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Association of Condominium, Townhouse, and Homeowners Associations

# ACTHANEWS

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**June 2014**

## Inside this issue:


| | |
|---|---|
| Learn and Lead | 2 |
| Legislative Update | 3 |
| SB 2664 continued | 4 |
| Question of the Month continued | 5 |
| Welcome New Members | 7 |
| Question of the Month | 8 |




**DEFEAT SB2664**

**Send a letter to the Governor TODAY!**

## S. B. 2664:

## Don't Let Owners be Taxed by Foreclosures

By: David Hartwell of Penland and Hartwell

Over the past several years, more and more legislation has been proposed to amend the Illinois Condominium Property Act ("ICPA"), but none seemingly as controversial as Senate Bill 2664. This bill, if signed into law by Governor Quinn, will dramatically and negatively affect how condominium associations collect assessments on units that are in foreclosure. This bill pits the competing interests of boards of directors operating consistent with their fiduciary duty by collecting unpaid assessments on all units (including units in foreclosure) against Illinois realtors desiring to consummate the sales of units.

SB 2664 materially amends several sections of the ICPA. First, Section 2 would be amended to add the new definition of "Regular Monthly Assessments" to mean: "the amount charged by the association as provided for in the current annual budget adopted under subsection (c) of Section 9 of this Act." This new definition is meant to provide a significantly narrower classification of "Common Expenses" which includes not only regular monthly assessments, but also includes special assessments, late fees, legal fees, fines, expenses to renovate a unit so that the Association could rent it, and all other expenses lawfully assessed by the Board of Managers.

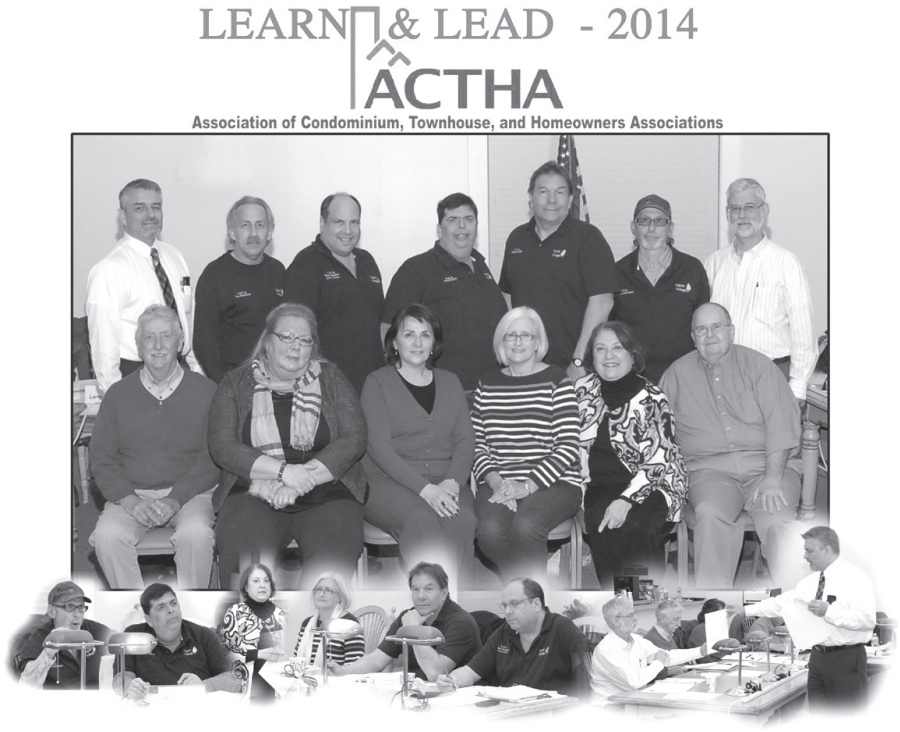
Section 9(g)(4) would be amended, in part, to require the purchaser of a condominium unit from a mortgagee, who acquired title through a judicial foreclosure sale, consent foreclosure, a common law strict foreclosure, or the delivery of a deed in lieu of foreclosure, other than the mortgagor, to pay the association unpaid -regular monthly assessments for the nine (9) month period preceding the date of judicial foreclosure sale, delivery of a deed in lieu of foreclosure, entry of a judgment in a common law strict foreclosure, or taking possession pursuant to a court order under the Illinois Mortgage Foreclosure Act. The amount may include attorney's fees incurred by the association during the same 9 month period, however the total amount shall not exceed the sum of 9 months of regular monthly assessments.

