



ILLINOIS STATE BAR ASSOCIATION

REAL PROPERTY

The newsletter of the Illinois State Bar Association's Section on Real Estate Law

A residential real estate attorney's scope of representation

By Myles Jacobs

Recently, I attend a closing where my client was refinancing her home. I can probably count on the fingers of one hand the number of times I have been asked to assist a client in a refinance of a residence. The closing was at a branch office of a major banking institution. A representative of the title company who would issue its mortgage title policy conducted the closing. The first document given to my client to execute was a joint tenancy deed which conveyed a one half interest in her home to her fiancé. The legend on the bottom of the deed indicated that my client had prepared the deed.

I asked my client about the deed and she had indicated she was not aware of the deed. I was advised that the bank had required the fiancé take title since my client was borrowing

additional funds as well as modifying the terms of her original loan. While a substantial amount of equity remained in the home, my client's income level suggested, in the eyes of the lender, the need of a co-signer. I questioned the closing agent about the deed with the legend indicating that my client had prepared the deed. The answer I received was that the bank did not want to incur any additional charges for their customer and, as a convenience to everyone, the title company had prepared the deed. He further stated that since no one in their office was an attorney, they had placed my client's name on the deed as the preparer. I informed him that even if there were an attorney in their office, the title company

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Legislative report

By James K. Weston, Sr.

The first year of the 96th General Assembly was again one of the most active periods in legislative history. It had many truly historic moments, not the least of which was the impeachment of Governor Blagojevich. The following is a brief review of the Acts passed having a bearing on general real estate matters.

PUBLIC ACTS

CONDOMINIUMS

P.A. 96-0055 – SB 154 – Amends the Condominium Property Act (765 ILCS 610/18) to provide that the owner of a unit that is in arrears for the payment of regular or special assessments shall not be counted toward a quorum but oth-

erwise retains the right to vote on amendments to the bylaws. Effective January 1, 2010.

P.A. 96-0174 – HB 688 – Amends the Condominium Property Act to add a new section (765 ILCS 605/14.5) that defines "distressed property," provides procedures where the condominium is in violation of building codes, half or more of the units are not occupied, 60% or more of the units are in foreclosure, there are more units recorded than exist, utilities to 40% or more of the units have been terminated or are threatened with termination, or taxes for 60% or more of the

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A residential real estate attorney's scope of representation

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could not prepare the deed, since it did not represent the borrower. The only way this could have then be done by the title company was if the attorney had contacted my client and been hired by her as her attorney to prepare the document and discussed with her the ramifications of conveying the half interest to her fiancé.

I asked my client what equity she had in the home and was surprised to discover she had put \$120,000 down when she purchased the home some three years ago. This refinancing was not only to lower the payment but also to withdraw some of the equity which was in the property. I asked her if she understood by executing the deed, as required by the bank, she was making a substantial gift to her fiancé which could have tax implications. She replied that this would be okay. I asked her if any provisions had been made with regards to what would happen to the home if they never married or if one or both of them died before the contemplated wedding date which was to be about 18 months away. Her reply was that she had never thought about either situation.

Lenders often require that additional persons take title to property or refuse to allow a spouse with bad credit to take title. These scenarios present a mine field for an attorney. In the situation I have cited, what is the obligation of an attorney when the title company, real estate broker or lending institution, as they often do, calls an attorney and tell him or her, they need a deed prepared for a transaction. It should not be necessary to remind the attorney that his or her client is the grantor in the deed and not the title company, real estate broker or the mortgage company. To proceed to prepare a deed at the request of someone other than the "client" without inquiry into the overall transaction can and will result in liability on the attorney for any and all consequences arising from the transfer of title. In addition, there also would be liability if he spoke to the client and simply followed instructions without making some inquiry regarding the circumstances of the transaction and deed requirement. Even attempting to limit the scope of employment only to the preparation of the closing documents will not eliminate liability regarding the consequences flowing from

the preparation of the documentation. ISBA Board of Governors opinion 94-1 has made it clear, that the attorney is responsible for the consequences of his or her actions in this type of situation. When hired to represent purchasers at a closing and it is discovered that the lender will only allow the transaction to proceed with only one spouse to be placed into title, the attorney should be prepared to explain to the clients the ramifications of the conveyance. Specifically, unless the non-title holding spouse is placed back into title after the closing, if the titleholder were to die, the non-title holding spouse would be sharing ownership of the property with his or her children. Similarly a full explanation is required when the lender makes a requirement for the loan that a co-signer take title.

