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PERKINS & ANCTIL P.C.

ATTORNEYS AT LAW

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LAW QUARTERLY

IN THIS ISSUE

The CAI New England Annual Expo Is Coming Soon

Perkins & Anctil, P.C. wishes to remind its client and business contacts that the 23rd Annual Expo of the CAI New England Chapter will be held on Saturday, October 27, 2012 at the Best Western Hotel in Marlboro, MA from 8:00a.m. to 2:30p.m. If you have attended in the past, then you are aware that this is a unique opportunity to meet with hundreds of vendors of all types specializing in serving the condominium industry. Further, seminars and other opportunities to obtain information make the day a premier educational opportunity for all attendees.

Perkins & Anctil, P.C. is pleased to announce that we will staff a legal vendor booth at the Expo. In addition, one of our partners, Gary M. Daddario, will present during the seminars. Attorney Daddario will join with Deborah A. Jones, President of American Properties Team, Inc., for a seminar on condominium collections. The seminar will provide attendees with the perspective of both the association's legal counsel and property management relative to this important topic.

We hope to see you there! Consultant Booth 75-C

Too Much of a Bad Thing: New Precedent on the Collection of 'Excessive' Fines

By: Scott Eriksen, Esq.

In the condominium world, fines are always a hot topic. Most condominium documents permit associations to impose fines when owners or their tenants run afoul of use restrictions. For example: Is a unit owner's dog darting around the common area without a leash? Fine. (Well, not *'fine'* – rather, impose a fine.) Tenant smoking in the common areas? Fine. Parking violations, improper use of pools or other amenities, littering? Fine, fine, fine. It is fairly routine for associations to fine unit owners and so many may wonder: *What is the likelihood of collecting the fine?* This question especially springs to mind when the fine may appear to be 'excessive.'

The ability to collect 'excessive' fines was recently the subject of *Reed v. Zipcar, Inc.*, 2012 U.S. Dist. LEXIS 106371, 1-20 (D. Mass. July 31, 2012). Naomi Reed, a Zipcar customer, filed a class action against Zipcar. Zipcar, as most city-dwellers know, provides *"wheels when you want them"* in the form of a car-sharing service. To become a Zipcar member, customers sign an agreement by which they promise, among other things, to pay a fee if they fail to return a car on time.

In her complaint, Ms. Reed claimed that she incurred excessive fees when she was late to return a vehicle. Reed challenged the late fees on three grounds: first, that they were an "unlawful penalty"; second, that they unjustly enriched Zipcar at the expense of its customers; and, finally that they constituted a violation of the Massachusetts Consumer Protection Act ("c. 93A").

On a hearing on Zipcar's motion to dismiss, Judge Gorton quickly disposed of Reed's first two claims, but gave notable attention to the c. 93A claim. Ms. Reed argued two theories in support of her c. 93A claim. The first theory was that the late fees were "grossly disproportionate" to the damages to Zipcar. The court disagreed. Unlike Ms. Reed, the court thought that quantifying Zipcar's damages from late vehicle returns would not be an easy task. Noting it would not be "as simple as multiplying the minutes late by an hourly charge…" the court considered that Zipcar would also have to factor in "expenses associated with managing the logistics of late returns … and the reputational harm caused by the frequent late return of vehicles." Without being able to demonstrate what a "reasonable" harm might be for a late vehicle return, the court held that Reed could not show that the actual late fees were "grossly disproportionate."

Ms. Reed's second theory was that the late fees were "unconscionable." Again the court disagreed. Judge Gorton found that the fees were not "procedurally unconscionable" since Zipcar was simply enforcing the terms of its membership agreement. The court also held that the late fees were not "substantively unreasonable" simply because they were higher than those of Zipcar's competitors.

Before wrapping up its c. 93A analysis, the court also noted that Zipcar had "good reason for charging high late fees." This reason, according to the court, was that the company's "continued success in the burgeoning car-sharing market" depended on its reputation for living up to its slogan and delivering *"wheels when you want them."* Thus, in the end, despite giving credit to Reed's deft attempt, Judge Gorton resolved that "just as one cannot get blood from a stone, some allegations, no matter how well articulated, do not give rise to a claim for relief."

