Legislative action heating up in New England - by Nena Groskind

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Legislative Action Committees (LACs) and their volunteer committee members in each state are CAI's official voice with legislators and regulators providing the opportunity for CAI to speak with one voice on matters that affect condominium associations and the industry at large.While some legislative sessions are in full swing while others near an end, many are generating a fair amount of work for LACs in the CAI New England member states of Maine, Massachusetts, New Hampshire and Rhode Island.

Maine (MELAC)

The Maine Legislature handed that state's LAC a welcome, though partial, victory, with the approval of legislation that will make it easier for condominium associations to amend their declarations. But that legislative victory turned out to be short-lived, as governor Paul LePage vetoed the measure, and the house fell short of the two-thirds majority required to override.

Governor LePage said he opposed the measure because it created an unacceptable level of uncertainty for condominium buyers."Those who have bought into the condominium model of property ownership should be able to trust that their rights will not be amended or curtailed," the governor explained in his veto message."Because this bill would take away [those] rights," he said, "I cannot support it."

The legislation is dead for this year, but it will almost certainly resurface next year, driven by the same arguments for supporting it. Current law requires unanimous owner approval of changes affecting the ownership or use of condominium units. The MELAC had proposed lowering that bar to 80%; unwilling to go quite that far, lawmakers reduced the requirement from 100% to 90% plus the approval of all individual owners affected by an amendment. That new 90% approval requirement would apply to amendments that change the rights of the declarant, alter the boundaries of units, their allocated interests or allowed uses.

The legislation lawmakers approved did not include additional language the MELAC had sought clarifying that owners can approve amendments creating, increasing or reducing the size of limited

common elements.The existing condominium statute “does not expressly authorize” those changes, Bruce McGlauflin, Esq., a partner in Petruccelli, Martin & Haddow, LLP, and chair of the Maine LAC, said. The legislation the governor vetoed would not have changed the existing requirement that 80% of owners approve the transfer of common element property.

The Maine LAC also counted as victories a couple of measures the legislature did not approve, including one that would have allowed condominium owners to install generators in common areas, as long as the equipment didn’t block access to common space.“We opposed that for obvious reasons,” McGlauflin said.“Just imagine a 50-unit high rise with multiple generators installed in hallways.”There is no need for legislation on this issue, he added, because boards have the authority to approve generators if they think the equipment is needed.

Another measure the MELAC opposed, requiring the losing party in litigation between condominium associations and owners to pay the victor’s attorneys’ fees, failed to win the approval of the Judiciary Committee.Under current law, courts have the jurisdiction to award attorneys’ fees to the prevailing party when the court deems that “appropriate.”But the standard practice is for litigants to pay their own attorneys’ fees, “and we think it’s best to leave that standard in place,” McGlauflin said.

New Hampshire (NHLAC)

The NHLAC’s top legislative priority this year – ‘tweaking’ some of the provisions in the sweeping overhaul of the condominium statute the legislature approved last year – never got off the ground. The effort was “ambushed,” NHLAC chair Gary Daddario, Esq., CCAL said, by an unanticipated and not very well-publicized change in the deadline for submitting legislative proposals.“By the time we heard about the change, the deadline had passed,” Daddario, a partner in Winer and Bennett, LLP, said. Those changes – mainly clarifying some of the language and correcting what appear to be “drafting errors”–will have to wait until next year.

Lawmakers did approve changes the NHLAC requested in two other measures, one dealing with owners’ access to the minutes of board meetings and the other with their access to association financial information. On the first, the legislation requires boards to respond within 15 days to requests for the minutes. The NHLAC suggested, and legislators approved, language requiring that those requests be submitted in writing.“We thought it was important to create a written record on which boards could rely, in the event of a disagreement,” Daddario said.

The NHLAC also suggested, and won, language specifying that boards are required to provide only the “official minutes,” prepared by the secretary of the association or someone designated by the board to perform that task. Additionally, the legislation authorizes boards to approve minutes by e-mail, eliminating the requirement for a formal vote in a regular meeting. Absent that authority, Daddario explained, boards that meet monthly or less frequently could not comply with a 15-day request for the minutes.

On the second measure, dealing with access to financial information, lawmakers added language excluding “personal” financial information of owners, and authorizing boards to charge a fee for

information that is more than three years old.

The amendment process for the two measures “has gone well” in both the House and Senate, according to Daddario, who said he expected both bills to win final approvalbefore the legislature adjourned in July.

Rhode Island (RILAC)

Focusing again on condominium foreclosures, the R.I. legislature is considering a two-part measure. The RILAC supports one of the provisions, dealing with the advertising requirements for foreclosures, but strongly opposes the other, giving owners a 30-day right of redemption after a condominium foreclosure action. The R.I. super lien statute gives mortgage lenders that redemption right, allowing them to reverse a foreclosure by paying all of the owners’ delinquent fees and the association’s attorneys’ fees, not subject to the limitations (six months of delinquent payments and $5,000 in attorneys’ fees) that would apply to pre-foreclosure actions.

