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Association of Condominium, Townhouse, and Homeowners Associations

ACTHANEWS

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September 2014

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2014 LEGISLATION AFFECTING CONDOMINIUMS, COMMON INTEREST COMMUNITIES AND COOPERATIVES

By Michael C. Kim of Michael C. Kim & Associates

S.B. 2664 amends the Illinois Condominium Property Act ("ICPA") to include a new definition of "Regular Monthly Assessments" (meaning the monthly amount assessed pursuant to the current annual budget); provides that if a person (other than a mortgagee) purchases a unit at a judicial foreclosure sale or purchases a unit from a mortgagee who obtained title at a judicial foreclosure sale, by a consent foreclosure, by common law strict foreclosure or by delivery of a deed in lieu of foreclosure, then that non-mortgagee purchaser shall be responsible to pay the association an amount not to exceed the regular monthly assessments for the unit for the 9 month period immediately preceding the date of the judicial foreclosure sale, delivery of a deed in lieu of foreclosure, entry of a judgment in common law strict foreclosure or the taking of possession of the unit pursuant to court order under the Illinois Mortgage Foreclosure Law. The maximum 9 months may include attorney's fees, but only if the inclusion of such fees does not exceed the 9 month maximum amount. No fines, late charges, chargebacks, special assessments or any other charges are permitted to be recovered. Also, the disclosure obligation of the association under Section 22.1 is reduced to 14 days (as opposed to the current 30) if the association is managed by a licensed manager or 21 days if the association is self-managed; such requests and production can be made electronically or in writing; and such disclosure statement must include the amount payable if ownership of the unit was transferred by judicial sale, consent foreclosure, common law strict foreclosure or deed in lieu of foreclosure.

The Governor amendatorily vetoed SB 2664. The Governor left in place the language approved by the legislature, but added the following new language to the beginning of the amended Section 9(g)(4):

"Following a foreclosure sale, a consent foreclosure, common law strict foreclosure or the delivery of a deed in lieu of foreclosure, the mortgagee [lender] shall have the duty to pay to the association those amounts required by subdivision (g)(1) of Section 9 of this Act, except [for the 9 months of regular assessments immediately before the judicial sale or delivery of a deed in lieu of foreclosure] ..." (Emphasis added) The Governor also made a minor change to Section 9(g)(5).

Continued on page 4

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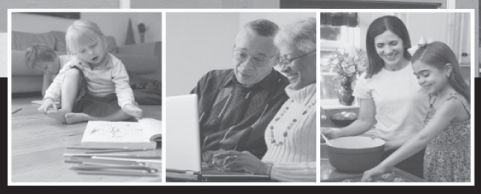

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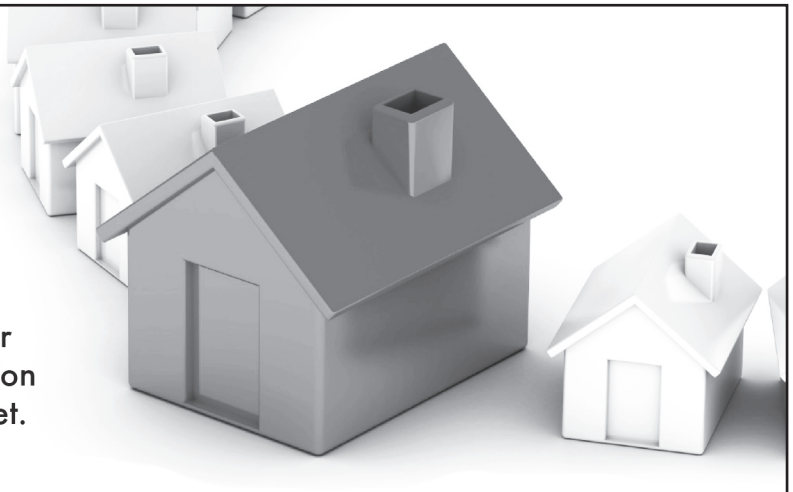

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Pursuant to the Governor's added language, when a unit is foreclosed or title is transferred via a deed in lieu of foreclosure, the condominium association would recover common expenses and other lawful charges not paid by the previous owner from the foreclosing lender except for the amount recoverable from the third-party purchaser (whether at the foreclosure sale or from the foreclosing lender after the foreclosure sale). As described above, the third-party purchaser would be responsible for up to 9 months of regular assessments and possibly attorneys' fees. However, the foreclosing lender (mortgagee) would be responsible for the remaining balance of all charges included in the association's lien under Section 9(g)(1), including but not limited to, regular assessments, special assessments, fines, late fees, attorneys' fees and costs. Essentially, the Governor's amendatory veto would make the condominium association "whole", which of course is a very positive.

