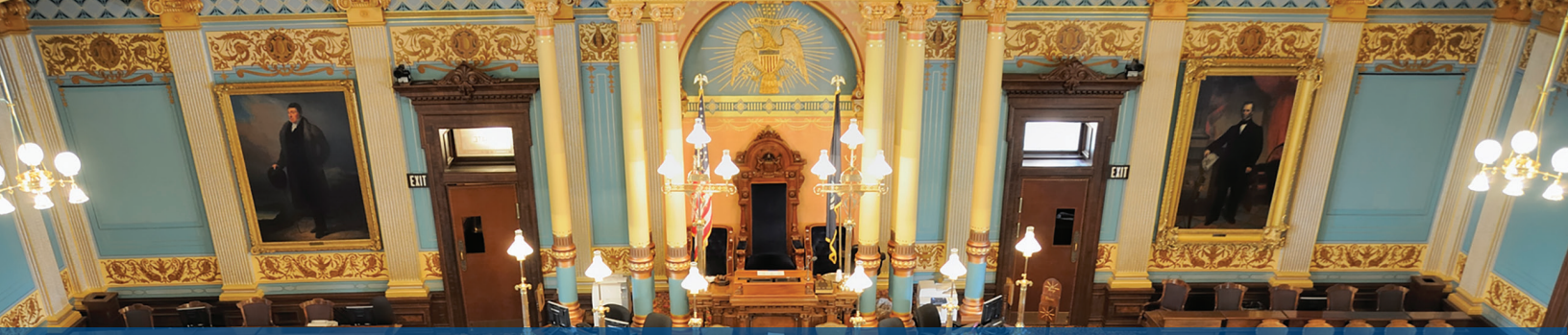
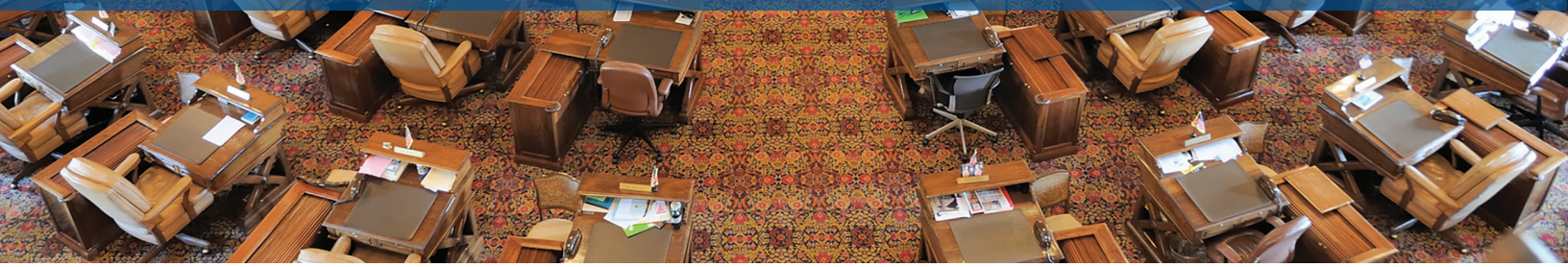


Senate Bill 610 Passes:
Is the amendment to MCL 559.167 of the Michigan Condominium Act constitutional?

By Ken Hirzel, Esq.



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On June 22, 2016, Governor Snyder signed Senate Bill 610, after it underwent several amendments in both the house and senate. Senate Bill 610 will become effective as of September 21, 2016 and will amend MCL 559.167 to read 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, the developer, its successors, or assigns may withdraw from the project any undeveloped land or convert the undeveloped condominium units located thereon to "must be built" without the prior consent of any co-owners, mortgagees of condominium units in the project, or any other party having an interest in the project. If the master deed confers on the developer expansion, contraction, or convertibility rights with respect to condominium 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 recording of the amendment to the master deed by which the developer last exercised its expansion, contraction, or convertibility rights, whichever period ends later. Any undeveloped land so withdrawn is automatically granted easements for utility and access purposes through the condominium project for the benefit of the undeveloped land.
>
> (4) If the developer does not withdraw undeveloped land from the project or convert undeveloped condominium units to "must be built" before expiration of the applicable time period under subsection (3), the association of co-owners, by an affirmative 2/3 majority vote of the members in good standing, may declare that the undeveloped land shall remain part of the project but shall revert to general common elements and that all rights to construct condominium units upon that undeveloped 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 the undeveloped land or convert the undeveloped condominium units to "must be built". However, if the undeveloped land is not withdrawn or the undeveloped condominium units are not 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 condominium 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.

