

1

New Hampshire Omnibus Legislation Affecting
Condominium Associations

2

Yet Another Defective Mortgage Case But with a
Different Result!

3

Is Your Payroll Ready? New Overtime Regulations
Will Soon Significantly Change Your Wage Practices

4

The Millennials' Path to Homeownership

From the Law Offices of *Summer 2016*
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Saturday, September 24, 2016, 8:00AM – 12:00PM

Perkins & Anctil is pleased to present our annual **Condominium Roundtable event**. Don't miss this opportunity to interact with our industry's top professionals and gain knowledge that will impact your association's bottom line.

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New Hampshire Omnibus Legislation Affecting Condominium Associations

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



The State of New Hampshire, through its legislative processes, just made being a board member or property manager in New Hampshire much more difficult by the enactment of the New Hampshire House Bill 353.

This legislation makes sweeping changes to the manner in which meetings involving the board and unit owners are to be conducted, the adoption of budgets, and by-laws requirements which will prove difficult to implement.

The purpose of this article is to provide a broad brush overview of some of these changes, but you should review the entire bill, a copy of which can be obtained using the following link:

<https://legiscan.com/NH/text/HB1307/id/1287889>

As a preliminary matter, it is apparent that through this legislation the state law makers have made it difficult for board members and property managers to govern and manage associations. Under the new law, the board must schedule, not less than quarterly, and in addition to the times set forth in the by-laws, an open meeting of unit owners affording them a reasonable opportunity to communicate on **any** matter affecting the association. See RSA 356-B:37-c. At its direction, the board may hold a meeting, not open to unit owners, providing the meeting is recorded and the recording is made available to unit owners for up to thirty days upon request.

If there are any materials to be distributed by the board prior to this meeting, the board at the same time shall make copies of these materials reasonably available to unit owners, with the exception of unapproved minutes or matters to be considered in executive session.

Executive session may only be held for the purpose of discussing matters set forth in RSA:356-B:37-d. This section involves traditional areas such as consultation with the association's attorney, potential litigation, personal matters or certain contracts. However, no final vote for action can be taken in executive session.

When dealing with budgets and special assessments, the board of directors, at least annually, shall adopt a proposed budget. The budget must be ratified at the annual meeting. RSA:356:40-d goes on to say that if the budget requires ratification by unit owners, unless 2/3 of all unit owners or any larger number specified in the declaration reject the budget, the budget is ratified whether or not a quorum is present. Special assessments must also follow this process although there are certain exceptions to emergencies.

356B:37 indicates that there must be at least one annual meeting which includes any budget changes or proposals to remove an officer or member of the board unless otherwise set forth in the by-laws. Meetings of the association shall be conducted in accordance with the most recent edition of Roberts Rules of Order, newly revised. See RSA:356-B:27(iii).

Having fun yet?

The new legislation also contains provisions which require that each employee of a management company or condominium association complete a background check prior to employment, with the cost being assessed to the managing agents. See RSA 356-B:40(a)(iv).

The legislation also has provisions regarding (a) quorums; (b) mail-in ballots; (c) declarant/directors appointment and the duty each owes the association; (d) removal of officers and directors; and (e) meeting by telephonic, video or other conferencing process. See 356B:37B.

Finally, there is a provision which requires that associations amend their documents within two years to comply with this new legislation.

As difficult as this legislation is going to be, New Hampshire did pass House Bill 1307 which states that any amendment to the condominium instruments requiring approval of mortgagees on units may be satisfied by the recording of an affidavit by the president of the association that written request for such approval was sent to the last known address of any mortgagee and that the mortgagee failed to respond within 60 days.

We will keep you apprised of the implementation and actions to be taken by board and management companies regarding this new legislation.

Yet Another Defective Mortgage Case But with a Different Result!

By: David R. Chenelle, Esq.

Over the course of the past few years there have been several important cases originating from the U.S.



Bankruptcy Court where a mortgage had been deemed to be void due to defects in the acknowledgement of the mortgage. As a result of these defective mortgages the then bankruptcy trustees were permitted to sell the properties free and clear of the respective mortgages. See: In re Reznikov; In re Nistad; and In re Traverse to name a few. But in a recent case that has gone through the gamut of Federal Courts and the Supreme Judicial Court (“SJC”) the result is quite different which will be a welcome relief to the real estate bar.