It is essential that the attorney fully discuss the facts and ramifications with the client at closing and, in the first situation, record a deed placing the other spouse back into title where the situation requires. In the case of the husband and wife, it is very clear that the law will allow the one spouse in title to convey to the other spouse after the closing without violating the "due on sale" clause. This would not be true where the parties are not married to each other. This situation would require an approval from the lender prior to the conveyance.

The second situation becomes more complicated. There may be a need for some type of agreement between the true owner and the co-signer. Whether a conveyance from the original title holder to the co-signer, post closing, is advisable and needs approval from the lender should be explored.

Opinion 94-1 was written by the Board of Governors of the ISBA based upon an inquiry which I made to its general counsel. My client was purchasing a home and at closing, I discovered from a review of the survey that the driveway to the home was located on an adjoining lot. There was no recorded easement to allow for the usage of the driveway. I called the attorney who had prepared the deed and told him that we would need an easement agreement. His reply was that he did not have time to worry about this. He was only hired to prepare the closing documents and that they were on their own to correct

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this. Opinion 94-1 clearly indicates that the attorney did owe his client a duty with regards to the closing and that once he agreed to represent the seller he could not claim it was only to prepare documents. If an attorney after consulting with his clients concludes that all the client wants are the documents prepared, I feel that he still would be liable for the consequences of the documents prepared. If there are encroachments or violations of building lines etc, and they are not noted on the warranty deed, would not the attorney have some liability if there ever was a suit involving the warranties under the deed?

It is my understanding that in certain portions of Illinois, attorneys are not usually at closings. The documents are ordered by either the title company, Realtor or the lending institution. Perhaps an attorney should think twice about earning a quick fee in exchange for the possible liability of his or her actions. ■

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Legislative report

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units are delinquent. A court is authorized to appoint a receiver that is given broad powers enumerated in the Act.

P.A. 96-0228 – HB 155 – Amends the Condominium Property Act to add a new section (765 ILCS 605/22.2) that bars the condominium association from exercising a right of refusal, option to purchase or right to disapprove the sale where a resale is financed by a loan guaranteed by the Federal Housing Authority.

ENVIRONMENT

P.A. 96-0026 – SB 1489 – Creates the Green Infrastructure for Clean Water Act. The Act provides for a study and report back to the General Assembly by June 30, 2010 on the best method of dealing with urban storm water, including management techniques or practices that will solve the problem with the best long term benefit to the State. Effective June 30, 2009.

P.A. 96 – 0073 – HB 1013 – Creates the Green Buildings Act. Provides that any new construction of State-funded buildings or major renovations to existing buildings (40% or more of current replacement cost) must comply with “Green Building Standards” as set forth in the Act. Effective July 24, 2009.

P.A. 96 – 0232 – HB 214 – The Residential Real Property Disclosure Act (765 ILCS 77/35) is amended by the addition of a new line 23 to the Disclosure Form requiring information as to the manufacture of methamphetamine on the property. Effective August 11, 2009.

P.A. 96 – 0278 – HB 2439 – The Illinois Radon Awareness Act (420 ILCS 46/10) is amended to provide that a seller must disclose that they either had no knowledge of elevated radon concentrations in the dwelling or that prior elevated radon concentrations have been mitigated or remediated. Residential dwelling units located on the third story or higher above ground level are exempt from the Act. This includes but is not limited to condominium units or units in a residential cooperative. Effective August 11, 2009.

P.A. 96 – 0417 – HB 4223 – The School Code (105 ILCS 5/10-20.46) is amended to add a new provision providing for radon testing for new and existing school buildings with a recommended schedule for retests.

HOUSING FINANCE

P.A. 96-0110 – HB 153 – Amends the Code of Civil Procedure (735 ILCS 5/15-1509.5) to provide for a notice to be added to a deed executed pursuant to a foreclosure or consent foreclosure that states the grantee's or mortgagee's name (name of contact person), street and mailing address and telephone number. Effective July 31, 2009.

