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LAW QUARTERLY

ANNOUNCEMENTS

New England Chapter CAI Business Partner of the Year Award
Perkins & Anctil, P.C. is honored to announce that Charles A. Perkins, Jr., a College of Community Association Lawyers fellow, has been awarded the ***2016 Business Partner of the Year Award from the New England Chapter Community Associations Institute.*** This award is presented to an individual who provides exemplary service to his client associations as well as to the broader community association industry through his involvement with education and legislative initiatives.

Thank you, Charlie for all your ongoing dedication as well as the time and resources that you volunteer to the community.

Tuesday, May 16, 2017, 10:00AM – 3:30PM New England Condominium Expo
Receive free advice from industry professionals, and network with your peers at the top real estate trade show in New England. Visit the Perkins & Anctil team at **Booth #326**. Location: Seaport World Trade Center – Exhibit Hall 200 Seaport Blvd, Boston, MA. To register, go to www.ne-expo.com/register.aspx.

Common Area Rules: Even If Condo Association Rules Appear Neutral, They May Be Attacked Under the Federal Fair Housing Act

By: Daniel M. López, Esq.

All condominium associations should be aware of the Federal Fair Housing Act ("FFHA"). Condominium associations should also know that the FFHA was created to prevent various types of housing discrimination, including that based upon race, color, religion, sex, national origin, disability and familial status. However, what many associations do not know is that even if their rules and regulations do not specifically single out one of the protected groups listed above, they may still be subject to litigation for violating the FFHA.

That brings us to the recent California court case of Caldera v. Aliso Villas Condo. Ass'n., 2016 U.S. Dist. LEXIS 15076. This case is a cautionary tale for associations around the country. It proves the point that just because your rules are not discriminatory on their face does not mean that they do not violate the FFHA. In this case, the court denied the Aliso Villas Condominium Association's motion to dismiss indicating that the Association may have violated the FFHA under a theory of disparate treatment.

The facts of Caldera are fairly straightforward. The Caldera household consists of a husband, wife, and their two minor children. The Calderas live in and own a unit in the Aliso Villas Condominium. The Association had several rules that were neutral on their face. These rules included (1) no ball playing in the buildings, garages and other structures, (2) no playing in parking lots, driveways or cul-de-sacs, (3) in the interest of safety, it is recommended that recreational activities not be conducted on streets, sidewalks or other common areas. Additionally, there was a sign at the playground that children under 14 must be accompanied by an adult at all times.

Despite the fact that none of these rules directly mentions any of the protected groups under the FFHA, the Calderas sued under the FFHA claiming discrimination based upon familial status. Under the FFHA, the definition of familial status is "one or more individuals (who have not attained the age of 18 years) being domiciled with…a parent or another person having legal custody of such individual or individuals." The Calderas sued under the theory of disparate treatment. Their first claim was that the adult supervision requirement violated 42 USC § 3604 by discriminating against persons in the terms, conditions or privileges of sale or rental of a dwelling or in the provisions of services or facilities in connection herewith, because of…familial status… Surprisingly,

the court did not dismiss the case because adult supervision rules have been found to be overly broad, not valid, and discriminatory on the basis of familial status.

The Calderas' second claim against the Association was that the Association violated 42 USC § 3617 which states: "It shall be unlawful to coerce, intimidate, threaten, retaliate, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised of enjoyed, or on account of his having aided or encouraged any other exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605 or 3606 of this title." All the Calderas needed to show was that they were engaged in an activity protected by the FFHA, that there was a connection between the activity and the adverse action and that they were damaged. Once again, the court sided with the Calderas and allowed their claims to move forward. This was because (1) the Calderas received notices about their children playing in the common area, (2) the on-site security guard had previously had arguments with parents and (3) the children were now frightened by the security guard.

As you can see, none of the rules created by that Association clearly jump out as being discriminatory. To the contrary, the rules appear to be in place to promote safety and prevent the possibility of injury liability. Unfortunately, this Association's attempt to avoid injury liability may have unintentionally opened up a new exposure to liability. When was the last time your association reviewed and updated its rules? Cases like <u>Caldera</u> should remind condominium associations to regularly review their rules to make sure that they are in compliance with the most recent case law and in order to prevent potential litigation.

Self-Renewing, Termination, and Indemnification Provisions… Oh My!

By: Charles A. Perkins, Jr., Esq.