Alvaro Pereira filed for protection under the U.S. Bankruptcy Court on July 10th, 2012 (The “Debtor”). At the time of his filing the Debtor owned his property located in New Bedford, MA, (“Property”) subject to an outstanding mortgage to Bank of America (“BOA”). The mortgage to BOA was recorded in the Registry of Deeds in December of 2005. The Chapter 7 Trustee assigned to the Debtor’s case was Deborah Casey, (“Casey” or the “Trustee”).

In her review of the recorded mortgage, Casey noticed that the acknowledgment jurat at the end of the mortgage failed to contain either the Debtor or the non-debtor spouse’s name. However, within the chain of title to the Property was an Affidavit, pursuant to M.G.L. c. 183, §5B, which was recorded on January 19, 2012. The Affidavit contained a statement from the then closing attorney that he had witnessed the Debtor and spouse sign the mortgage in question, that they had provided to him satisfactory evidence of their identity and that they had signed the mortgage voluntarily.

Notwithstanding the curative affidavit, the Trustee challenged the validity of the mortgage claiming that it contained a material defect and that the Affidavit was insufficient to correct the omission of the Debtor and spouse’s name on the acknowledgment. Casey filed an Adversary Proceeding in the U.S. Bankruptcy Court seeking to avoid

BOA’s mortgage under the Trustee’s strong-arm provision of the U.S. Bankruptcy Code, 11 U.S.C § 544(a). Within several months BOA and Casey filed cross motions for summary judgement. On June 21, 2013 after a hearing on the competing motions, the Court denied BOA’s motion while granting Casey’s motion. BOA then appealed to the U.S. District Court for the District of Massachusetts.

BOA’s primary focus on the appeal to the U.S. District Court was not the existence of the defective mortgage but rather that the Affidavit cured the defect. Contrary to the Trustee’s argument that the affidavit was insufficient to cure the defect, the District Court found otherwise. In the Court’s decision dated 9/26/14, it overturned the U.S. Bankruptcy Court’s Decision and stated that the affidavit performed all the necessary functions of a proper acknowledgement; was annexed to the mortgage by a marginal reference; and provided a satisfactory acknowledgment that the mortgage was voluntarily executed by the Debtor. Once filed, it provided notice to the world of the existence of the mortgage.

Now it was the Trustee’s turn to appeal, which she did to the 1st Circuit Court of Appeals. Finding that the issues of this case were better suited for the Supreme Judicial Court (SJC) to decide, the Appeals Court certified 2 questions to the SJC:

1. Whether an attorney affidavit could provide constructive notice of the mortgage to a bona fide purchaser; and
2. Whether an attorney affidavit could correct a material defect in a certificate of acknowledgment.

The SCJ responded in the affirmative to both questions resulting in the Appeals Court

affirming the decision of the U.S. District Court granting BOA's motion for summary judgement.

Is Your Payroll Ready? New Overtime Regulations Will Soon Significantly Change Your Wage Practices.

By: **Kimberly A. Alley, Esq.**



Get ready for drastic changes to your payroll if you employ white collar or highly

compensated employees. In the words of Bob Dylan, "The Times They Are A-Changin'" when it comes to overtime wage requirements for these "exempt" employee categories.

The U.S. Department of Labor recently released its long awaited Final Rule implementing major changes to overtime regulations under the Fair Labor Standards Act ("FLSA"). The new rule, which becomes effective on December 1, 2016, substantially increases the minimum salary requirements for the FLSA's "white collar" and "highly compensated" overtime exemptions.

Most significantly, the new rule raises the threshold for the executive, professional and administrative exemptions from \$455 per week to \$913 per week. This change alone is anticipated to impact over 4.2 million salaried workers.



The FLSA requires that employees are paid one and a half times their regular rate of pay for all hours

worked over 40 hours in a workweek, unless the employee qualifies as an "exempt" employee. There are a number of identified "exempt" categories of employees under the FLSA. These exemptions include certain "white collar" executive, administrative and professional employees, as well as "highly compensated" employees that meet a certain threshold.

The new Final Rule significantly alters the requirements necessary for an employee to qualify under these exemptions. Its most significant provisions include:

1. More than doubling the minimum weekly salary required for most employees to fall within the executive, administrative or professional exemption from \$455 per week to \$913 per week (\$23,660 to \$47,476 annualized).
2. Increasing the minimum annual salary required for an employee to qualify for the "highly compensated" employee exemption from \$100,000 to \$134,004.
3. Mandating automatic adjustments to the salary thresholds based on cost-of-living increases every three years beginning in January 2020.

The Final Rule does not alter any of the current job duty requirements for the overtime exemptions. It also allows employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level.