P.A. 96-0111 – HB 3863 – Amends the Code of Civil Procedure (735 ILCS 5/15-1202.5, 15-1508.5, 1701, 15-1703 and 15-1704) to define “dwelling unit” for the purpose of notification of foreclosure actions, including the form of notice. Effective August 11, 2009.

P.A. 96-0265 – HB 2005 – Amends the Code of Civil Procedure (735 ILCS 5/15-1508) to permit a mortgagor that occupies the property in foreclosure to match a bid at sale without requiring a guarantee or bond. Effective August 11, 2009.

JUDGMENTS

P.A. 96 -0305 – HB 3726 – The Code of Civil Procedure (735 ILCS 5/2-1602 and 13-218) is amended to provide for a twenty year limitation from the entry of a judgment for the filing of a petition to revive it. Effective Date August 11, 2009.

MINERAL LAW

P.A. 96-0102 – HB 2530 – The School Code is amended to add “mine subsidence” to the list of allowable uses of state funding for temporary relocation expenses. Effective July 29, 2009.

MORTGAGE BROKERS

P.A. 96- 0112 –HB 4011 – Amends the Residential Mortgage License Act of 1987 (205 ILCS 635/) extensively to conform it to the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008. The amendment is aimed at mortgage brokers and their employees and provides for strict regulation of that industry. The 37 page bill cannot ade-

quately be summarized here and readers are urged to obtain a copy of the bill and read it in its entirety. Effective July 31, 2009.

MECHANICS LIENS

P.A. 96 – 0654 – HB 236 – Amends the Mechanics Lien Act (770 ILCS 60/7) to add a provision requiring general contractors for improvements to owner-occupied single-family residences to give the owner a written notice within 10 days after the recording of a mechanics lien against any property of the owner. Notice is given when sent or personally delivered. Failure to give the notice that results in damage to the owner will offset the lien to that extent. Recording of a lien is not an element of damage. The Act does not apply to subcontractors. The Act only applies to contracts entered into after the effective date of the Act. Effective Date January 1, 2010.

MODULAR HOUSING

P.A. 96 – 0724 – SB 1560 – Creates the Industrialized Residential Structure Deed Restriction Act. Provides that a deed restriction may not prohibit the erection of a manufactured housing unit containing one or two dwelling units on real property provided the unit conforms to a model building code published by a model code organization. Further provides that aesthetic compatibility requirements are permitted. Effective Date January 1, 2010.

P.A. 96 – 0750 – HB 1142 – Creates the Modular Housing Buyer Protection Act. Provides that modular dwellings must comply with all state requirements. Approved units shall bear a yellow seal either on the electrical box or the inside of the kitchen sink cabinet. Unlike manufactured homes, local building codes may require additional items beyond the minimum State requirements.

REAL ESTATE TAXES

P.A. 96 – 0122 – SB 207 – Amends the Property Tax Code (35 ILCS 200/12-30) to rewrite the instructions and content of the notice of changed assessments for counties of a population less than three million. The contents are too voluminous to note here. A copy of the Act should be obtained and read. Effective Date January 1, 2010.



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P.A. 96 – 0231 – HB 212 – Amends the Property Tax Code (35 ILCS 200/21-355) to provide that if a petition for tax deed has been filed, the amount to redeem may include fees paid to a registered or licensed title insurance company or title insurance agent. Effective Date January 1, 2010.

P.A. 96 – 0324 – HB 4326 – Amends the Illinois Municipal Code (65 ILCS 5/11-74.4-8b) to permit the recapture of any benefits received under tax increment financing if the benefited project is abandoned or relocated. Effective Date January 1, 2010.

P.A. 96 – 0355 – HB 238 – Amends the Property Tax Code (35 ILCS 200/15-170) to add Assisted Living and Shared Housing Act to the Senior Citizens Homestead Exemption. Effective Date January 1, 2010.

P.A. 96 – 0522 – HB 3664 – Amends the Property Tax Code (35 ILCS 200/14-20) to allow any homestead exemption provided under Article 15 to qualify for a Certificate of Error. Effective Date August 14, 2009.

