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IN THIS ISSUE

A Neighborhood Watch and HOA's Liability Issues

By: Fredrick J. Dunn, Esq.

Without question, the death of Trayvon Martin has transfixed many Americans as it has stirred up a great deal of racial and political controversy. However, far removed from the dramatic media coverage and passionate editorials, there lies an issue which also deserves attention from many condominium and homeowners' associations. The recent shooting death should trigger associations to review their insurance policies.

Many legal analysts have indicated that Martin's family will certainly sue his accused killer, George Zimmerman. Additionally, it is thought that Martin's family will also sue the homeowner's association (HOA) that initiated the neighborhood watch program. The question then becomes whether or not the HOA can be found vicariously liable for the actions of Mr. Zimmerman. Thereafter, if the HOA is found liable, what impact can that have on the other homeowners as individuals?

Addressing the question of the HOA's liability deals with a number of factors. Activities that involve HOA committees can be seen as official activities of the HOA. Other areas, such as HOA parties planned by informal groups present a bit of a gray area. The neighborhood watch program is a prime example of the complexities of an HOA's liability. If the HOA initiated the neighborhood watch program, and calls regular meetings, the HOA may be liable for anything that a homeowner does while acting under the program. Thus, the proper measures must be taken to ensure that the homeowners understand their roles and responsibilities.

If an HOA is intending to initiate a neighborhood watch program, they should contact the local police to obtain startup ideas and support. Secondly, the HOA should set up a screening process to determine appropriate candidates for the program. Additionally, the HOA should ensure that there are constant reminders and refreshers of the program's procedures and rules. Finally, it may be beneficial to contact an attorney that is well versed in community association law.

In the event the HOA is found to be responsible for the actions of one of its members, the follow up question surrounds another homeowner's responsibility. It is highly unlikely that anyone else would be personally responsible for the wrongdoings or injuries caused by the actions of another. However, if the HOA is found liable, insurance may cover the financial obligation. Unfortunately, there could be a shortfall which might then result in a special assessment for the homeowners. Further, the insurance policy may not cover such matters. Thus, the implication for all members of the HOA could be significant.

Some states limit an individual's liability if the association carries certain levels of insurance. Additionally, the homeowner may carry their own insurance for such matters. It is highly advisable that associations, and their members, take a moment to remove themselves from the frenzied media coverage of the death of Martin so that they can assess their own programs and committees and also to review insurance policies and applicable coverages. There will undoubtedly be a number of lessons to be learned from this event, one of which is that associations must be mindful and vigilant in monitoring the actions of their employees, agents and volunteers.

Perkins & Anctil, P.C. Proudly Announces Launch of Our Collection Case Tracking System

By: Gary M. Daddario, Esq.

At Perkins & Anctil, P.C. we strive to provide legal services that not only accomplish our clients' goals, but do so in an environment of exceptional customer service. Several years of poor markets and a poor economy have exponentially increased the collections of many properties. With so many delinquent accounts, association finances have become a "hot topic" among condominium boards. As a result, more than ever before, property management faces a challenge in monitoring collection cases and understanding the process. The Perkins & Anctil Collections Team wants to assist property management with this task. Accordingly, we will now offer a no-charge, face-to-face meeting on a quarterly basis to all property management companies and self-managed associations that have open collection files with our firm. This will provide an opportunity for our office to ensure that you are informed relative to case status and progress and that you understand the process as well. A live discussion will allow us to address your questions and concerns fully. Thanks to the available remote access to our in-house, customized computer system, we will appear for quarterly meetings with a laptop and the ability, as necessary, to view files and documents relative to the cases we discuss. To Schedule your quarterly meeting, please contact Gary Daddario (gdaddario@perkinslawpc.com).

Note that our new quarterly meeting offering is an addition to (and not a replacement of) our monthly status reports and our annual "roadshows" for discussing changes in law and other hot topics. As with quarterly meetings, you may contact Gary Daddario to schedule a free "roadshow".

Is That Restriction Still Valid After All These Years?

By: Scott Eriksen, Esq.

They say nothing is forever. But in the case of certain land use restrictions, some may last longer than expected.