Now, if you have made it this far you have no doubt noticed that the *Reed* case has literally ***nothing*** to do with condominiums. At first glance, the case may not seem at all relevant for associations. Contract and c. 93A claims generally fall flat in the condominium arena, and we have yet to see an association participating in the car-sharing game. However, in its analysis of Reed's c. 93A claim, the Court raises a number of arguments which may serve as useful precedent in an action to defend condominium fines:

1. First, to successfully contend that fines are "grossly disproportionate" may require some

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showing of what a "reasonable" fine would be. In many cases, this would no doubt be difficult to establish. Consider the following: when an owner violates a rule that requires cars to be removed from parking areas in the event of a snowstorm, what is a "reasonable" measure of the damages for such violation? The calculus is arguably more complicated than the simple cost of clearing snow from around the spot after the fact. For example, there are administrative costs associated with each step of the fine process – identifying the vehicle, informing the Board/property manager, removing the vehicle, clearing the snow, imposing the fine, following up, etc. In an isolated incident these costs may be quantifiable, but for an association dealing with multiple offenders, the determination may not be so simple.

2. Second, it should come as no surprise that an individual may not generally allege that fines are "unconscionable" where the individual "freely agreed" to subject himself to the same by purchasing the condominium unit.

3. Finally, like Zipcar, most condominium associations have a good reason for imposing fines. A successful association is a harmonious association. Abiding by the same rules as your neighbors should not be onerous; nevertheless, it is our experience that the occasional unit owner needs a gentle reminder of this courtesy and obligation. Fines – for better or worse – are a useful tool in ensuring that each owner is aware of and abides by the rules to which they have agreed to live by.

While this article may seem light-humored, we do not mean to belittle the decision of whether imposing fines – as opposed to a written warning or some other action – is a proper first course of action in response to a violation. Furthermore, even if fines are permissible under the condominium documents, it is important for any association to be consistent in the application and pursuit of the same. We strongly recommend that the Board or property manager contact counsel regarding how best to deal with any serious or repeated violations of the condominium documents.

Nothing Is Set in Stone... The Granite State Contemplates Changes to the New Hampshire Condominium Law

By: Gary M. Daddario, Esq.

Pursuant to a not often discussed provision of New Hampshire law (R.S.A. 356-B:70) a perpetual committee exists for purposes of advising the New Hampshire legislature on the laws relating to condominiums and homeowners associations (the "committee"). The committee is comprised of members of the legislature. As President-Elect of the CAI New Hampshire Chapter, I have had occasion to attend some of the recent public hearings of the committee. The committee intends to finalize recommendations and draft legislation for changes in R.S.A. 356-B within the next few months. I offer the following information regarding discussions from the public hearings and expectations of the potential proposed legislation. This is not a summary of the potential proposed legislation, as the same has neither been completed nor released. Further, this article is for informational purposes and conveys the opinions of its author. It is not meant to convey the position of CAI New Hampshire with respect to the matters mentioned herein.

A subject high atop the list of the committee's priorities is the establishment of a licensing system for property managers. The committee is under the impression that the volume, variety and severity of the complaints received alleging improprieties by property management agents in New Hampshire establishes a condition that must be addressed. Licensing would likely be linked with educational requirements for initial applicants and continuing educational requirements for renewals. Licensing will likely take place on an individual basis, meaning that a company license will not serve to cover the various property managers employed by the company. Some New Hampshire property managers have expressed support for such a licensing system. These managers believe that the education and training linked to the licensing system will serve to increase the overall professionalism of the industry.

Also high on the priority list of the committee is the establishment of a "grievance board". This board would not undertake the process of determining the outcome of unit owner disputes but rather of determining whether or not the dispute possesses sufficient merit to warrant legal proceedings. The board is envisioned as being comprised of a variety of members including legislators, an attorney and unit owners. The unit owner members would be from a variety of types of New Hampshire condominiums and homeowners associations. Some members of the board would be appointed by the Governor of New Hampshire and others would come from other sources. Those in the industry will likely find it hard to imagine how such a board, once "open for business", will not be consistently overwhelmed with unit owner complaints.

Other contemplated provisions appear to be ideas aimed at readjusting the balance of leverage between unit owners and associations. For instance, there has been mention of a provision which would impose penalties on association boards for circumventing or manipulating the association's bylaws without proper involvement of the community. Another would award legal fees to the prevailing party in a dispute between a unit owner and the association. While a "level playing field" has a certain appeal on its face, one wonders whether such provisions will result in an increase in complaints and litigation that associations are forced to confront.