Recalling the memorable dialogue from the Wizard of Oz "lions and tigers and bears … oh my" reminds me of the three problematic provisions found in most contracts: self-renewing provisions, termination language and indemnification provisions.

We have seen an increase in the number of boards and management companies executing vendor purchase orders or boiler-plate contracts without thoroughly reviewing the terms contained in the documents. Oftentimes there are certain terms and conditions overlooked and never negotiated between the parties prior to execution. This can create problems for the association when it turns out the provisions favor the vendor.

Specifically, boards and management companies should be wary of the following provisions:

1. <u>Self-Renewing Provisions:</u> Many contracts contain an automatic renewal clause which allows an agreement to continue for a defined prior of time if the existing agreement is not terminated in accordance with specific terms and conditions.

2. <u>Liquidated Damage Provisions:</u> A specific amount which a party to an agreement has agreed to pay to another can be enforced in the event that party fails to fulfill its obligations under the agreement or contract.

3. <u>Indemnification Provisions:</u> A provision under which one party will commit or agree to compensate the other for any loss or damages caused as a result of the association or in some instances, a vendor.

These types of provisions are found in a host of different contracts from maintenance agreements to laundry, rubbish removal, landscaping and snow removal contracts.

We recommend at a minimum that boards prepare a standard vendor agreement and have certain provisions that can be incorporated into an agreement depending on its needs.

In the event of a major capital expenditure (i.e. roof and/or siding replacement), the board should consider having the contract reviewed in advance of going out to bid. Having this document prepared and reviewed in advance is the best way to ensure that it includes specific terms and provisions favorable to the board or association.

In addition to the foregoing, we are also concerned about these additional provisions.

1. Insurance requirements;

2. Termination provisions with or without cause; and

3. Penalty or liquidated damage clauses.

Well defined default provisions should also be included in any

agreements and boards should include alternate dispute resolution remedies such as mediation and/or arbitration.

We also suggest that boards pay particular attention to the language regarding warranty on labor and materials.

In closing, boards should make sure the association avoids the lions, tigers and bears found in contracts so it will easily travel down that yellow brick road.

The Burgeoning Crisis of Student Loans: What to Do and Where to Go!

By: David R. Chenelle, Esq.

In a recent study released by the U.S. Department of Education ("USDE"), the number of people severely behind in their student loans has soared in the past year, and continues to grow. This is evident by the sheer number of student loans that default on a daily basis which was last reported to be approximately 3,000 student loan defaults! Further, the Consumer Federation of America (CFA) released a recent study finding that millions of people had not made a payment on the more than $137 billion in federal student loans for at least nine months, a 14 percent increase in defaults from a year earlier.

According to the CFA report, the average amount owed per federal student loan borrower, is $30,650.00 which is a 17 percent increase since 2013. Although the study cannot point to any one reason for this increase, it did state that the borrowing to attend expensive graduate programs and an overall rise in the cost of a college education are contributing factors.

As stated in the USDE's recent release, a Senior Fellow at the CFA stated that "our broken system works well for the student loan industry but is failing borrowers, tax payers, and our economy." Ultimately the free flow of cash between the lending institutions and schools of higher education allows for recently graduated high school students (and their parents) to borrow thousands upon thousands of dollars for student loans with the ability to put off the consequences of having to pay back such significant amounts to a much later date.

The CFA report apportions the cause for this condition to a wide range of reasons, but puts the blame in part on the colleges doing a poor job of graduating students who are taking on debt to earn a less than marketable degree leaving them with limited prospects of earning enough to repay their significant loans. A portion of the blame was also given to the Education Department which the CFA felt did not hold schools accountable for their marketing claims of high incomes upon graduation.

In recent months, several states have filed law suits against Navient, which was spun off from Sallie Mae in 2014, claiming that the loan process was paramount to predatory lending and has extended billions of dollars in private student loans that should never have been made. The State of Washington's attorney general's office stated in its pleadings that the "loans were designed to fail". Within the lawsuits, it was also alleged that Sallie Mae used private subprime lending with expected default rates as high as 92 percent! Once a person defaults on their student loans the default provisions are triggered resulting in the assessment of double digit interest charges creating a cascading, downward spiral of financial distress for the borrower!

