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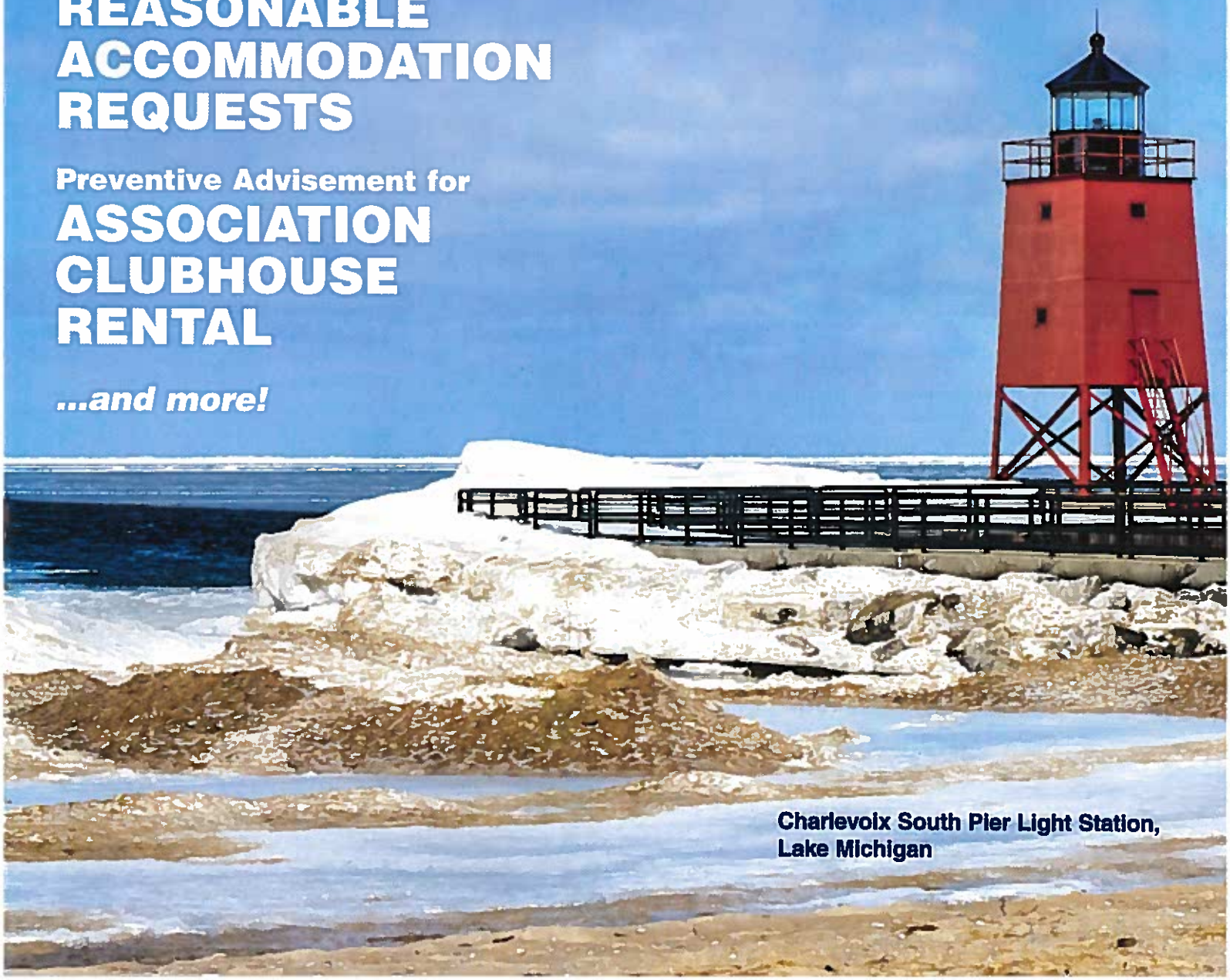

Charlevoix South Pier Light Station, Lake Michigan

Michigan Senate Bill 610:

A fix to Section 67 of the Michigan Condominium Act (MCL 559.167) or the creation of a new set of problems?