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(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 condominium 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.

(7) As used in this section, "undeveloped land" means land on which were recorded 1 or more condominium units, none of which were either identified in the condominium subdivision plan as "must be built" or have had construction commenced, although infrastructure construction or common element construction may have commenced. Undeveloped land does not include condominium units that are depicted or described on the condominium subdivision plan pursuant to section 66 as containing no vertical improvements.

How will the amendments to MCL 559.167 impact condominiums?

As indicated in *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?* (Michigan Community Association News, Fourth Quarter, 2015), MCL 559.167 was enacted in 2001 in order to provide an end date for the development of condominiums. MCL 559.167(3) required that a developer, its successors or assigns either complete any units identified as "need not be built" on the condominium subdivision plan within ten (10) years of the date of commencement of construction or within six (6) years of exercising a right of conversion, expansion or contraction. If the developer, its successors or assigns did not complete the "need not be built" units with the statutory time periods, the right to construct the units would terminate and the land remain in the condominium as common elements if it was not withdrawn.

In contrast, Senate Bill 610 amends MCL 559.167 to eliminate the automatic reversion of "need not be built" units to common elements after the expiration of the six (6) year or ten (10) year statutory time periods. MCL 559.167(4) will now require 2/3 of the co-owners that are in good standing to vote to approve a reversion of "need not be built" units to common elements by adopting a declaration that will be recorded in the register of deeds after the expiration of the statutory time periods. If 2/3 co-owner approval is obtained, the condominium association must then send the declaration to a developer or successor developer at its last known address. The developer or successor developer may withdraw the land on which the units were to be located or amend the master deed to make the units "must be built" within the sixty (60) day time period. If the developer or successor developer fails to withdraw the land or amend the master deed within sixty (60) days, the condominium association may record the declaration, which becomes effective upon recording and the "need not be built" units will remain in the condominium as common elements. In short, Senate Bill 610 effectively gets rid of an "end date" for the development of a condominium.

Senate Bill 610 also made other minor amendments that bring additional clarity to MCL 559.167. MCL 559.167(3) was amended to indicate that the ten (10) year time period now begins to run upon the recording of the master deed instead of the date that construction is commenced. The six (6) year time periods still begins to run on the date that an amendment to the master deed is recorded which exercises a right of conversion (MCL 559.131), expansion (MCL 559.132) or contraction (MCL 559.133). As suggested in *Michigan Senate Bill 610: A fix to Section 67 of the*

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Michigan Condominium Act (MCL 559.167) or the Creation of a new set of Problems? (Michigan Community Association News, Fourth Quarter, 2015), a statutory definition of "undeveloped land" was also added in the newly created MCL 559.167(7) as part of the senate amendments to the original bill.

Is it constitutional for MCL 559.167 to have retroactive application?

Senate Bill 610 also creates MCL 559.167(5) which purports to give retroactive effect to MCL 559.167(3) and MCL 559.167(4). As discussed in As suggested in *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?* (Michigan Community Association News, Fourth Quarter, 2015), attempting to make the amendments to MCL 559.167 retroactive is going to create a great deal of uncertainty with respect to the property rights and will likely pose constitutional problems. Specifically, while the legislature is free to change MCL 559.167 with respect to its ***prospective*** application to condominiums, a constitutional issue arises when an amendment to a statute ***retroactively*** impacts vested property rights.

MCL 559.161 states that each owner of a condominium unit also owns an appurtenant shares of the common elements. Pursuant to MCL 559.163, each co-owner has the rights to share with the other co-owners in the common elements. Pursuant to MCL 559.137, the master deed is required to assign a percentage of value to each unit which will reflect an undivided interest in the common elements. Accordingly, pursuant to MCL 559.167(3), once the ten (10) year time period or the six (6) year time period expired under the prior version of the statute, the co-owners had a vested property right as part of their ownership of the common elements.