The lenders’ redemption right recognizes that in large financial institutions with far-flung offices in multiple states, foreclosure notices may not always reach the individuals who can act on them, Edmund Allcock, Esq., CCAL a partner in Marcus, Errico, Emmer & Brooks, P.C., and co-chair of the RILAC, said. But there is no need, and no justification, he said, for providing a similar redemption right for foreclosed owners.“Owners have gotten notices of their delinquencies, they know they haven’t paid their fees and they know they’re being foreclosed on. Why should they also get a post-foreclosure redemption right? It makes no sense,” Allcock said.

The measure has been referred to a committee for further study, and, he predicts, “it will probably be stuck there.But bills can be released suddenly, sometimes on the last day of the session,” he noted, “so we’re watching it carefully.”

The RILAC is also watching, and opposing, a measure that would allow condominium owners or associations to insist on non-binding arbitration for most disputes. The RILAC’s position is that the legislation is both pointless and unnecessary.The arbitration requirement simply adds a step to the process and increases the costs, but it doesn’t resolve disputes, Allcock observed, because either party can reject the mediator’s recommendation and pursue court action.If condominium boards want to pursue an alternative dispute resolution process, he noted, they can ask owners to amend their governing documents accordingly.

That argument prevailed last year, when the arbitration measure won committee approval, but never came up for a vote. This year, the House has actually approved the bill, but “we don’t think its prospects are very good in the Senate,” Allcock said. “We’re hoping it won’t come up at all, or that it will be rejected if it does.”

Massachusetts (MALAC)

The Massachusetts legislative docket includes more than 50 measures affecting condominiums in

some way.Two of them are bills the Massachusetts LAC has proposed – one modifying the timeline for construction defect suits, the other prohibiting developers from inserting “poison pill” provisions in condominium documents limiting the ability of associations to sue them.

More than half of the pending bills are perennial measures that are refiled every year.“They never go anywhere,” MALAC Chair Matthew Gaines, Esq., a partner in Marcus, Errico, Emmer & Brooks, P.C., noted.“But we have to keep an eye on them.”

Three measures with more potential to advance are getting closer attention. The oft-filed “Clothesline Bill,” allowing condo owners to install that equipment, is back again this year, improved over past versions with some amendments the MALAC has sought, but still not quite where it needs to be to win the committee’s support.

Unlike prior versions, which simply prohibited association rules barring clotheslines, the current measure specifies that associations can impose reasonable restrictions on where they are located.The MALAC wants additional language stating that associations can prohibit the installations where they are not feasible – for example, in downtown high rises, where, Gaines noted, “there is simply no place to put them.”

The committee is also following with interest a measure that would allow the local Board of Health to fine residents who smoke in a condominium, if it determines that the second-hand smoke “endangers or materially impairs the health or safety” of residents in surrounding units.Local officials could also require smoking residents to seal their units (to prevent the migration of smoke to neighboring units) or to refrain from smoking entirely.

The legislation is unclear on several points, Gaines said, among them:

Whether it would apply to existing condominiums or only to those created in the future; and

Whether enforcement could actually make a condominium smoke-free.That doesn’t appear to be the case, Gaines said, because the Board of Health would act only if neighbors complain about the second-hand smoke and health inspectors deem it to be a problem.

“We’re going to watch the legislation,” Gaines said, “and we may propose some changes to clarify it.”

The MALAC is also watching, with some concern, a bill that would allow municipalities to tax a condominium developer’s right to build future units in a phased development. The legislation targets the current practice, in which developers include land designated for future phases as common area in the first phase.Because common area is not taxable, the developer avoids paying taxes on the undeveloped parcels.

“We understand the concern” that prompted the legislation, Gaines said.“Municipalities are losing tax revenue.”But the proposed solution is problematic.“Municipalities aren’t taxing real property,”

Gaines explained.“They are taxing thin air – the developer’s right to build more units.”And that tax liability might discourage other developers from coming in to complete future phases if the original developer is unable to do so.If the developer goes bankrupt after completing additional units, it appears that the unpaid taxes would attach to those units and become the obligation of owners who purchase them, which “doesn’t seem fair,” Gaines said.

The MALAC has opposed the legislation for those reasons.Local assessors who are lobbying for the legislation “understand our concerns” Gaines observed, and are working on language to address the problems.

Another measure that has attracted the MALAC’s attention would make it illegal for owners to misrepresent that a pet is a qualified “service dog,” when it does not meet those requirements. The proposed legislation references service dogs as defined by the Americans with Disabilities Act, which applies to restaurants and other public accommodations, but not to condominiums. It is the Fair Housing Act that allows condominium owners to insist on “reasonable accommodations” for physical or emotional disabilities, allowing them to have service or therapy animals in buildings that otherwise prohibit pets.

Gaines says the legislation is “a great first step” toward addressing complaints that many condo owners abuse the Fair Housing accommodation process to circumvent pet restrictions.But the measure would have to be redrafted to apply to condominium communities.

Even with that redrafting, the legislation would be hard to enforce, Gaines acknowledged.But it is possible that the proposed penalty for violations (30 hours of community service at an organization serving individuals with disabilities and a fine of up to $500) would make people “deal more honestly” with service animal requests “and think twice about fudging their claim to need one.”

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