed to do so, the dissident units owners could sue for access to the records and if the court found the directors' actions in withholding the records to be in bad faith, would be entitled to reimbursement for their reasonable attorney fees from the Association.

3. A third possible situation would be involved if the Association's Declaration or Bylaws contained provisions requiring that an action or actions be taken by the Board as part of the process for the calling of a special unit owner's meeting by unit owners. An example of this would be a requirement that the proposed agenda of the special meeting be first submitted to the Board, which itself would then be required to submit the agenda to the owners. If the Board, after demand to do so and without legal justification, refused to submit the agenda to the unit owners, the dissident group would be required to initiate a unit owner's derivative suit against the Board to force the Board to act. In the derivative suit, the suing unit owners would be acting on behalf of the association to seek a court order to force the Board to perform its duties.

Note: Mr. Kreisler originally wrote on the process for how special meetings are called by the owners in ACTHA's March 2012 newsletter issue. This question and answer is a follow-up to what occurs when a Board fails to act on the owners' petition.

WELCOME NEW ACTHA COMMERCIAL MEMBERS!

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- Index of Newsletter Articles from 2011
- "HIPPA and Community Associations" by David Buetow of Fuchs & Roselli

February 2012

- "Collecting Assessments in Foreclosure Situations" by Lara Anderson of Fullett Rosenlund Anderson PC
- "Admitted vs Non-Admitted Insurance Carriers" by Ron Sirotski of Hollinger Services
- "Foreclosures/Winter/Vacant Units" by Kelly Elmore of Penland & Hartwell

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- "Bed Bugs and A Board's Duty" by Denise DeBelle of the Law Offices of Denise DeBelle
- Legislative Corner
- "Interviewing for a Management Company" by Tom Dase of Dase Management
- "Special Meeting Process" by Barry Kreisler of Kreisler Law

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- "Are You a Micro-Manager" by Martin Stone of HSR Property Services
- "Landscaping: Definition of Terms" by Acres Group
- From the Executive Director
- "Townhome Insurance" by Karyl Foray of Rosenthal Bros./Barbara Wick of CARMIC

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- "Elections: Questions to Ask" by Gabriella Comstock of Keough & Moody
- "Safeguards Against Fraud" by Mike Majewski of Selden Fox, Ltd.
- ACTHA Board of Elections
- Legislative Corner
- "Reducing Property Tax Assessments" by Mark O'Brien of Iacconi & Associates

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- "Com Ed Increases Residential Electric Heating Rate" by Jerry Wolin of Oak Brook Club CA
- "Townhome vs Owner Insurance" by Hruska Insurance
- Legislative Recap
- "Committees vs Commissions" by David Bendoff of Kovitz Shifrin Nesbit

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- "The Importance of Reserve Studies" by John Hershey of J. Hershey Architecture
- "Capital Improvement Considerations" by Lou Agnos of Nikko Associates, Ltd.
- "Recording Delinquent/Partial Payments" by Larry Little of The A.C.T. Group

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- "Forcible Entry and Detainer Act" by Douglas Sury of Keay & Costello
- "Property Damage" by Sheila Malchiodi of QCi Restoration
- "Process for Appealing Tax Assessments" by Matt Panush & Fran O'Malley of Worsek & Vihon

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- "CICAA Changes" by Mike Kim of Michael C. Kim and Associates
- "Best Methods for Washing Vinyl Siding" by Phil Davis of Harris Exteriors & More
- "Importance of Assessment Collection" by Charles VanderVennet, Attorney

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- "Manager Licensing" by ACTHA
- "Top 10 Insurance Mistakes" by Karyl Foray of Rosenthal Bros.
- Getting Involved with ACTHA
- "Serving on the Condo Board: Residents Only?" by Andrew Girard of Girard Law Group

ACTHA's Certification Program
LEARN & LEAD

Begins Thurs., Feb. 28, 7—9 p.m. for six consecutive weeks in the Mt. Prospect area

Learn and Lead was especially designed for anyone actively involved in their association whether serving on the board or a committee, someone aspiring to a board position, or someone who just wants to know. It is a six week course that focuses on: Governance, Administration, Meetings/Elections, Finance, Physical Aspects and Insurance/Risk Management. Individuals may register for certification or attend only those modules you are interested in. One can learn more about Learn and Lead as well as registering online by visiting www.actha.org.