As set forth above, the committee continues to work on these matters. Stay tuned regarding the actual proposed legislation and the position of CAI New Hampshire, both of which will be fully developed in the coming months.

An Illegal Tax Masquerading As A Permissible Fee: II[1]

By: Fredrick J. Dunn, Esq.

For decades, the Town of Saugus had routinely experienced problems with its sewer infrastructure. Excessive amounts of water frequently entered the system through leaks in the system's defective pipes, joints, and sewer connections, commonly referred to as infiltration. At the same time, additional amounts of water would enter the system due to inflow from faulty manhole covers and the illegal connection of private sump pumps and roof drains. Collectively, the infiltration and inflow (hereinafter referred to as "I/I") increased the volume of liquid in the system and, coupled with storm events, caused overflow and backup issues. In order to prevent such backup and overflow, the town discharged untreated sewage into the Saugus River, which flowed through marshes and other areas of environmental concern, to the ocean.

Due to environmental concerns, the Department of Environmental Protection ("DEP") evaluated the sewer system and subsequently mandated repairs to the system which required the reduction of I/I into the system. In 2005, the town entered into an Administrative Consent Order ("ACO") to address the mandates of the DEP. It is the town's actions and procedures taken in response to the ACO which resulted in the case of *Denver Street LLC vs. Town of Saugus (and three companion cases), 78 Mass. App. Ct. 526 (2011).* [**See also 462 Mass. 651 (2012)**].

The four plaintiffs in the matter were developers and land owners who, when seeking permits for residential developments, were required by the town to connect to the sewer system and pay an I/I reduction contribution. Such contributions, which ranged from approximately a quarter of a million dollars, for two of the developers, to approximately $75,000.00, were termed "fees" by the town, and were ultimately paid under protest. Initially, each plaintiff filed a separate complaint seeking a refund of the payment each had made arguing that the payment constituted an illegal tax rather than a permissible fee. The complaints were consolidated and the judge determined that such payments indeed constituted an illegal tax, not an allowable fee. Refunds in the amounts paid were ordered, along with the addition of

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prejudgment interest in the amount of twelve percent.

The town challenged the ruling arguing that the payments were a permissible fee in that the new users to the sewer system would receive a particularized benefit and that such payments had a reasonable relationship to the costs of sewer system repairs. The town also argued that an award of twelve percent interest was also in error. The Appeals Court affirmed the original ruling. **The town again challenged the Appeals Court's ruling. The Supreme Judicial Court (hereinafter the "SJC") reversed the judgments and entered judgments for the town.**

Many cases have centered on the question as to whether a payment required by a municipality constitutes an illegal tax or a permissible fee. Quoting *Commonwealth v. Caldwell, 25 Mass. App. Ct. 91, 92 (1987), Silva v. Attleboro, 454 Mass. 165, 168 (2009)* indicated, "A municipality does not have the power to levy, assess, or collect a tax unless the power to do so in a particular instance is granted by legislature." However, pursuant to *G.L. c. 40, § 22F*, a municipal board or officer may fix reasonable fees for any licenses, permits, certificates, or services. The courts have routinely considered a three factor test in resolving the question raised by such cases. This test was set forth in *Emerson College v. Boston, 391 Mass. 415 (1984)*.

> "Fees imposed by a governmental entity … share common traits that distinguish them from taxes: (1) they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society; (2) they are paid by choice, in that the party paying the fee has the option of not utilizing the government service and thereby avoiding the charge; … and (3) the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses."

In the instant case, the Appeals Court **and the SJC** chose to focus on the first and third factors, as the developers and land owners certainly had the choice to make the payments or not develop residential properties which required connections to the sewer system. **Both parties therefore agreed that the payments were voluntary, thereby negating the need for the Courts to address the second factor concerning voluntariness.**

The first factor of the *Emerson College* test focuses on whether there is a specific benefit. More simply, the payment may be characterized as a permissible fee if the fee payer receives a specific benefit not shared by other members of society. In the absence of a specific benefit, the fee would be more characterized as a tax. Here, the **Appeals** Court was unable to find any specific benefit as every inhabitant of the town benefited from any I/I repairs as funded by the prospective "new users". Through the various I/I repairs, sewage overflow into the streets and residences could be averted and the discharge of untreated sewage into environmentally sensitive areas could be avoided. These two benefits would not be exclusive to the "new users", but would be experienced by all inhabitants of the town, and neighboring towns. Thus, the **Appeals** Court felt that the payments failed the first portion of the *Emerson College* test and constituted an illegal tax. The **Appeals** Court also reasoned in the same manner with respect to the third factor of the test. **However, the SJC reasoned otherwise.**