Take, for example, Massachusetts General Laws c. 184, §23. This statute provides that *"[c]onditions or restrictions, unlimited as to time, by which the title or use of real property is affected,* ***shall be limited to the term of thirty***

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***years** after the date of the deed or other instrument … except in cases of gifts or devises for public, charitable or religious purposes…"*

At first glance, this provision seems sweeping – a flat prohibition of non-charitable restrictions on title or use of land beyond 30 years. However, as the Appeals Court decision in *Killorin v. Zoning Bd. of Appeals,* 80 Mass. App. Ct. 655 (2011) illustrates, even legislative limitations have their…well, limitations.

At issue in *Killorin* was a 1940 special permit decision (the "Decision") which permitted a large colonial house to be converted into 8 apartments on the condition that "*…[the Subject Lot] shall not be further subdivided and shall contain only the … apartment house and no other buildings except an eight-stall garage along the rear boundary of said lot.*"

Ms. Killorin acquired the property in 1966. After her death, the trustees of her trust attempted to sell the property. In connection with their attempts to sell the property, the trustees sought to have the Decision modified and the restrictions on the further subdivision deemed inapplicable. The Andover zoning board twice denied the trustees' applications for modification. The trustees appealed the denials to the Essex Superior Court, and the Superior Court affirmed the decisions of the zoning board.

On further appeal, a central issue before the Appeals Court was *"whether c. 184, § 23, applies to conditions or restrictions set by a government agency, such as a zoning board of appeal, as part of the process of granting a special permit, when allowing activity that would otherwise conflict with local zoning laws.*" Noting that *"statutory language itself is the principal source of insight into the legislative purpose*" the Court found that the language of c. 184, § 23 strongly implied that *"the restrictions controlled by* [c. 184, § 23] *are those created by deed, will, or other instrument.*"

The Appeals Court also noted that the context of c. 184, § 23, *"in a chapter dedicated to the formal requirements and effects of **deeds or other instruments of conveyance** of real property*" was relevant in determining legislative intent.

In an interesting note for the condominium world, the Appeals Court also referred to the Massachusetts Supreme Judicial Court decision of *Johnson v. Keith*, 368 Mass. 316 (1975), holding that similar *"limits on restrictions contained in G.L. c. 184, §§ 26-30, were 'inapplicable to the enforcement of restrictions against the owner of a condominium unit.'"* In *Johnson*, the SJC noted that *"because restrictions in the master deed [of the condominium association] and in the by-laws may be amended by the unit owners, they resemble municipal by-laws more than private deed restrictions."* The *Killorin* court concluded that the Johnson decision provided *"additional support for the proposition that the restrictions or conditions contemplated by c. 184, §23, are not those created pursuant to regulations under c. 40A or municipal zoning by-laws, and therefore not applicable to conditions of a special permit ..."*

The Appeals Court concluded that it would also be *"anomalous and unjust"* if the property owners were allowed to retain the benefit of the Decision (namely *"permission to maintain an apartment building in a single-family historic district"*), without being held to the corresponding condition.

Killorin is noteworthy for insight that it provides as to the scope of c. 184, § 23. It is important to remember that not all restrictions are created equal, and some will survive beyond 30 years.

What Is a Personal Representative? Should I Revisit My Current Estate Plan Light of the New MUPC?

By: Scott Eriksen, Esq.

Benjamin Franklin offered perhaps the most compelling reason for personal estate planning when he penned the phrase ***"in this world nothing can be said to be certain, except death and taxes."*** All U.S. citizens will die and all of them will pay taxes. Depending on the size of their estates, and whether or not they have an appropriate estate plan, the taxes they pay may well include wealth transfer taxes – commonly referred to as "inheritance" or "death taxes." While the current federal estate tax exemption level is at an all-time high ($5.12 million dollars in 2012), there may be other important reasons to revisit your personal estate plan.

For Massachusetts residents, one such reason is the recent adoption of the Massachusetts Uniform Probate Code (the "MUPC"). The MUPC implements a number of changes to the laws governing wills, guardians, conservators and estate administration. Some noteworthy changes under the new MUPC are set forth below.

• Under the MUPC the term ***"personal representative"*** replaces the familiar ***"executor/executrix"*** in wills. The MUPC also eliminates the need for naming ***"temporary executors."***

• The MUPC greatly expands the list of enumerated powers of personal representatives. See Section 3-715(a).