I am interested in registering for Learn and Lead. I am interested in:

___ Certification: $100/ACTHA member; $150/Non-member

___ Individual seminars: Free/ACTHA member; $20 per session for non-members. I will be attending:

___ Governance (Feb. 28) ___ Administration (Mar. 7) ___ Meetings/Elections (Mar. 14)

___ Finance (Mar. 21) ___ Physical Aspects) (Mar. 21) ___ Insurance (Apr. 4)*

NAME:_____

ASSOCIATION:_____

ADDRESS:_____CITY:_____ZIP:_____

PHONE:_____EMAIL:_____

Make check payable to ACTHA and return to: 11 E. Adams, Chicago IL 60603

ACTHA's Spring Conference Program

For more detailed information as well as who will be exhibiting, visit

ACTHA's website: www.actha.org & click on "Spring Conference & Trade Show"

Your choice! Pick one program from each of the time slots offered!

8:30 a.m.—9:30 a.m.

1) Calling All Newcomers - Learn Now, Avoid Failure

Presenter: David Bendoff of Kovitz Shifrin Nesbit

2) Budgeting – Makes Cents

Presenters: Mark Cantey, CPA of Cantey Associates

3) Rapid Fire! Pros'Top Tips

Panelists: George Darling of Total Roofing & Construction, Sherm Fields of Acres Group, Dick Fink of Coder Taylor, Steve Silberman, Frost Ruttenberg Rothblott, Peter Santangelo of Community Advantage

11:30 a.m.— 12:30 a.m.

1) **Insurance 101 - I Never Knew That**

Presenters: Lara Anderson of Fullett Rosenlund Anderson, PC, Joel Davis of CAU Insurance, Carrie Surratt of Care Property Management Services

2) Fraud – Where Did It Go?

Presenters: Tom Engblom of Community Association Banking and Brad Schneider of Condo CPA

3) First Impressions: The Property (Part 1)

Presenters: John Hershey of J. Hershey Architecture, Kate Susmilch of Winston Management Group

1:30 p.m.— 2:30 p.m.

1) Leasing—Cut Your Losses

Presenters: James Erwin of Erwin & Associates and Dan Haumann of Advocate Property Management

2) Delinquencies—Ouch!

Presenters: Charles VanderVennet, Attorney & Sal Sciacca of Chicago Property Services

3) First Impressions: The Community (Part 2)

Presenters: Sima Kirsch of Law Offices of Sima L. Kirsch and Kate Susmilch of Winston Management Group

Conclude the day with ACTHA's popular "Ask an Attorney" panel!!!

Gabriella Comstock of Keough & Moody, Jim Slowikowski of Dickler Kahn Skowikowski & Zavell

Registration Form

YES!! I want to register for the Conference and Trade Show on Saturday, March 16, 2013 at the Drury Lane in Oakbrook Terrace. **Registration fee includes**: seminars, continental breakfast, lunch, Trade Show, and materials.

There is no charge to attend the Trade Show. The fee to attend any of the educational programs is: ACTHA Member Rate: $45 or $40 if sending 3 or more from the same association; Non-Member rate: $120 per person

_____ Attending the Trade Show only

_____ Attending the Trade Show, Educational Seminars & Lunch

_____ Amount Enclosed; Make check payable to "ACTHA" and remit to 11 E. Adams, Ste. 1107, Chicago, IL 60603 or register online at www.actha.org: 2013 Spring Conference

Name of Association:_____

# of units:____ Name of Community Manager (if applicable):_____

PLEASE PRINT: Name Address: Email:

_____

_____

_____

_____

NOTE: Confirmations are not sent except upon request. No refunds are given after March 10 and there will be an additional charge of $20 per person for anyone registering after April 17 or at the door. All cancellations are subject to a 25% handling fee.

Association of Condominium,
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Homeowners Association
ACTHA

Question of the Month

By: Barry Kreisler ^ Kreisler Law PC
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Q. The owners have acquired the necessary signatures to hold a special meeting but because they want to remove the President of a three member board and the other two board members support the President, the board is refusing to conduct the special meeting. What can the owners do?

A. There are three ways in which the existing Board might attempt to impede the dissident owners from proceeding with the special meeting:

1. If the dissident owners have the names, addresses and percentage interest of the other unit owners and there are no other impediments particular to their Association's Declaration and Bylaws to the calling of such meeting, the dissidents could simply call the special meeting themselves by sending notice of the meeting no less than 10 and no more than 30 days before the date of the meeting as to the time, place and purpose of the meeting and then proceed with the meeting. If the President or the Secretary of the Association failed to meet their statutory obligations to conduct and take the minutes of the special meeting, the owners present by motion duly adopted at the meeting could appoint a substitute chairman and secretary for the meeting.
2. If the dissident owner group does not have the information necessary to send out notice of the meeting, they could serve a written request on the present Board to review the Association records containing that information and state as the purpose for such request their need for the information

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