It is essential that employers immediately begin strategic preparations for ensuring their compliance with the Final Rule by

its December 1, 2016 effective date. Failure to comply with Massachusetts' Wage Laws subjects employers to harsh penalties that can include multiple damages and payment of attorneys' fees. Among other agenda items, employers should take measures to determine which employees are impacted by the overtime changes and evaluate whether to reclassify the employee or provide salary increases.

If you have questions concerning the new overtime regulations, please contact the attorneys at Perkins & Anctil, P.C. Our employment law group is experienced in providing guidance in a full array of employment practice areas.

The Millennials' Path to Homeownership

By: **Rhonda L. Duddy, Esq.**



It appeared that the secret to successful home buying was always location, location, location. By buying in an exclusive neighborhood you would get a greater return on your investment. Expensive downtown neighborhoods seem like logical places for wealth, but the small wealthy suburbs where builders build custom made homes can be a preference for the wealthy as well. Can first time home buyers also consider location to be of utmost importance when buying a home or is that a luxury they can't afford in this market?

Clearly the prices of homes are rising and particularly prices of homes in the city are out of reach for many people. So where are members of the millennial

generation going? Those that are in the age range of 18-34 have been slowly entering the housing market. Some may prefer to buy in the city for the easy commute and active lifestyle and some may prefer the suburbs that offer larger homes, but both are caught in a dilemma. Not only do they need to decide on location, but they are faced with how to save for a home and if they have been able to save, then they also need to find the inventory in their price range.

The Editor of the Economist, Robert Guest stated, "Education has become so expensive that many students rack up heavy debts...Housing has grown costlier, too, especially in the globally connected megacities where the best jobs are. Young people yearn to move to such cities: beside higher pay, they offer excitement and a wide selection of other young people to date or marry. Yet constraints on the supply of housing make that hard."

Millennials have more student loan debt than other generations so many haven't been able to save the recommended 20% down payment for a new home and are also facing tight financing from lenders. According to Ellie Mae's Millennial Tracker, more than one-third of home loans made to Millennials since 2014 were Federal Housing Administration (FHA) loans insured by the federal government. FHA loans allow borrowers to make a 3.5% down payment, but do come with the price of mortgage insurance. Ellie Mae's Millennial Tracker also lists the average FICO score as 734, which many young buyers do not have.

In addition to the financing issue for young buyers, there is also an inventory issue. Home buyers in other years have had double the number of homes for sale to choose

from. The trend used to be to buy a home, preferably in a great location, and build some equity. Svenja Gudell, chief economist at Zillow, said "You don't have that normal flow of people being able to enter the bottom of the market and sell and move into the middle — it really disrupts this flow that we used to see." Not having enough inventory is said to have been caused by the previous number of foreclosures and number of homes with no equity or negative equity, which has caused people to stay in their homes.

Low inventory is driving the prices up and causing bidding wars. When a young buyer does find a home, they are sometimes competing with other buyers and are forced to offer over asking prices for homes. Buyers are writing personalized letters to sellers to give them an emotional edge in the hope that the seller will choose their offer over possibly several other offers. In an effort to buy a home they line sidewalks attending open houses on the weekend looking for that possibly only home in the median price range for that suburb. In any event they must have their financing in place and be prepared to move quickly because of low inventory. If you're thinking that buying a condominium might be an answer for a starter home, according to the Warren Group, the median sale price of a condominium in Massachusetts exceeded that of a single family home in March of 2016 for the first time in four years. Overall, the median price of a home in Massachusetts rose 3.8 percent to \$353,000, according to Massachusetts Association of Realtors and the median home price in the Boston area was \$420,000.00.

Whether it is a lack of financing options for buyers or a lack of inventory, the traditional path of homeownership is changing. Millennials have many decisions to

make. They must decide if buying is right for them or should they continue to rent because they are priced out of the home buying market. They must decide how important location is to them. If its city life they want, they must decide if it will be worth paying such a high price per square foot. If not, then they must decide if commuting from the suburbs and dealing with traffic and congestion is worth it for them.

Although it appears it is a struggle for Millennials to buy a home these days, this is the generation that also has had more higher education and more technology at their fingertips than prior generations, so let's have confidence in them to figure this one out.

About Our Law Firm

Perkins & Anctil, P.C. is one of Massachusetts' and New Hampshire's leading firms practicing condominium law, condominium conversions, real estate law, developer and lender representation, representation before town and municipal boards, landlord/tenant matters, real estate litigation, and bankruptcy.
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