The realtors argued that this new amendment would provide them with a simple formula to reasonably ascertain the

*Continued on page 4*

## GOOD JOB!

Tahoe Village in Wheeling recently hosted Learn and Lead at their property. ACTHA was delighted when this association contacted us about doing the program. They were wonderful hosts and it was a convenient way to offer the educational program to their board members and others. If you would like ACTHA to offer our certification program for board members and owners, at your property, contact gael@actha.org




PICTURED:

Back row: Joel Davis, Instructor, CAU; Larry Schneyr*; Ken Kramer*; Mike Cohen*; Ed Koman*; Bob Trembley*

First row: Jack Thew; Linda Anders; Mary Smyrniotis*, Diane Salvato*; Diane Pagoulatos*, ACTHA Board member; Gary Schroeder

* denotes Learn and Lead graduate

# LEGISLATIVE UPDATE

## THE PROCESS

We are often asked what the process is for passing bills in the General Assembly and in light of the passage of S. B. 2664, what the next steps are. Below is summary of the steps involved:

- Legislation is often introduced at the behest of an interest group or by a constituent. Before it can be introduced it goes to the Legislative Reference Bureau which drafts the language.
- The Legislation may be introduced in either the House or the Senate chamber. Sometimes the same piece of legislation will be introduced in both houses. It receives its own bill number in each chamber. Often the sponsor will be on the committee where the bill is expected to be heard.
- The bill goes to the respective chamber's Rules Committee, composed of leadership. They assign the bill to a committee or they may hold the bill in Rules (a polite form of "death").
- The bill is heard in the committee it is assigned to. It must receive a majority of the total number of members of the committee to pass it out of committee and on to the next stage (second reading).
- At this stage the bill may be amended (it may also be amended in committee). It then goes to Third Reading or passage stage. If the bill receives 60 votes in the House or 30 in the Senate it passes that respective chamber. (In some instances, it may require a three-fifths vote.)
- Once passed out of the chamber of origin, the process as outlined above begins in the other chamber.
- If at any stage, the bill falters, it most likely will not proceed further, although it could conceivably be placed as an amendment onto another bill if the bill is germane to the subject (sometimes in the eye of leadership).
- If the bill passes both chambers, it then goes to "Enrolling and Engrossing". Within 30 days it must go to the Governor who may 1) sign the bill, 2) amendatory veto it, 3) veto the bill, or 4) take no action in which case it becomes law (this rarely happens). Once the bill reaches his desk, he has 60 days to act on it.
- If the Governor signs the bill, it becomes law (bills sometimes have an effective date stated or if there is no stated effective date, it becomes law upon being signed).
- If the Governor vetoes the bill, it goes back to the chamber of origin where it must receive a three-fifths vote (70 in the House and 36 in the Senate). If it receives the necessary number of votes in the house of origin, it proceeds to the other chamber where the process is repeated. If the bill does not receive the necessary three-fifths vote in either chamber it does not become law.

S. B. 2664 received only 64 votes in the House so if we are able to prevail with a veto by the Governor, condo owners and associations will most likely be victorious. This is why your communicating with the Governor is so important.

*Continued from page 1*

potential amount owed by a buyer of a foreclosed unit, therefore alleviating the possibility of learning about a higher, unknown sum at the time of closing. Further, the Realtors argued that this new amendment would protect buyers from what they claim are sizable and unreasonable attorney's fees attributed to a collection action. The argument, at best, seems to be a thinly veiled attempt to do nothing more than decrease the amount rightfully owed to association at time of sale. Moreover, the amount of common expenses owed on a foreclosed unit can be easily ascertained if Realtors increased their level of due diligence and make such inquiries earlier in the sales process. Simply put, if Realtors sought to obtain this information in advance of a couple days before the sale, there would be no surprise. Notably, for the sale of a unit which is not in foreclosure, the buyer is required to pay all common expenses lawfully assessed against the unit.

Lastly, the bill would amend Section 22.1 of the ICPA to require associations to produce to the seller or perspective buyer all documents as required by that section within fourteen (14) days if the association is managed by a management company, or twenty-one (21) days if the association is self-managed.

The benefits of this bill are few. The timeframe for ascertaining the lien amount is simplified; and the term of lien amount is now 9 months instead of the previous 6 months. Further, the lien may be perfected in several additional types of transfer of title for a unit in foreclosure; and the new language does not require the association to initiate an action (which means the filing of a forcible entry and detainer lawsuit) to perfect the lien.

The downside of this proposed bill could be significant and potentially catastrophic for an association for the following reasons. First, foreclosures in Illinois typically take much longer than 9 months to complete (18-30 months), and there is no definite time period within which a bank must complete the foreclosure. As such, owners who are in foreclosure may fail to pay their monthly assessments substantially longer than the 9 month lien period. Second, associations will be dissuaded from their right of remedy to obtain possession of the unit to rent it and recoup assessments if they cannot recover attorney's fees and costs or expenses related to making the unit rentable. Third, and potentially most devastating, an association which has existing special assessments will be precluded from recovering those unpaid amounts. The net effect is that paying unit owners will be penalized because they will be responsible for paying all of the unrecoverable amounts in order to make up for the shortfall. For those associations with even a couple of foreclosures, the impact of this proposed bill could be tens of thousands of dollars.

Based on the foregoing, SB 2664 seems to only benefit the Realtors because they can essentially lower the sales price of a unit. It does not appear as though the Realtor groups produced any quantifiable evidence to demonstrate that condominium unit sales have been stagnated or frustrated by the existing lien language in Section 9 of the ICPA. Quite simply, Realtors are not doing proper and timely due diligence, understating amounts of common expenses owed on the unit, and are upset by having to explain the disparity at the time of closing. Conversely, paying unit owners will be detrimentally affected by essentially having to pay a tax for each unit that goes into foreclosure in their association. This amount by the way is unascertainable for associations because they cannot reasonably predict how long a foreclosure will last and therefore will not be able to determine (or even budget for) the amount of the potential loss. It seems fundamentally unfair that paying members must pay more than their fair share for unit owners that fall into foreclosure.