COMMENT: The original SB 2664 limited the association's recovery to a total amount not to exceed the 9 months of unpaid regular assessments immediately preceding the judicial sale or other described triggering events. While attorney's fees are theoretically allowed, such fees are to be included in the 9 month maximum amount, not in addition to it. The association has no right to collect special assessments, late charges, chargebacks or any other expense. SB 2664 was vigorously opposed by various groups, including ACTHA and CAI.

The Governor's amendatory veto is a significant victory for the condominium industry; the "war" is not yet over. The bill will now be sent back to the Senate, from which it originated. The Senate may approve the changes, override the amendatory veto, or do nothing. If the Senate approves the changes or overrides the amendatory veto, then the bill goes to the House for similar action.

The Governor's new language imposes new and potentially unlimited liability exposure on banks. There is a likelihood that the banking/lending industry will strongly object to the amendatory veto, arguing that it will cause lenders to refuse to give mortgages for the purchase of condominium units. The lenders have two choices: try to get an override of the amendatory veto or let the bill die (by no action being taken by the General Assembly).

The Governor's amendatory veto is a potentially huge and unprecedented victory for condominiums with an unexpected boon to the ability of an association to collect all unpaid common expenses and related charges in a foreclosure action. It would be unique in the nation. However, the amendatorily vetoed bill is still not yet law. We must now wait to see what the Legislature will do, which does not meet again until the fall veto session begins on Nov. 19.

NOTE: SB 2664 only affects condominiums; master associations and common interest communities are unaffected by this change (so far).

SB 3014/Public Act 98-0762 (effective June 1, 2015), amends ICPA Section 12 to require that the condominium association's master property insurance policy must provide coverage in a total amount at least equal to the full insurable replacement cost of the entire condominium property, less deductibles but including coverage sufficient to rebuild the property in compliance with existing building code as well as demolition costs and increased costs of construction (the total amount of demolition and increased construction cost coverages shall be at least 10% of the insured building value or $500,000, whichever is less). SB 3014 also requires that the association's directors and officers liability coverage includes defense of non-monetary claims, breach of contract actions, and decisions related to placement or adequacy of insurance. Past, present and future board members (while acting in their capacity as board members), the managing agent and employees of the board or managing agent must be included as insured under the directors and officers liability coverage. "Improvements and betterments" to a unit include additions, alterations or upgrades installed or purchased by a unit owner (note that improvements and betterments need not be covered by the association's master property insurance policy). Finally, with regard to mandatory unit owner insurance coverage, SB 3014 deletes the board's alternative to purchase that insurance

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Board of Directors
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insurance for a unit owner who fails to do so. These charges would go into effect with insurance policies issued or renewed on or after June 1, 2015.

COMMENT: In general, these are logical and beneficial changes. **Only applies to condominium associations**.

SB 3057/Public Act 98-0842 (effective January 1, 2015) amends the Common Interest Community Association Act ("CICA") to modify the requirement that a unit owner deliver a copy of a lease to the association; instead, the owner must do so "unless otherwise provided in" the association's governing documents.

COMMENT: Many common interest communities in resort areas allow short term leasing, and those associations did not want to be statutorily required to receive copies of those short term rental agreements. Of course, if such an association wanted to receive such rental agreements, they could so provide in their governing documents. **Only applies to common interest communities.**

SB 3286/Public Act 98-0966 (effective January 1, 2015) amends the Code of Civil Procedure so that an employee of a "gated residential community" (defined as a condo association, housing cooperative or "private community" – whatever that is) must grant entry into the community, including its common areas and common elements, to a private process server authorized under Section 2-202 of the Code, who is attempting to serve process on a defendant or witness who either resides within or is known to be within that community.

COMMENT: Not surprisingly, this legislation was pushed by private process servers. The association should require that the process server provide proof of its authorization under Section 2-202. On the other hand, it takes the association "out of the middle" between the hiding resident and the bona fide process server. Finally, it literally only applies to an association's employee (such as a doorman) but does not address security services provided by independent contractors.