By Kevin M. Hirzel, Esq.

The intended purpose of MCL 559.167 of the Michigan Condominium Act was to create an end date for developing condominium projects in Michigan and prevent incomplete projects that are not only an eyesore, but also create numerous practical problems for operating a condominium association. The current version of MCL 559.167 has been in place for almost fifteen (15) years and allows for a developer to withdraw all undeveloped portions of land from the project within ten (10) years of the date of commencement of construction or within six (6) years of the exercise of a developer's rights of conversion, contraction or expansion. If a developer did not withdraw the undeveloped land from the condominium project, the undeveloped land would automatically convert to common elements.

While the current version of MCL 559.167 was certainly well intentioned, it fails to address several key issues that are associated with removing land from a condominium and/or converting units to common elements. Accordingly, it is no surprise that MCL 559.167 is one of the most heavily litigated and most controversial sections of the current Michigan Condominium Act.

On November 10, 2015, Senator Margaret O'Brien introduced Senate Bill 610, which was referred to Committee on Local Government. A copy of the proposed amendments can be found at footnote #1 below.[1] The author of this article commends Senator Margaret O'Brien and Senator Arlan Meekhof for taking the initiative to introduce a bill that attempts to bring clarity to MCL 559.167. However, as will be discussed below, Senate Bill 610 only fixes certain problems associated with MCL 559.167 and will likely create new issues moving forward. Fixing MCL 559.167 is no small feat, nor is there likely a perfect solution; however, the author of this article believes that a complete overhaul of the Michigan Condominium Act is necessary in order to address the current issues with MCL 559.167 as well as numerous other problems.

What problems does Senate Bill 610 Fix?

A. Measuring the Ten (10) Year Withdrawal Period.

Under the current version of MCL 559.167, the ten (10) year time period to withdraw undeveloped land begins upon the commencement of construction of the condominium. The term "commencement of construction" is not defined in the Michigan Condominium Act and the exact date is often disputed. In order to resolve this problem, Subsection (3) of Senate Bill 610 would have the ten (10) year time period to withdraw units commence upon the recording of the Master Deed in the Register of Deeds for the County where the condominium project is located. Given that determining the date that a Master Deed is recorded is relatively easy, Senate Bill 610 succeeds in bringing clarity to the measurement of the ten (10) year time period to withdraw units.

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What are the Potential Consequences of Senate Bill 610?

A. Removal of Units or Removal of Land?

The legislative analysis for MCL 559.167 indicates that the original intent of the statute was to provide a mechanism in which **all undeveloped land** would be removed from the condominium. Specifically, the *House Fiscal Agency Analysis* provides in pertinent part:

> *Length of Project.* Under the bill, if a developer did not complete development and construction of an entire condominium project, including proposed improvements, during a period ending 10 years from the date the developer began construction, then the developer, its successors, or assigns would have the right to withdraw from the project **all undeveloped portions of it,** without the prior consent of any co-owners, mortgagees of units in the project, or any other party having an interest in the project.
>
> •••
>
> If the developer did not withdraw the undeveloped portions of the project from the project before the 10 or six-year time period expired, those lands would remain part of the project as general common elements and all rights to construct units on that land would cease. (emphasis added)

Presumably, the Michigan Legislature intended this to mean that both units and common elements – regardless of whether they were "must be built" or "need not be built"–could be withdrawn. If the units or common elements were not withdrawn, those units or common elements would automatically convert to common elements. In essence, this process would bring finality to a condominium project.

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One of the most problematic issues with the current version of MCL 559.167 is that it does not clearly express the above described legislative intent. The first sentence of the current version of MCL 559.167(3) appears to allow for a developer to remove "all undeveloped portions of the project not identified as 'must be built.'" In contrast, the fourth sentence of the current version of MCL 559.167(3) indicates that any "undeveloped portion of the project" that has not been withdrawn shall automatically become general common elements. Accordingly, while the current statute is not clear as to whether only "need not be built" portions of a project automatically convert to common elements, the statute does allow for a developer to remove **undeveloped land** from the project. While a statutory definition of "undeveloped land" in the definitions section of the Michigan Condominium Act would certainly be useful, it does appear to encompass something more than just "units." Accordingly, the current version of the statute appears to provide some flexibility to developers with respect to removing "undeveloped land" from a condominium.

