



September
2017
Newsletter

As summer comes to an end, we are reminded that the end of 2017 is right around the corner. This is also the time when we begin to see changes in the law which will take effect in 2018.



This newsletter is devoted to changes in statutes applicable to community associations. It also summarizes a recently decided case, once again related to Section 9(g) of the Condominium Property Act.

At K&M, our goal is to help community association managers and board members stay apprised of these changes. Yet, we understand that these changes also give rise to questions affecting your association. After you read this newsletter, please contact our office with your questions.

Happy reading!

Chuck Keough

Summary of Changes to the Common Interest Community Association Act and Illinois Condominium Property Act

EFFECTIVE JANUARY 1, 2018

On August 24, 2017, Governor Rauner approved House Bill 0189 which amends certain terms of the Common Interest Community Association Act and the Illinois Condominium Property Act. These changes are effective as of January 1, 2018. The following is a summary of the changes. ***Please pay close attention to the changes to Section 19 of the Condominium Property Act related to document requests, as the law is reducing the amount of time an association has to respond to such a request from 30 to 10 business days!***

Changes to the Common Interest Community Association Act

765 ILCS 160/1-20(e): This Section is amended to state that if an association's governing documents require the approval of any mortgagee or lienholder of record when amending the

association's governing documents, the approval is deemed given unless the mortgagee or lienholder delivers a negative response within 60 days after the association mailed the request. The request to the mortgagee or lienholder must be sent by certified mail.

765 ILCS 160/1-45(i): Associations with 100 units or more must use Generally Accepted Accounting Principals when fulfilling its accounting obligations.

Changes to the Illinois Condominium Property Act

765 ILCS 605/9(c)-(5): This is a *new* provision to the Act which provides that at the end of an association's fiscal year and after the association has approved any end-of-year fiscal audit, if the fiscal year ended with a surplus of funds over actual expenses, so long as there are no contrary provisions in the association's governing documents, the Board, in its discretion, shall dispose of the surplus in one or more of the following ways:

1. contribute the surplus to the association's reserve fund;
2. return the surplus to the Unit Owners as a credit against the remaining monthly assessments for the current fiscal year;
3. return the surplus to the Unit Owners in form of a direct payment to the unit owners; or
4. maintain the funds in the operating account, in which case the funds shall be applied as a credit calculating the following year's annual budget

This provision also provides that if the fiscal year ends in a deficit, then, to the extent that there are not any contrary provisions in the association's governing documents, the Board, in its discretion, may address the deficit by incorporating it into the following year's annual budget. This provision also allows, within 30 days after notice of the Board's decision, 20% of the Unit Owners to deliver a petition to the Board objecting to the action. Within 30 days of the date of the delivery of this petition, the Board shall call a meeting of the Unit Owners to allow the Owners to vote to select a different option as to how to address the deficit. A majority of the total votes of the Unit Owners is needed to reject the Board's decision and if a majority is not obtained at the meeting, the Board's decision is ratified.

765 ILCS 605/15(a): This Section is amended to permit Unit Owner(s) who object to the sale of the Property within the Association the option of receiving the value of his/her unit less unpaid assessments *or* the outstanding balance of bonafide debts secured by the unit less unpaid assessments. An objecting Owner is also entitled to reasonable relocation costs. The amendment to this Section applies to all pending and commenced sales as of the date of amendment.

765 ILCS 605/18(a)(8)(iv): This Section is amended to extend the amount of time from 14 to 21 days that 20% of the Unit Owners must submit a petition to begin the process to challenge a Board's decision to adopt a budget or any separate assessment that results in the sum of all regular and separate assessments payable in the current fiscal year to exceed 115% of the sum of all regular and separate assessments payable during the preceding fiscal year.

765 ILCS 605/18: There are two changes to Section 18.

1. Section 18 (a)(16) is amended to extend the amount of time from 20 to 30 days that 20% of the Unit Owners must submit a petition to begin the process to challenge a Board's action to enter into a contract with a Board member or a member of the Board Member's immediate family, when the person has 25% or more of an interest in corporation or partnership contracting with the association.
2. Section 19(b)(9)(c) is amended to extend the amount of time from 14 to 30 days that 20% of the Unit Owners must deliver a petition to begin the process to challenge a Board's decision to adopt a rule that prohibits proxy voting at an election meeting and only allows voting by ballot, as outlined in Section 18(b)(9)(B) or (B-5).

765 ILCS 605/18.4(a): This Section is amended to extend the amount of time from 14 to 21 days that 20% of the Unit Owners must deliver a petition to begin the process to challenge a Board's decision to make a replacement to the common elements that results in an improvement over the

original quality, when the expenditure exceeds 5% of the annual budget and is not an improvement mandated by law or in response to an emergency as defined in Section 18.

765 ILCS 605/18.10: This is a **new** Section that requires a condominium association which consists of 100 or more units to use Generally Accepted Accounting Principles in fulfilling any accounting obligations under the Condominium Property Act.