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VOTERS DO MAKE A DIFFERENCE. But only when they make their voices heard. If your association is impacted by S.B. 2664 then take action today.

WRITE Governor Pat Quinn at the State Capitol in Springfield, IL 62706.

ACT TODAY! Encourage your fellow owners to also write. Need a flyer to post in your building? Visit www.actha.org and click on "Illinois Laws and Legislation/Current Topic".

Think you are not affected because you are in a non-condo? Guess again. It could happen to you and probably will.

DEFEAT SENATE BILL 2664

*Continued from page 8*

Since the act of authorizing a loan or pledging the assets must be done by the board, it must be done in an open board meeting, with proper notice (ICPA, Sec. 18(a)(9). This means that an owner either present at the relevant board meeting, or who later reads the minutes of the board meeting, should know that the board has acted to borrow money. However, a board, in authorizing the loan and the assignment/pledge of its assets, may, by resolution, give prior authority to its officers to negotiate the exact terms of the loan. Thus the final interest rate and other terms may not be available to a unit owner initially. How much negotiating "space" a board is willing to give its officers varies from association to association.

A loan is just a contract to borrow and then pay back money. As such, an owner could (ICPA, Sec. 19(a)(6) ) make a request of the association after the closing of the loan, for a copy of the loan documents on the basis that they are just a contract of the association. If the owner states a proper purpose for the request, (ICPA, Sec. 19) it entitles the owner to review and copy the loan documents.

As to whether owners can stop short-term non-priority projects in favor of immediate priority projects such as tuckpointing, the ICPA does not directly address this issue either. But virtually all declarations leave the board with very wide discretion (and without the need of prior unit owner approval) in the control of the timing and priority of the spending of association money to maintain and decorate the association's existing common elements. It is possible, but unlikely, that your declaration, bylaws and/or rules specify an order of priority for a board's spending of money or otherwise limit that discretion.

Some declarations limit how much money a board may spend on a project, without prior unit owner approval. But if those expenditures are to maintain, repair or replace existing common elements, such dollar limits are not enforceable (ICPA, Sec. 18.4(a)).

Owners who disagree with a board's pending priorities can try to remove one or more directors from office. Your declaration will specify that process. But it is usually hard to do. Or, you could run for the board yourself.

In an extreme case, you could sue the board members for breach of fiduciary duty. But given board discretion in the spending of association money, I would think it would have to be a fairly compelling case of mistaken priorities for the unit owners to get a court to override the board's exercise of its discretion.

# B. ALLENDORFER

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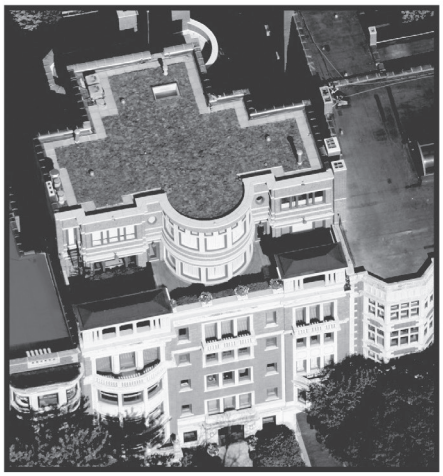

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# Question of the Month

*By: Mark Rosenbaum of Fischel & Kahn, Ltd. / 155 N. Wacker, Chicago 60606*
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**Q.** Does a Condominium Board need to disclose that it is taking out a loan and any of the specifics such as the terms? The Board does not plan on raising assessments or instituting a special assessment but they are planning on using the reserve fund to pay for a lobby refurbishment even though the reserve study indicated the association should be currently undertaking some capital improvement/maintenance projects. Is there anything owners can do to stop short-term non-priority projects in favor of immediate priority projects such as tuckpointing?

**A.** You have actually raised several different questions. I will take them one at a time.

° Does a Condominium Board need to disclose that it is taking out a loan and any of the specifics such as the terms? The Illinois Condominium Property Act (ICPA) is actually silent on the issue of borrowing money. However, condo associations are either not-for-profit corporations or have the powers of a not-for-profit corporation. (ICPA Sec. 18.3: Among the powers of a not-for-profit corporation is the power to borrow money; Illinois General Not-for-Profit Corporation Act, Section 103.10(h).)

Almost always, when an association borrows money, it ends up pledging all, or substantially all, of its assets to secure the loan. Act, Section 18.4(m) allows the board, by a majority vote of the entire board, to assign the Association assessments and to pledge all, or substantially all, of the remaining assets of the Association, unless the declaration and/or bylaws say otherwise.

Since an association only pledges those assessments and assets as security for a loan, it is in the board's control as to whether to borrow money, subject to any specific limitations contained in the declaration and/or bylaws (which theoretically could include, among other things, requiring a unit owner vote before borrowing money).

*Continued on page 5*