In contrast, Senate Bill 610 has completely removed the term "undeveloped land" from MCL 559.167 and would only allow for undeveloped "units" to be withdrawn from the condominium. Examples of undeveloped land that could no longer be withdrawn under Senate Bill 610 would be areas that were planned for clubhouses, pools, open spaces, roads, tennis courts, etc. If undeveloped units were withdrawn, but the undeveloped common elements remained, many condominiums would be forced to maintain common elements that served no useful purpose to the condominium. Similarly, developers would be forced into withdrawing oddly shaped parcels of land, i.e. land that only consisted of former units, which would make further development of the withdrawn land difficult.

B. Automatic Conversion of Common Elements or a Vote to Withdraw?

As indicated above, the purpose of MCL 559.167 was to prevent incomplete condominium projects and to create an end date for the development of a condominium. Under the current version of MCL 559.167, undeveloped land automatically converts to common elements. From an association perspective, this is important as it allows for a condominium association to properly prepare a budget, determine maintenance responsibilities and costs, levy assessments and determine the necessary amount of funds to hold in reserve, *inter alia*. In short, the association will know the final configuration of the association and the association's responsibilities related to same.

From a developer's perspective, having a final completion date is important as well. While a developer should certainly have a reasonable amount of time to withdraw land from a condominium project so that it can develop the land for another purpose, merely allowing units to remain stagnant in a condominium is problematic for developers as well. Specifically, allowing undeveloped units to remain in a condominium will often prevent the occurrence of the transitional control date, which occurs when non-developer owned units can outvote developer owned units. *See* MCL 559.110(7). Given that MCL 559.276 imposes a three (3) year statute of limitations on claims against a developer from the transitional control date, it would seem that developers would not want condominium projects to drag on indefinitely as the statute of limitations on claims against a developer may never begin to run, and developers would be open to potential lawsuits for an indefinite period of time. Accordingly, the creation of a system where all undeveloped units, irrespective of whether they are "must be built" or "need not be built", would convert to common elements at a certain point in time would seem to benefit both associations and developers and effectuate the original intent of MCL 559.167.

In contrast, Senate Bill 610 eliminates the automatic conversion of units to common elements and requires 2/3 of the co-owners vote to approve the conversion of undeveloped units to common elements. What if a developer never sells 2/3 of the units or controls more than 1/3 of the votes? Such

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a vote will likely never occur or pass. If this is the case, there will be no end date to the development of the condominium. Similarly, if a developer is going to have a second chance to withdraw units after a successful co-owner vote, why even have a ten (10) year time period to withdraw units, as the ten (10) year time period becomes completely meaningless.

Finally, the proposed revisions to the statute could create title problems because they does not address what would happen in a situation where the developer did not actually receive notice that an association voted to convert the undeveloped units into common elements. Senate Bill 610 only requires that an association send notice that it voted to convert units to common elements via first class mail to the last known address of the developer or successor developer. What if the developer or successor developer has moved, the notice gets lost in the mail or a secretary discards the notice as junk mail? If the developer sold an undeveloped unit to an unsuspecting purchaser, and the association had not yet recorded its declaration that converted the unit into common elements, what happens to the unit once the association records the declaration? Similarly, what happens if a co-owner and/or developer were to challenge the validity of an association vote on this issue? In short, automatic conversion of units to common elements at a date certain provides certainty to all interested parties, whereas requiring a vote to convert units to common elements only appears to create a multitude of new problems and is contrary to the original intent of MCL 559.167. If developers do not believe that ten (10) years provides sufficient time to complete a condominium, this time period could be adjusted or a mechanism could be put into place that would allow for a vote by the co-owners to extend this time period to another date certain.