765 ILCS 605/19: There are numerous material changes to this section, which are as follows.

1. Section 19(a)(7) requires the Board to maintain in its books and records the e-mail address and telephone number of each member.
2. Section 19(b) does not require an Owner to state a proper purpose when requesting to inspect contracts and other agreements pursuant to 19(a)(6) or the financial records pursuant to 19(a)(9). It also requires the Board to make available all records requested within **10 business days**, instead of 30.
3. "Commercial purpose" is defined as the use of any part of a record described in 19(a)(7) and (8) or information derived from such records in any form for sale, resale, solicitation or advertisement for sales or services. (This definition is relevant to further changes to Section 19(e).
4. Section 19(e) is amended to state that when an Owner requests to inspect documents as provided for in Section 19(a)(7) and (8), the Owner must state a purpose that relates to the association. It also provides that the Board may require the Owner to certify in writing the information within the records obtained by the member will not be used for any commercial purposes, as defined in Section 19(d-5). It also allows the Board to impose a fine on a person who makes a false certification. This Section also requires the Board to respond to a request within **10 business days** instead of 30. This Section deletes the language that the Owner has the burden of proving that the request states a proper purpose.
5. Section 19(f) is amended to state that the Board **may** charge the requesting member the cost to make records available for inspection and the actual cost to reproduce the records.

We recommend that each association review their Rules and Regulations related to the inspection of records to confirm compliance with these changes to Section 19.

765 ILCS 605/27(a)(ii): This Section is amended to state that if an association's governing documents require the approval of any mortgagee or lienholder of record when amending the association's governing documents, the approval is deemed given unless the mortgagee or lienholder delivers a negative response within 60 days after the association mailed the request. The request to the mortgagee or lienholder must be sent by certified mail.

765 ILCS 605/31: There are several changes to Section 31.

1. Section 31(a) now includes a definition for the phrase "combination of any units" as used in Section 31, to mean any 2 or more residential units to be used as a single unit which may involve exclusive use of a portion of the common elements which are adjacent to the combined unit, i.e. a portion of an adjacent common hallway.
2. Section 31(e) was added to provide that when units are combined if they are granted an exclusive right to use as a limited common element a portion of the common elements, which are not necessary or practical for use by any other Unit Owners, such a granting is not a diminution of the ownership interests of all other Unit Owners. Therefore, 100% Unit Owner approval is not needed.
3. Section 31(f) was added to provide that for an amendment pursuant to this Section to be effective all of the requirements of this Section must be met.

Again, these changes go into effect on **January 1, 2018**. Any questions about these changes can be directed to Gabriella Comstock at grc@kmlegal.com.

1010 Lake Shore Revisited

In December, 2015, the Illinois Supreme Court affirmed the previous rulings in the *1010 Lake Shore Association v. Deutsche Bank National Trust* case. In the *1010 Lake Shore* case, the Association initiated a collection action against Deutsche Bank National Trust for not only the amounts owed and accrued **after** the foreclosure sale, but also for the unpaid common expenses incurred and accrued by the foreclosed owner **preceding** the foreclosure. Relying on Section 9 (g)(3) of the Illinois Condominium Property Act, the court held that because Deutsche Bank National Trust failed to pay assessments as required, the association's lien was not extinguished. The court entered judgment in favor of the association for the full balance owed.

The question left unanswered by *1010 Lake Shore* was this: By what period in time must the current assessments be paid in order for the prior lien to be extinguished? This question was first addressed by the First District Court of Appeals in *5510 Sheridan Road Condominium Association v. U.S. Bank*, 2017 IL App (1st) 160279. In the *5510 Sheridan Road* case, the Appellate Court held that Section 9(g)(3) did not create a timing requirement for the payment of current assessments. Rather, it merely outlined when the purchaser became responsible for the payment of post-sale common expenses. Therefore, under the reasoning of *5510 Sheridan Road*, a purchaser could pay post-sale common expenses at any point in time and extinguish the lien.

In a subsequent opinion filed on August 8, 2017 in *Country Club Estates Condominium Association v. Bayview Loan Servicing, LLC*, 2017 IL App (1st) 162459, a separate division of the First District Court of Appeals further evaluated the issue. The Court in *Country Club Estates* held that *1010 Lake Shore* required that purchasers submit **prompt** payment of post-sale common expenses in order to terminate the lien. Otherwise, there would be no incentive for purchasers to promptly pay common expenses following a foreclosure, which would adversely impact condominium associations and their members. The determination of what constitutes prompt payment would depend upon the facts and circumstances of each case. The Appellate Court further held that to the extent that *5510 Sheridan Road* seemed to imply that there was no timing requirement for the payment of post-sale common expenses, it was inconsistent with the binding Illinois Supreme Court decision in *1010 Lake Shore*.

What does this mean for condominium associations? At this time, it means that the theory in *1010 Lake Shore* remains viable. In order for a foreclosure purchaser to fully extinguish a pre-foreclosure lien, it must promptly pay post-sale common expenses. It continues to be our recommendation that associations adopt a collection policy which specifies what 'prompt payment' of common expenses means, and which sets forth the timing for turnover of accounts for collection. Then, in response to the failure of Owners to abide by such policies, full amounts should be demanded and legal action should be initiated in order to recover such amounts. In addition to the foregoing, condominium associations should ensure that they are operating with clean hands. That is, an association cannot prevent or interfere with a lender's ability to make prompt payment and then, still claim the benefits of *1010 Lake Shore*. Therefore, condominium associations and/or management should ensure that they are promptly responding to inquiries from foreclosing lenders requesting accounts statements and W-9s.

If your association would like to adopt a collection policy and/or you have questions regarding how these cases affect your association, please contact Dawn Moody at d1m@kmlegal.com.

Chicago
312-899-9989
info@kmlegal.com

Naperville
630-369-2700
www.kmlegal.com

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Keough & Moody, P.C., 114 East Van Buren, Naperville, IL 60540

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