HB 4782/Public Act 98-0996 (effective January 1, 2015) amends the Code of Civil Procedure to provide that, in eviction cases brought by a condominium, common interest community or master association, the association may lease the unit for a term of up to 13 months, commencing anytime within 8 months after expiration of the stay of the judgment. Any such lease may be extended for additional terms of up to 13 months each, upon motion by the association.

COMMENT: Clarifies and confirms the association's ability to rent a unit taken in an eviction case, and allows it greater flexibility as to the commencement of such leasing.

HB 4783/Public Act 98-1068 (effective January 1, 2015) amends the ICPA by adding a new Section 18.8 which declares as void any provision in the condominium declaration or bylaws that limits or restricts the rights of the board by (1) requiring the prior consent of unit owners in order to take any action (including litigation or demand for trial by jury) or (2) requiring the board to arbitrate or

Continued on page 5

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mediate a dispute with the developer or any non-unit owner prior to commencement of litigation or demand for a jury trial. However, if at least 75% of the unit owners approve of such requirements (that is, obtaining unit owner consent or a requirement for mediation or arbitration) after turnover from developer control, then such otherwise void provisions may be enforced.

COMMENT: This legislation overturns a prior poor decision by the Illinois Appellate Court which allowed developers to include within the declaration/bylaws various unfair, burdensome "defenses" against association claims. Only applies to condominium associations.

HB 4784/Public Act 98-0735) (effective January 1, 2015) amends ICPA Section 18.4 by adding a new subsection "s", which allows the condominium board to adopt and amend rules and regulations (1) to authorize electronic delivery of notices and other communications required or contemplated by the ICPA to the unit owners who provide the association with written authorization for such electronic delivery and an electronic address (that is, e-mail address) for that purpose, and (2) authorizing an owner to designate an e-mail address or US Postal service address, or both, as the owner's address on any list of members/unit owners which the association is required to provide under the ICPA (i.e. Section 19) or under the declaration/bylaws.

COMMENT: Only applies to condominiums. Logical adaptation to our electronic world. Some associations have already made this change via their own means, but this statutory blessing is nonetheless welcomed.

HB 5322/Public Act 98-1042) (effective Jan. 1, 2015) amends both the ICPA and CICA to allow use of "acceptable technological means" (which includes, but is not limited to, electronic transmission over the Internet or other network, whether by direct connection, intranet, telecopier or electronic mail). For common interest communities, "acceptable technological means" can be used to transmit a ballot in an election and, in fact, elections are permitted by this method (and in such case, proxies are not allowed). There are requirements for instructions, inclusion of candidate names, the ability to cast votes for write-in candidates, and subsequent re-voting by a member. Common interest communities can use "acceptable technological means" to send or receive notices, votes, consents, signatures or approvals required by the governing documents or under the CICA, and such "acceptable technological means" may be used by the association or its members or residents to perform any obligation or exercise any right under the governing documents or the CICA as long as such means "provides sufficient security, reliability, identification and verifiability." A verifiable electronic signature satisfies any requirement for a signature under the governing documents or the CICA. A record must be created of authorized action by transmission (or equivalent) and notarization requirements are eliminated if the signature and identity of a person can be otherwise authenticated. Finally, if a person does not provide written authorization to conduct business using electronic transmission or other equivalent technological means, then the association shall, at its expense, conduct business with that person without use of electronic transmission or other equivalent technological means. However, the use of "acceptable technological means" does NOT apply to notices required under the eviction provisions of the Code of Civil Procedure or any lien enforcement under CICA.

For condominium associations, HB 5322 amends the ICPA to allow use of "acceptable technological means" to provide notice of unit owners/membership meetings if and to the extent that the declaration/bylaws/rules expressly so provide, provided that "the director and officer or his agent certifies in writing to the delivery by electronic transmission." A unit owner may submit a proxy in a board election by electronic transmission to the extent the declaration/bylaws/rules expressly so provide, provided that "any such electronic transmission shall either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the unit owner or the unit owner's proxy." Use of "acceptable technological means" is now also permitted to submit votes/ballots in board elections (there are requirements for instructions, inclusion of candidate names, the ability to cast votes for write-in candidates and subsequent re-voting by a member); any such submitted votes/ballots shall be counted toward the establishment of a quorum for that election "meeting". Finally, HB 5322 also inserts a new ICPA Section 18.8 (see discussion of HB 4783, above) which addresses use of technology in the same manner as for common interest communities as described in the preceding paragraph; in that regard, the ICPA will have language virtually identical to the CICA.