C. Consistency of Terminology.

The first sentence of MCL 559.167(3) currently allows for a "developer, its successors, or assigns" to withdraw units from a condominium. The first sentence of MCL 559.167(4) indicates that if a "developer" does not withdraw units, the possibility exists that the undeveloped units will convert to common elements. What if the developer has assigned its rights or there is a statutory successor developer under MCL 559.235? Can undeveloped units owned by an assignee or successor developer be converted to common elements? Presumably the answer to this question is "yes", as the second sentence requires notice to any "developer or successor developer" before an association could vote to convert undeveloped units to common elements. However, if the developer has assigned its rights, does such notice need to be provided to an assignee of a developer? Presumably, the answer to this question is "yes", but the inconsistent use of terminology needs to be fixed in order to avoid MCL 559.167 from continuing to be frequently litigated.

Unresolved Issues of Senate Bill 610

Besides the issues identified above, there are numerous issues that Senate Bill 610 does not address.

A. Who is responsible for any outstanding taxes on land that converts to common elements?

One of the major problems with MCL 559.167, which Senate Bill 610 does not address, is what happens to any outstanding

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encumbrances that are attached to property that converts to common elements? In *Paris Meadows, LLC v City of Kentwood,* 287 Mich App 136, 149; 783 NW2d 133, 141 (2010), the Michigan Court of Appeals held that common elements cannot be taxed and that only condominium units are subject to taxation. Accordingly, when condominium units are converted to common elements, an issue arises as to whether the former owner of the units is liable for any taxes or tax liens, whether the association is now responsible or whether the tax obligation disappears. While not addressed in Senate Bill 610, the easiest way to resolve this issue would be to amend other portions of the Michigan Condominium Act and the Michigan General Property Tax Act to reflect that condominium units are not taxable until a building permit is pulled and/or until construction of a unit is completed. In short, undeveloped units, that may never be developed, would have the same taxable status as common elements, given that the undeveloped units may eventually become common elements anyway.

B. Who is responsible for any outstanding mortgages or other liens on land that converts to common elements?

In addition to tax obligations, it is possible for other encumbrances, such as mortgages or construction liens, to attach to undeveloped units that may convert to common elements. Once again, Senate Bill 610 does not indicate whether a mortgage or construction lien that remains would be extinguished by the conversion of units to common elements. Given that the developer was presumably responsible for these types of encumbrances, and the developer has ample opportunity to remove any undeveloped units from a condominium, any amendment to MCL 559.167 should indicate that these encumbrances are removed from the common elements and that the obligation for paying the same remains with the developer or other party that was responsible for creating the encumbrance.

C. Does Senate Bill 610 apply to all condominiums currently in existence?

Subsection (5) of Senate Bill 610 seems to indicate that units in existing condominiums cannot convert to common elements without completion of the election, notice and recording requirements. The inclusion of such a provision is especially problematic for condominiums in which the 10 year period has already expired and the undeveloped units have already automatically converted into common elements. Under the current statute, the automatic conversion does not require that an association take any action because the conversion to common elements is automatic. Accordingly, most associations and developers have likely been operating under the assumption that the undeveloped land is owned by the association and that the developer no longer has any obligation with respect to the condominium project.

Subsection (5) is especially problematic as it appears to undo an automatic conversion that has already taken place. If such a conversion has already happened, is an association now required to re-create the units, hold a vote and provide a developer a second chance to the develop the units? What if the developer does not want the units back? Would title automatically revert to the developer if the association did not satisfy the election, notice and recording requirements?

Similarly, if the statute now requires that units be re-created and added back to a condominium, would a condominium that has relied on the elimination of units to trigger the transitional control date now revert back to developer control? If so, would the statute of limitations now begin to run again on claims against a developer until there was a second transitional control date even though the statute of limitations may have previously expired? What if the association has already built a structure or otherwise developed the common elements after they have been automatically converted? Is the association now required to remove the structure and/or units? In short, making Senate Bill 610 retroactive is going to create a great deal of uncertainty with respect to the property rights of the interested parties.