• The MUPC distinguishes between ***guardians*** and ***conservators***. A ***guardian*** is one who has custody of a ***person***, where as a ***conservator*** is one who has custody of ***property***. This means that a parent could draft his or her will to name one person to raise a child and another person to manage that child's funds. Parents need not name two different people to act as guardian and conservator, but this provision allows the flexibility to do so. The MUPC also allows such appointments to be made in a separate writing witnessed by two persons.

• The parents of an unmarried incapacitated adult or the spouse of an incapacitated adult may nominate a guardian for such incapacitated person in their wills or in separate, witnessed instruments. These nominations will be given priority by the courts.

• A testator – one executing a will – also now has the option of leaving a *binding* written memorandum to dispose of tangible personal property (such as automobiles, jewelry, furniture, artwork, etc.). The writing disposing of such property need not be contained in the will and may be executed either before or after the will. To be valid and binding, it must be signed and describe the property to be disposed of with reasonable certainty.

• Prior to the adoption of the MUPC, marriage automatically revoked an existing will (unless the will was made specifically in contemplation of the marriage). Now, a will executed before marriage remains in effect and the spouse is entitled to receive the share of the testator's estate as if the testator had died without a will – but only as to property not left to a descendant of the testator.

Though the MUPC is not designed to render existing plans deficient in any significant respect, its adoption may warrant a review of your existing plan. If you do not have an existing plan – well, see Franklin's quote above.

Employee or Independent Contractor: Making the Wrong Classification Can Be Dangerous For Your Business

By: Christopher S.M. Driscoll, Esq.

The Federal and Massachusetts state governments both have very strict rules about how employers classify individuals as either an employee or an independent contractor. Failure to properly classify an individual (and give them the proper benefits and pay the required taxes) can lead to stiff civil and criminal penalties, or both. It is worth noting that the Massachusetts statute is broader and gives more protection to workers. For example, in a recent case a roofing company and its principals plead guilty to violation of M.G.L. c. 149, § 148B, the Massachusetts Independent Contractor statute ("the IC statute"). One of the principals received a two year suspended jail sentence. The court also fined the two principals and the company $224,000, and banned them from bidding or contracting for any public works project for a period of 5 years. They also had to make restitution to their insurance in the amount of $100,000.

Independent contractors can provide flexibility and savings to employers. Independent contrac-

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tors engaged on a short term or project basis can allow a quick response to a new demands. Independent contractors also often possess specialized knowledge and skills, and may bring creative solutions to the table. Independent contractors are important to our economy. However, some employers have abused workers by classifying them as independent contractors and have gained a competitive advantage over their competitors.

The legislature first enacted the IC statute in 1990, and has been amended several times since. There are several purposes of the IC statute according to the Attorney General:

1) to prevent insurance fraud;

2) to ensure that employees that are misclassified as independent contractors are not denied the many protections and benefits that employees enjoy;

3) to ensure that those misclassified are not left without unemployment insurance and workers' compensation and employer-provided health care; and

4) to ensure that those misclassified are not paid reduced wages.

In addition when individuals are misclassified, Massachusetts loses some tax revenue since payroll taxes are not paid, and it can incur costs in having to pay for health coverage, worker's compensation benefits, and unemployment assistance directly out of government funds without the employers having contributed what they should have.

The IC statute only applies to individuals, so if you have contracted with a large outside corporate vendor to perform some task then you are safe. However, if you have gotten a specific individual to perform some task, then it needs to be closely examined if they should actually be treated as an employee.

The test for whether someone should be characterized as an employee is known either as the "1-2-3" or "A-B-C" test. There is a presumption that any individual performing a function or task for a business is an employee. In order to disprove this presumption, the statute says that employer must prove all of the following:

1) that the worker is **free from its control and direction** in performing the service, both under a contract and in fact;

2) that the service provided by the worker is **outside the employer's usual course of business;** and

3) that the worker is **customarily engaged in an independent trade, occupation, profession or business** of the same type.

Free from Direction and Control

First, it is important to note that the Attorney General states that having a contract stating that the worker has freedom from supervisory direction and control over how the task or service is performed is insufficient in of itself. However, if there is no agreement or contract stating that the worker is free from direction or control, then that counts strongly against the employer. That being said, the worker need not be entirely left to their own devices or given no instruction. But the work being performed must be done so by the worker at their own discretion and autonomy. For example, factors that would count towards the worker being free from control and direction are things like whether the worker is allowed to uses his own discretion as to the method as to how the task is carried out, whether they use their own tools, and if they determine their own hours.