COMMENT: Well-meaning but five areas of concern: 1) Creates a conflicting new ICPA Section 18.8 (vs. the ICPA Section 18.8 being created under HB 4783); 2) It has different and possibly confusing (if not outright conflicting) provisions on use of technology with HB 4784; 3) Ambiguities about "sufficient security, etc."; 4) The provisions applicable to condominiums are different in some ways from those applicable to common interest communities but without explanation or justification; and 5) Nothing is provided for master associations under ICPA Section 18.5 HB 5322 seems to be one draft version short of "final."

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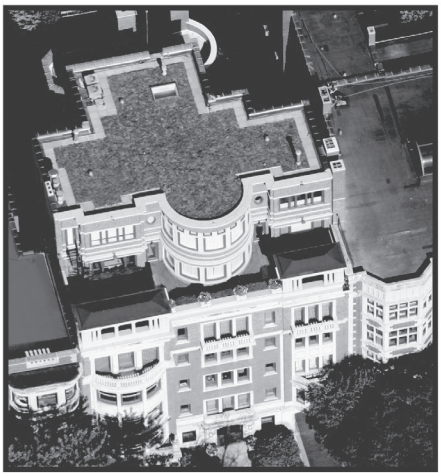

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ACTHA'S FALL EXPOs

South Expo: Sat., Sept. 13, Tinley Park Convention Center

North Expo: Sat., Oct. 25, Westin North Shore in Wheeling

(for detailed info on the South Expo's programs and speakers, visit www.actha.org/SouthExpo)

North Expo Educational Programs

8:00 - 9:30 a.m. Choose from one of two seminars

10 Myths of Community Living: Buying into community living sometimes brings surprises: unexpected intrusions into what some consider private living habits, boards and owners feeling they can act at will, maintenance free means free maintenance and countless other "myths." Board members are owners and owners may at some point be board members so learn about putting the word "community" back into community association living. *Presenters: Kara Cermak of Rowell, Inc. and Kim Merrigan of McGill Management*

Palm: Its Effects on Meetings: Everyone's talking about Palm but this session focuses on the consequences in relation to the manner of conducting business, workshops, commissions, email communications, conference calls and more. How is it business as usual or is it? *Presenters: Howard Dakoff of Levenfeld Pearlstein and Adam Stolberg of Advantage Management*

11:30 - 1:00 p.m. Choose from one of two seminars

Budget Development and Reserve Studies: This session covers the process and elements to consider in developing a realistic budget and how to use a Reserve Study as a tool in the process. *Presenters: Christopher Berg of Independent Association Managers and Matt Hass of Waldman Engineering Consultants*

Legislative Update: Is it difficult to keep track of the legislation and court cases affecting community associations? Learn about the good, the bad, and the ugly and hot it affects your association. *Presenters: David Hartwell of Penland and Hartwell and Kristopher Kasten of Michael C. Kim and Associates*

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Non-member rate: $ 45 or $25 (if registering for the North Expo before Oct. 13; add $10 if registering after the Wed. before)

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Question of the Month

By: Karyl Foray of Rosenthal Bros. / 740 Waukegan Rd., Deerfield 60015 / 708-560-1248 / kforay@rosenthalbros.com / www.rosenthalbros.com

Q. Our association is concerned because of the varying levels of homeowners insurance carried by our homeowners. The amount of the policy varies by as much as $300,000. We have been advised that each homeowner should carry enough insurance to completely replace their individual unit in the event of a catastrophe. How do we calculate the replacement value of a unit? The units are similar in size.

A. Association Boards do not have the legal right to tell/require owners as to how much insurance they need to purchase. If your Declaration states that each unit owner must purchase enough insurance to replace their individual unit, then it is the unit owner's obligation to fulfill. A Board can certainly issue a reminder one or twice a year to remind them of this obligation but you cannot tell someone how much to insure their unit for.

Every unit in an Association is different even if they look the same from the outside. Some owners have had changes installed by the developer when they bought the unit (i.e. moved a wall, added a closet), some owners (or previous owners) have made changes and enhancements (i.e. a finished basement or garage, installed granite counter tops or bathroom fixtures). A Board does not want to get in a situation where it is insisting that an owner insure their unit for $350,000 when in fact after a major fire occurs it actually costs $500,000 to replace the unit. The Board would be opening itself up to a Directors and Officers liability claim and that is never a good situation to be in. You might also want to consult your attorney to see if there are other options the Association might have.