When analyzing the first factor, the SJC felt that the Appeals Court and the town failed to recognize the importance of the terms of the ACO. Specifically, the ACO required that no new connections to the system be made until such time as the current system was repaired. Such repairs, pursuant to the town's repair plan, were scheduled to take place over a ten year period. Here, the specific or "particularized" benefit was the developers' immediate access to the system, rather than having to wait the scheduled ten years for the system to be repaired. Such immediate access to the system, for the developers, was not a benefit to all members of the town. The developers could have chosen to wait until the repairs were completed; instead, they made the payments, and received a specific benefit by being able to access the system immediately. Thus, the SJC concluded that the first factor of the test was satisfied. A similar conclusion was also made with respect to the third factor of the test.

When focusing on the third factor, the **Appeals** Court looked to determine whether the charges were related to compensation for the governmental entity's expenses in providing a service rather than a charge collected to raise revenues. The town's argument that the I/I reduction contribution compensated the town for services related to expenses it incurred in connection with the entry of new users to the sewer system was rejected. The town attempted to rely on the holding in *Bertone v. Department of Pub. Util., 441 Mass. 536 (1992)* in which a fee was upheld for users seeking new or expanded electrical service. In *Bertone*, the new user fee was necessary to improve the town's existing electrical infrastructure to accommodate the new users. In the instant case, there was no evidence that the town's sewer system needed to be repaired to accommodate any prospective new users. As mentioned above, the town had been experiencing similar sewer system problems dating back to 1986. The findings of the DEP, and subsequently mandated repairs **pursuant to the ACO** were necessary whether or not any new users were added to the system. By failing the first factor of the test, and the third, in that the new users received no specific benefits not shared by the other members of the town, and the amount of the I/I reduction contribution was not reasonably related to the cost of services from which the new users alone derived a benefit, the payment was determined to be an illegal tax masquerading as a permissible fee. **The SJC rejected this finding and, in doing so, relied on portions of *Bertone*.**

In *Bertone*, the third factor of the test could be satisfied where a charge was designed to reimburse a municipality for expenditures made from a general fund. Further, in *Southview Coop. Hous. Corp. v. Rent Control Bd. Of Cambridge 396 Mass. 395 (1985)*, "[R]easonable latitude must be given to the agency in fixing [the amount of] charges," and such charges should "not be scrutinized too curiously even if some incidental revenue were obtained." In the instant case, the town applied the developers' payments as reimbursement for monies previously expended by the town for I/I removal. This fact was not disputed by the town and the Appellate Judge. However, the Appeals Court took its analysis a step further by scrutinizing the amount of the payments in light of the requirements of the ACO, which called for decreasing ratios as additional I/I was removed from the system. The developers argued that the payments were too high, and should have been less, based upon the fact that the town failed to calculate the payment with a lower ratio. The Appeals Court agreed and found the charge to be a means for generating revenue, i.e. a tax. The SJC ruled that the analysis should have stopped once the Appeals Court found that the payments were used to reimburse the town for monies already spent. Thus, the third factor of the test could be satisfied, along with the first, and the charges could be construed as a permissible fee, rather than an impermissible tax.

[1] This article shall supplement a previous article discussing the decision of the Appeals Court from the Summer 2011 newsletter. For convenience, the supplemental information and discussion appears in **boldface font** herein.

Does a Homestead Exemption Protect a Remainder Interest in Real Estate?

By: David R. Chenelle, Esq.

This was the question before the U.S. Bankruptcy Court, District of Massachusetts, Central Division in the case of *In Re: Nicole D. Gordon*, Docket 11-44524 HJB. The short answer is no, but read below for the details.

The facts of the case were not in dispute. On October 31, 2011, the debtor, Nicole D. Gordon, filed a Chapter 13 Bankruptcy Petition under the U.S. Bankruptcy Code. Within her

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Schedules, she listed a ¼ remainder interest in a house in which she and her mother live. This interest came about some 15 years prior to her Bankruptcy Case when her mother conveyed the property while retaining a life estate. The Debtor's remainder interest was listed as having a value of $35,240.00. In order to "protect" her remainder interest, the Debtor, just prior to the bankruptcy filing, recorded a declaration of homestead pursuant to the Massachusetts Homestead Statute, which she claimed on her Schedule C.