CONCLUSION

From all indications, Senate Bill 610 was well intentioned to solve one of the most problematic areas of the Michigan Condominium Act. All interested parties are likely in agreement that MCL 559.167 has numerous problems and needs to be amended. However, as discussed above, MCL 559.167 cannot be amended in a vacuum, and will likely need to be amended as part of a broader sweeping measure that include revisions to other provisions of the Michigan Condominium Act and the Michigan General Property Tax Act. Accordingly, I would urge all Michiganders to contact their state senator and voice their opposition to Senate Bill 610 until a complete overhaul of the Michigan Condominium Act can be introduced and/or request that Senate Bill 610 be amended to address the above issues. Contact information for your state senator can be found at the following link: http://www.senate.michigan.gov/fysbyaddress.html ■

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NOTES:

[1] Senate Bill 610 would modify MCL 559.167 as follows:

Sec. 67. (1) A change in a condominium project shall be reflected in an amendment to the appropriate condominium document. An amendment to the condominium document is subject to sections 90, 90a, and 91.

(2) If a change involves a change in the boundaries of a condominium unit or the addition or elimination of condominium units, a replat of the condominium subdivision plan shall be prepared and recorded assigning a condominium unit number to each condominium unit in the amended project. The replat of the condominium subdivision plan shall be designated replat number _____ of _____ county condominium subdivision plan number_____, using the same plan number assigned to the original condominium subdivision plan.

(3) Notwithstanding section 33, **for 10 years after the recording of the master deed,** if the developer has not completed development and construction of units ~~or improvements~~ in the condominium project **that are defined as being enclosed by improvements which comprise both a vertical and horizontal dimension and** that are **not** identified **in the condominium subdivision plan pursuant to section** 66 as **"need not" must** be built", ~~during a period ending 10 years after the date of commencement of construction by the developer of the project,~~ the developer, its successors, or assigns ~~have the right~~ **to may** withdraw **any such units** from the project ~~all undeveloped portions of the project not identified as~~ **or convert the** units to "must be built" without the prior consent of any co-owners, mortgagees of units in the project, or any other party having an interest in the project. If the master deed ~~contains provisions permitting the~~ **confers on the developer** expansion, contraction, or ~~rights of~~ convertibility **of rights with respect** to units or common elements in the condominium project, then the time period is **10 years after the recording of the master deed or** 6 years after the ~~date~~ **recording of the amendment to the master deed by which** the developer **last** exercised its ~~rights with respect to either~~ expansion, contraction, or ~~rights of~~ convertibility **rights,** whichever ~~right was exercised last~~ **period ends later.** The undeveloped ~~portions of the project~~ units **not labeled "must be built" so** withdrawn ~~shall also~~ **are** automatically **be** granted easements for utility and access purposes through the condominium project for the benefit of the undeveloped portions of the project.

(4) If the developer does not withdraw ~~the undeveloped portions of the project~~ from the project **or convert those units not labeled "must be built"** before

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expiration of the ~~time periods, those undeveloped lands~~ **applicable time period set forth in subsection (3), the association of co-owners, by an affirmative 2/3 majority vote, may declare that those undeveloped units** shall remain part of the project **as but revert** to general common elements and **that** all rights to construct **those** units ~~upon that land~~ shall cease. **When such a declaration is made, the association of co-owners shall provide written notice of the declaration to the developer or any successor developer by first-class mail at its last known address. Within 60 days after receipt of the notice, the developer or any successor developer may withdraw those undeveloped units or convert them to "must be built". However, if the units are not withdrawn or converted within 60 days, the association of co-owners may file the notice of the declaration with the register of deeds. The declaration takes effect upon recording by the register of deeds. The association of co-owners shall also file notice of the declaration with the local supervisor or assessing officer.** In such an event, if it becomes necessary to adjust percentages of value as a result of fewer units existing, a co-owner or the association of co-owners may bring an action to require revisions to the percentages of value under section 95.

(5) A reversion under subsection (4), whether occurring before or after the date of the 2016 amendatory act that added this subsection, is not effective unless the election, notice, and recording requirements of subsection (4) have been met.

(6) Subsections (3) and (4) do not apply to units no longer owned by the developer or by the owner of the property at the time the property became part of the condominium project, unless the purchaser from the developer or owner of the property at the time the property became part of the condominium project is a successor developer under section 135.

Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.