In a similar situation involving a change to Michigan's adverse possession statute in 1988, the Michigan Court of Appeals held that a retroactive application of the statute was unconstitutional as it impaired or abrogated vested property rights. In *Gorte v Dept of Transp,* 202 Mich App 161, 164; 507 NW2d 797, 799 (1993), the plaintiff filed a complaint for adverse possession against the state on March 3, 1988 claiming that he held title to land via adverse possession from the state. *Id.* at 164. MCL 600.5821 was amended to preclude adverse possession claims against the state and became effective on March 1, 1988, prior to the filing of the lawsuit. *Id.* The trial court held that since 1966, plaintiff and his predecessors had adversely possessed the disputed acreage and that the amendment to MCL 600.5821 did not bar plaintiff's adverse possession claim because he had a vested property right before March 1, 1988. Id. In affirming the trial court, the Court of Appeals held:

> …a statute may not be applied retroactively if it abrogates or impairs vested rights. In re Certified Questions, 416 Mich. 558, 572, 331 N.W.2d 456 (1982)…where a period of limitation has expired, the rights afforded by that statute are vested and the action in question is barred. Russo, supra, 439 Mich. at 594–595, 487 N.W.2d 698. Thus, § 5821, as amended, cannot be applied to plaintiffs if it would abrogate or impair a vested right.
>
> Defendant argues that, in amending § 5821, the Legislature intended to void not only causes of action accruing after the effective date of the statute, but also causes of action for adverse possession against the state that could have been asserted before March 1, 1988, but were not.…We are constrained, however, to follow the rules of statutory construction that dictate that a statute of limitations may not be applied retroactively to take away vested rights.

We therefore interpret § 5821, as amended, to preclude the running of the period of limitation against the state for purposes of adverse possession after the effective date of the statute. We further interpret § 5821 as inapplicable where applying the statute would abrogate or impair vested rights.

> Because the statute cannot be applied if it would abrogate or impair a vested right, it is necessary to determine when a claim of title to property by adverse possession vests. Generally, the expiration of a period of limitation vests the rights of the claimant. *Russo, supra*….Defendant argues the contrary view, that plaintiffs' possession of the property merely gave plaintiffs the ability, before the amendment of § 5821, to raise the expiration of the period of limitation as a defense to defendant's assertion of title. Contrary to defendant's arguments, however, Michigan courts have followed the general rule that the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession….Thus, assuming all other elements have been established, ***one gains title by adverse possession when the period of limitation expires, not when an action regarding the title to the property is brought.***

Id. at 167-69 (emphasis added).

Similar to the adverse possession statute, MCL 559.167(3) vests co-owners in a condominium with absolute title in the common elements, and the ability to prevent further development, as a result of the expiration of the statutory time periods. Prior to amending MCL 559.167, co-owners had a property interest in the common elements and a property interest in a cause of action to quiet title upon the expiration of the statutory time periods. As such, given the holding in *Gorte,* it is unlikely that the Court of Appeals would hold that MCL 559.167 could retroactively eliminate vested property rights and causes of action that had previously accrued. Accordingly, it is likely that MCL 559.167 will remain a highly litigated section of the Michigan Condominium Act for the foreseeable future.

Conclusion

Senate Bill 610 was probably the most radical change to the Michigan Condominium Act in the past fifteen (15) years. Eliminating the automatic reversion of "need not be built" condominium units to common elements effectively eliminates any end date for a developer or successor developer to complete a condominium. Uncertainty as to an end date for completion of a condominium will make it more difficult for condominium associations to properly prepare budgets, project maintenance costs, levy assessments and determine an adequate reserve fund as required by MCL 559.205 and Mich Admin Code, R 559.511. It also remains to be seen as to whether Senate Bill 610 will increase the number of failed condominium projects, which is the exact problem that the original statute was intended to combat. While MCL 559.167 was certainly controversial prior to Senate Bill 610, it will remain controversial until the Michigan Court of Appeals or Michigan Supreme Court opines on the constitutionality of retroactively applying the amendments to MCL 559.167 to condominiums that have already had the statutory time periods expire. ■

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