The Chapter 13 Trustee filed a timely Objection to the Debtor's exemption, stating that the Debtor cannot claim an exemption in the remainder interest pursuant to the Massachusetts Homestead Statute because the Debtor is not an "owner" as defined by the Statute. The Trustee contends that an "owner" is exclusively defined by the Statute as a "natural person who is the sole owner, joint tenant, tenant by the entirety, tenant in common, life estate holder or holder of a beneficial interest in a trust." The Trustee contended that since the Statute in defining "owner" did not include a remainder interest, then it cannot be claimed as such.

The Debtor's arguments were two fold. First, she argued that the recent amendments to the Homestead Statute, which expanded the definition of an "owner" to include the beneficial interest in a trust, should be liberally interpreted in favor of the Debtor to include a remainder interest. Second, in the absence of Massachusetts case law on point, she invited the Court to follow an Ohio case. The Court declined to accept that invitation.

In order to qualify for the Massachusetts Homestead Exemption under M.G.L. ch. 188, §1, a Debtor must be an "owner" as defined by the Statute; and must occupy or intend to occupy the property as their principal residence. Although the Chapter 13 Trustee's Objection also challenged the second prong as well, she ultimately waived her objection of residency during oral arguments.

The Court sifted through the various issues and defenses of the parties, and ultimately centered on the clear and unambiguous reading of the Homestead Statute. In providing judicial notice of the recent amendments to the Statute to include both holders of life estates and holders of beneficial interests in trust, the Court rejected the Debtor's request to include remainder interests. In so doing, the Court stated that "liberal construction does not license the Court to ignore [the] plain and unambiguous statutory language." Addressing the recent amendment, the Court stated that the Massachusetts Legislature took pains to specifically define what an "owner" of real estate included, while other states legislatures did not.

In sustaining the Chapter 13 Trustee's Objection to the Debtor's exemption, the Court concluded that holders of a remainder interests are not entitled to claim a Massachusetts Homestead Exemption "because a holder of a remainder interest is not among the types of enumerated 'owners' under the statute."

The Debtor has filed her Notice of Appeal with the Bankruptcy Appellate Division on September 10, 2012.

Richard G. MacDonald v. Old Republic National Title Insurance Company, et al

By: Charles A. Perkins, Jr.

The case entitled *Richard G. MacDonald v. Old Republic National Title Insurance Company, et al*, is an interesting Federal Court Decision that deals with what one would think is a clear breach of contract and tort which would render the Defendant, Old Republic National Title Insurance, liable for a title insurance issue.

In this case, an individual named MacDonald delivered $135,000 to a person for unit mortgage loans arranged for by said person. As security for the loan, MacDonald was granted a first mortgage affording to encumber three (3) condominium units. Further, to ensure validity, enforceability and priority of the purported mortgages, MacDonald purchased and received three (3) title insurance policies issued by Old Republic.

Old Republic moved to dismiss Count III of MacDonald's Complaint which was brought against Old Republic for failing to conduct a competent search of title and creating liability under the New Hampshire Revised Statute Section, 416-A:6. He also brought a claim for liability for negligence.

The Court went through a lengthy analysis and indicated that a title insurer has a common law duty to the insured and MacDonald may bring his claim for negligence against Old Republic. The Court also found that MacDonald was allowed to bring the statutory standard of conduct for his actions of negligence and that the economic loss doctrine did not apply.

They reserved the right to certify this question to the New Hampshire Supreme Court in the event the resolution of Count III ultimately determines or affects MacDonald's recovery in this matter.

Flood Insurance Coverage Costs

By: Charles A. Perkins, Jr.

There are two recent cases against lenders who have asserted that each can increase flood coverage costs against owners. There had been lower court decisions essentially dismissing the unit owner's complaint and allowing the lender to increase the costs. However, in both of the Appeals Court cases, and one for a different reason, the Court vacated the dismissal and allowed the same to move forward.

A copy of these cases, *Stanley Kolbe v. BAC Home Loan Servicing, LP, et al* and *Susan Lass v. Bank of America, N.A.*, may be obtained by contacting Sharon Adams at sharon@perkinslawpc.com.

About Our Law Firm

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