

## COMMUNITY ASSOCIATION INSTITUTE – LEGISLATIVE ACTION COMMITTEE

### Michigan Senate Bill 610: Opposition Letter

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.

#### What problems does Senate Bill 610 Fix?

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.

#### What Problems Does Senate Bill 610 Create?

##### **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)

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" would certainly be useful, it does encompass something more than just "units" (which is by definition contained in Senate Bill 610 only includes airspace). 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.

Further and even more problematic, by removing the phrase "undeveloped land" from the Statute, and merely allowing the developer to remove undeveloped "units," Senate Bill 610 would essentially only permit the developer to remove the right to construct units, as the units are only airspace and removing only "units" without any corresponding "land" would leave that "undeveloped land" upon which the units were to be built a part of the condominium. This surely cannot be the intended result of Senate Bill 610; however, as worded, this result would be mandated (i.e. removal of development rights only without any corresponding removal of the land upon which the unit was to be constructed).

## **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.

In contrast, Senate Bill 610 eliminates the automatic conversion of units to common elements and requires 2/3<sup>ds</sup> of the co-owners vote to approve the conversion of undeveloped units to common elements. The Condominium Act was enacted as a remedial consumer protection statute, and requiring such affirmative action by the co-owners conflicts with one of the Act's purposes of protecting the unsophisticated consumer. While automatic conversion without some additional affirmative action, such as recording in the County records an amendment to the Master Deed that reflects the automatic conversion, creates potential title insurance issues, shifting the burden to the consumer is not the appropriate remedy. As set forth in the proposed revisions submitted to Senate Bill 610's sponsor, the better method would be to continue with the automatic conversion concept while at the same time requiring an amendment to the Master Deed to reflect the automatic conversion.

Further, the notice provisions contained in the proposed statute could create the same title problems that exist when dealing with tax foreclosures; namely, the argument that a developer's due process rights have been violated for a lack of proper notice. As the title company industry well knows, when anything short of personal notice is permitted, objections based on due process violations are ripe. Further, this notice requirement again shifts the burden to the unsophisticated consumer, which directly conflicts with the protectionist purpose of the Act. Indeed, it is the developer of the condominium that is most informed as to when the Master Deed was recorded, and it is an engaged developer that will ensure that all appropriate time frames (including those related to expansion, contraction and conversion contained in Sections 31, 32 and 33 of the Act) are adhered to. The consumer purchaser is not charged with monitoring every other development-related time frame under the Condominium Act, so there is certainly no rational reason to require it here.

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.

## **C. New Subsection (6).**

It is presumed that the intent of new Subsection (6) of Senate Bill 610 is in place to prevent anyone other than a developer or successor developer from taking advantage of the developer's rights contained in Subsections (3) and (4) (such as the right to withdraw unbuilt

units). However, as worded, this new Section opens the door to claims that any unbuilt units that are not owned by the developer or a successor developer cannot be converted to General Common Elements. The language of Subsection (6) must therefore be revised to make clear that the conversion provisions apply regardless of who owns the unbuilt units at the expiration of the relevant timeframes.

### 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, Senate Bill 610 in its current form only creates more problems. Accordingly, to the extent this legislation is to move forward, we respectfully request it only move forward in the revised form that has been submitted to the Bills' sponsor by the Community Association Institute – Legislative Action Community.