Outside of the Employer's Usual Course of Business

A worker whose services form a regular and continuing part of the employer's business should be classified as an employee and not an independent contractor under the IC statute. However, if the worker is performing services that are "part of an independent, separate, and distinct business" from that of the employer, the worker can be treated as an independent contractor. As an example, a painter hired to paint a law firm's office is an independent contractor. An attorney or paralegal hired by the same law firm would have to classified as an employee under this portion of the test, since the services they provide are the central portion of the services provided by the employer.

Customarily Engaged in an Independent Trade, Occupation, Profession or Business

As the courts have defined this part of the test the question is "whether the worker is wearing the hat of an employee of the employing company or is wearing the hat of his own independent enterprise." To qualify as an independent contractor, "the insignia must be that of a freestanding, independent entrepreneurial business in which the worker has a proprietary interest." What this portion of the test is looking to determine is the independence and entrepreneurship that the worker has from the employer. Some of the factors that show this are whether worker would be free to provide their services to another customer, if the relationship between the employer and worker is so interconnected that if the employer terminated the relationship the worker's business would end, and whether the worker has a financial investment in the business providing the service to the employer.

The Servicemembers Civil Relief Act: Some Considerations On Its Impact On Collections and Lien Enforcement

By: Christopher S.M. Driscoll, Esq.

The Servicemembers Civil Relief Act ("SCRA") is a Federal law that provides certain protections to soldiers, sailors, airmen, Marines, commissioned officers in the Public Health Service, Coast Guard Personnel, National Oceanic and Atmospheric Administrators while on active military service and for up to a year after active duty. It does not protect members of the Reserve and National Guard who have not been called up to active federal duty. While the origins of the act go back to the Civil War, it was most recently amended and brought to its current form in 2003. Because the statute is very broad, and covers many different subjects, this article will focus on the enforcement and collection of liens.

The general purpose of the law is to shield members of the military from having to defend against lawsuits, foreclosures, evictions and other collection activities such as garnishment or attachment of property or wages. However, the protection is not absolute, as Congress has strived to balance the legitimate interest of military members ("members") not to be burdened with having to defend against such activities when they may be unable to do so, with the interests of creditors of members. The law is based on the premise of the inability of members to manage their affairs while away, and that their pay is probably less than it was when they were civilians. The courts have interpreted the law in this light, and are generally deferential to the interest and concerns of the active duty military, but they also recognize that the law should not be used as a sword to defeat the legitimate interest of those to whom members owe money.

In Massachusetts, in order to foreclose on a mortgage, there is no requirement that a mortgagee go to court beforehand. However, the Federal statute prevents a foreclosure unless the member has waived their rights under the law or "upon a court order granted before such sale, foreclosure, or seizure with a return made and approved by the court." Therefore, in order to comply with the statute, a mortgagee must file a suit for the limited purpose of determining whether an owner/mortgagor is on active duty military service. If the mortgagor is on active duty, then the court will examine the circumstances and apply the statute, and may modify the interest rate and/or prevent the foreclosure from going forward. The court may also restructure the repayment arraignment, including reducing principle payments for a period of time.

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Other liens are generally enforced through the filing of lawsuits against the person and real or personal property which is secured by the lien. While the SCRA does not prevent a creditor from filing suit, it does give the member several important rights. First, before a judgment can enter, the court must determine if an individual is an active duty member. Either side can provide information on this point to the court, but if the defendant does not answer the complaint, the plaintiff/creditor must submit an affidavit to the court stating whether the defendant is in the military. While the government does have a website to help do this (https://www.dmdc.osd.mil.appj/scra.scraHome.do) without a birth date or social security number, it does not promise accurate results. There are also some private companies that perform the record checks as well.

If the defendant is on active duty (or within 60 days of the end of their service), then the court cannot enter a default judgment against them without first appointing them an attorney to defend them in this matter. The court can also stay the matter for 90 days to allow the attorney to contact the member and determine if a defense is available. If such a default judgment has entered, then the member can have the court reopen the case by filing a motion with 90 days of the end of their service if being on active duty hampered them in presenting a meritorious or legal defense.