P.A. 96 – 0755 – HB 4120 – Amends the

Property Tax Code (35 ILCS 200/18-184.5) to add a provision for the abatement of vacant facilities up to two years with the abatement not to exceed \$4 million. Effective Date January 1, 2010.

P.A. 96 – 0779 – HB 4046 – Amends the Property Tax Code (35 ILCS 200/15-185) regarding to leaseback property and qualified leased property to be extended to municipalities contiguous to municipalities with a population in excess of 500,000. Effective Date August 28, 2009.

TITLE INSURANCE

P.A. 96 – 0645 – SB 2111 – Adds a new section to the Title Insurance Act (215 ILCS 155/26) that provides the title insurance companies and title insurance agents must have “good funds” in order to disburse the proceeds of a closing. Effective Date January 1, 2010.

WIND FARMS

P.A. 96 – 0028 – SB 1923 – The Illinois Enterprise Zone Act (20 ILCS 655/5.5) is amended to add new wind power facilities generating electricity to the Act. Effective Date July 1, 2009.

P.A. 96 – 0306 – HB 3746 – The Counties Code (55 ILCS 5/5-12020) is amended to limit the maximum setback for renewable energy systems to 1.1 times its height. The Municipal Code (65 ILCS 5/11-13-26) is amended to the same extent. Effective Date January 1, 2010.

ZONING

P.A. 96 – 0696 – HB 3716 – The Counties Code (55 ILCS 5/5-12001.1) is amended to provide for public hearings for zoning variations to be held at zoning or other appropriate committee meetings with proper notice. Effective Date January 1, 2010.

P.A. 96 – 0704 – SB 138 – Amends the Capital Development Board Act (20 ILCS 3105/10.09-1) to implement a state supervised procedure for building codes in jurisdictions where there is no local building code after July 1, 2011. Effective Date January 1, 2010.

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April

Wednesday, 4/21/10- Bloomington, Double Tree Hotel—Construction Law- What’s New in 2010? Presented by the ISBA Special Committee on Construction Law; co-sponsored by the ISBA Special Committee on Real Estate Law. 9-4. Cap 80.

Friday, 4/23/10- Champaign, I- Hotel and Conference Center—Practice Tips & Pointers on Child-Related Issues. Presented by the ISBA Child Law Section; co-sponsored by the ISBA Family Law Section. 8:25-4. Cap 70.

Tuesday, 4/27/10- Chicago, ISBA Regional Office—Construction Law- What’s New in 2010? Presented by the ISBA Special Committee on Construction Law. 9-4.

Wednesday, 4/28/10- Chicago, ISBA Regional Office—Intellectual Property Counsel from Start-up to IPO. Presented by the ISBA Intellectual Property Section. 8:30-3:30.

Thursday, 4/29/10- Chicago, ISBA Regional Office—Key Issues in Local Government Law: A Look at FOIA, OMA, Elections and Attorney Conflicts. Presented by the ISBA Local Government Law Section & the ISBA Standing Committee on Government Lawyers. 12:30-4:45.

Friday, 4/30/10- Chicago, ISBA Regional Office—Anatomy of a Trial. Presented by the ISBA Tort Law Section. Time TBD.

May

Tuesday, 5/4/10- Chicago, ISBA Regional Office—Boot Camp- Basic Estate Planning. Presented by the ISBA Trust and Estates Section. 9-4.

al Office—Boot Camp- Basic Estate Planning. Presented by the ISBA Trust and Estates Section. 9-4.

Wednesday, 5/5/10- Chicago, ISBA Regional Office—Price Discrimination: Dead or Alive? Robinson Patman after Feesers. Presented by the ISBA Antitrust Section. 12-2 p.m.

Thursday, 5/6/10 – Chicago, ISBA Regional Office—Ethical Strategies for Client Development and Service. Master Series Presented by the Illinois State Bar Association. 8:30-12:45.

Thursday, 5/6/10 – Live Webcast—Ethical Strategies for Client Development and Service. Master Series Presented by the Illinois State Bar Association. 8:30-12:45. ■

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