While the frequency of student loan defaults has continued to increase, the ability to seek relief from those loans through the U.S. Bankruptcy Court has continued to increase in difficulty! While there is a redress through the Bankruptcy Code under §523 (a)(8) a debtor must first be able to demonstrate that he suffers from a "substantial hardship" in order to get relief. While this may sound like a simple matter, the courts in interpreting the application of this increased burden have made the results anything but promising.

One glaring consequence of the growing student loan debt is the impact to young couples seeking to purchase their first home. A recent article posted by an on-line service that works with such young couples stated that 41 percent of college educated individuals have postponed their attempts to buy a home due to their crippling monthly student loan payments or simply because they cannot qualify for a mortgage.

A number of options have been made available to the harried borrower, but those options are limited for those with private student loans except through the direct outreach program by the Department of Education. If a person's loans are based upon the Federal Student Loan program, more options are available and are generally based upon an income driven analysis. Here is a link that may provide some insight and assistance: https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven

What Does "Brexit" Mean for Your Condominium?

By: Daniel M. López, Esq.

First, I must apologize for the somewhat misleading title of this article, and admit that I am shamefully attempting to link an historic political-economic decision to the microcosm of community association law. Truth be told, I couldn't say how "Brexit" may impact condominiums or other associations in New England. I do not mean to downplay the potential significance of this event, the effects of which are yet to be known: however, it did genuinely spark my idea for this article.

As Britain prepares to leave the European Union, I wondered how many of our clients have ever wondered whether they could "Cleave" (sorry that was my play on "Condominium-leave") their condominium unit from the rest of their association. This thought may never have crossed many owners' minds, as the practical and economic realities of condominiums (particularly townhouse or garden/apartment style buildings) make it infeasible, if not impossible, to split. That is to say nothing of the fact that most people who choose to live in a condominium do so, at least in part, for the community element and genuinely enjoy being part of a common association.

However, there are other condominium scenarios, which arise in the case of free-standing units, where owners have inquired of our firm whether they could break from the perceived unwieldy bureaucracy and shared expense of association living and establish their "independence" as single-family owners. So, what of it then? Is it possible or practical to break from one's association?

The short answer in Massachusetts is that while it may be possible to remove units from an existing condominium, it is no simple matter and there are many considerations - both legal and otherwise – that come into play. Because I am a lawyer, and this is a legal newsletter, we'll focus on the legal aspect of removal. Massachusetts General Law Chapter 183A Section 19 provides a roadmap for leaving the condominium. However, just as the classic song by Neil Sedaka teaches, "Breakin' Up Is Hard To Do."

The first step in "Cleaving" is obtaining approval of at least seventy-five percent of the unit owners. Remember, this is the minimum percentage required for leaving the condominium and if the governing documents require approval of a higher percentage of unit owners then you will need to obtain that higher percentage before leaving the condominium. After obtaining approval from the required percentage of unit owners, you must then obtain consent from all lien holders of the affected units. In reality, obtaining approval from the lien holders will be a Herculean task, if not impossible. There is no single standard that lien holders will look at in making a determination as to whether they will consent to your leaving the condominium. In fact, many banks and mortgage companies in particular may be hesitant to consent because the condominium provides an additional safety net for the property.

Even if a group of split-minded owners were to accomplish removal pursuant to the statute, they may find that zoning and planning requirements render the effort fruitless. Local zoning ordinances impose specific dimensional requirements for lots which homes constructed under a condominium regime do not satisfy.

As you can see there are myriad legal considerations which make it exceedingly difficult to remove a unit or group of units from a condominium. If you are successful in removing certain units from a condominium, but later have buyer's remorse, there is a solution. That solution is as simple as having the removed units rejoin the condominium as Chapter 183A Section 19 does "not bar the subsequent resubmission of the land and buildings involved." We should be glad there is such a simple fix if there are any second thoughts after leaving because there does not appear to be any simple fix for the buyer's remorse many in Britain are experiencing from Brexit.

About Our Law Firm

Perkins & Anctil, P.C. is a leading firm in all facets of real estate law. Our diverse experience includes all aspects of condominium and community association law, real estate conveyancing (including the representation of numerous local and national lenders), developer representation (from the municipal approval process through the sale of property), landlord-tenant matters and real estate litigation. In addition we offer years of industry experience in general litigation and bankruptcy cases, as well as the full spectrum of employment related matters. Our attorneys have been acknowledged for their expertise in Massachusetts and New Hampshire. We encourage you to set up an initial complimentary meeting with us.
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