If a member has notice of the action, he can ask the court to stay the lawsuit. The court, if provided with the proper information must grant a stay of at least 90 days and can decide to stay the case for longer periods of time in order to allow the service member the ability to respond to the case at a time when it would not impact their military duties. Additionally, if the member's military service interferes with complying with a prior judgment, garnishment attachment etc., a court can stay those as well.

Another obstacle to lien enforcement is Section 537 of the SCRA. It states that "[a] person holding a lien on the property or effects of a servicemember may not, during any period of military service of the servicemember and for 90 days thereafter, foreclose or enforce any lien on such property or effects without a court order granted before foreclosure or enforcement." While the section is entitled "enforcement of storage liens" the language is certainly broad enough that a court may expand its meaning to cover condominium liens. However, in Massachusetts, a court order is required to foreclose on a condominium, so therefore this should not be an impediment to condominium collections.

The SCRA can be found at 50 U.S.C. App. §§501 et seq.

Trying to See Through the Smoke…How Boards May Deal with a Common Problem

By: Gary M. Daddario, Esq.

It's an average nightmare for a condominium board member or manager- one unit owner is complaining about the smoking of another unit owner…and allegations include "excessive smoking", "smoke entering the unit" and "resulting illness". Such a scenario quickly raises questions associated with whether, when and how a condominium board may regulate smoking in the community.

Generally speaking, there is no constitutional right to smoke. That being said, there is no particular statute applicable to Massachusetts condominiums regarding this issue. Further, there seems to be no definitive Massachusetts court decision on this topic either. A 2005 Boston Housing Court decision provides some course of action inasmuch as the court there recognized that "excessive" smoking could be grounds for a suit in nuisance.

In the condominium context, the "world" is divided into two parts: 1) the "common" areas; and 2) the "units". To the extent that smoking is addressed in the constituent documents of an association, any restrictions must be obeyed and, if necessary, the board can seek to enforce them. Typically, condominium documents provide broad and total authority for the board to govern the common areas of the association. So, to the extent that the constituent documents do not address smoking, a condominium board could usually do so with respect to smoking in the common areas.

As to the units, again, any restrictions in the constituent documents must be obeyed and may be enforced. However, failing any such restrictions, the board would need to undertake a process for adding them. A well-known Massachusetts case from 1975, *Johnson v. Keith,* stands for the proposition that a board cannot regulate inside a unit via a simple board rule. Rather, new restrictions to the use of the units must be accomplished through a formal amendment of the condominium documents. Such amendments normally require in the range of 66% to 75% vote of the entire ownership in order to pass. Sometimes, the proposed amendment provides for the "grandfathering" of existing smokers. Such "grandfathering" provisions can assist the association in securing the necessary votes to pass the amendment. An association board should work with legal counsel to ensure that an appropriate restriction is proposed, proper notice and voting occurs and that, if passed, the amendment is properly added to the association's documents of record.

Most condominium documents prohibit any "nuisance" or "noxious activity" from being caused/maintained by a unit owner or occupant. Such a provision provides an avenue for attempted enforcement against an offending smoker. Note, however, that the association will bear the burden of proof. Prior to incurring the associated legal expenses, an association would be wise to confirm that they have multiple complaints, willing witnesses and some means of evidencing the problematic behavior. Also, in order to qualify as a "nuisance", the behavior will need to be extreme and to have an impact outside of the unit in which it is occurring. If a sufficient case can be demonstrated to the court, an association may obtain injunctive relief. Injunctive relief is an order from the court requiring the defendant to modify their behavior.

Where smoking is complained of but does not rise to the level of a nuisance, an association may elect to meet with owners in an attempt to resolve the dispute through remediation. Sometimes sealing areas between units and instituting use of air filtration devices can bring the problem under control. Unit owners may also agree to particular terms regarding the time of day, volume of cigarettes and/or locations within the unit where smoking will occur. In some instances, smoking is not banned and the impacts of the smoker are not demonstrated outside of the smoker's unit. In such cases, the association may elect to not be involved in the neighbors' dispute. Under such circumstances, the issue presented may not be an "association" issue. Boards may always seek advice of legal counsel when asked to respond to any particular set of circumstances.

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