From the Law Offices of

PERKINS & ANCTIL P.C.

ATTORNEYS AT LAW

Fall 2014

LAW QUARTERLY

IN THIS ISSUE

ANNOUNCEMENTS

Event

We invite you to be our guest at the annual **CAI Roundtable Event for Board Members & Property Managers** at the Radisson Hotel and Suites in Chelmsford, MA on **Saturday October 25, 2014** from 8:00 a.m. to 12:00 p.m. Don't miss this opportunity to pick the minds of our industry's top professionals and gain knowledge that will impact your association's bottom line. Discussion will include hot legal topics including the "Creepy & Scary" Condominium, insurance needs, maintenance challenges and operating your association at peak performance. Industry speakers to include, Charles A. Perkins, Jr. and Robert W. Anctil, of *Perkins & Anctil,* Thomas Daniel of *Schernecker Property Services, Inc.,* Robert Masse of *W.T. Phelan & Co. Insurance Agency, Inc.*, Clark Griffith of *CCA Architectural, Engineering and Construction* and Ken Bloom of *Bloom, Cohen, Hayes LLC.* Please register today to reserve your seat at this valuable seminar by contacting **mphelps@perkinslawpc.com** or calling **Michelle Phelps at 978-496-2000**.

COMPLIMENTARY FULL BREAKFAST SERVED AT 8:00 AM

We hope to see you there!

Condominium Lien Enforcement

Perkins & Anctil is pleased to announce that effective September 1, 2014, Attorney **David R. Chenelle** has been promoted to serve as the director of our Condominium Lien Enforcement Team. David has been with Perkins & Anctil for the past four years, an has been a member of the Massachusetts Bar for over 19 years. During his time with our firm, David served as the chair of our Bankruptcy department, and has been the attorney of record for over 3,500 different bankruptcy matters. In addition to continuing his role as the head of the Bankruptcy department, David will now also be leading our Condominium Lien Enforcement team. In this capacity, David will oversee the efforts of our experienced paralegals who are dedicated exclusively to handling lien enforcement matters for our 750+ condominium association clients. David's experience and knowledge base make him uniquely suited to this new role, and he has worked overtime to understand the procedures, legislation and our current cases. We look forward to continuing to exceed our clients' expectations in all elements of Condominium Lien Enforcement law.

Bad Apples: How to Avoid Spoiling the Barrel

By: Scott Eriksen, Esq.

We have all heard, and probably used, the "bad apple" idiom at one point in our lives. You know, the one that goes something like: *"All it takes is one bad apple to spoil the bunch."* There is literal scientific truth to this statement. A ripening/decaying apple emits ethylene gas, a naturally occurring plant hormone, the release of which will speed up the ripening (molding/decaying) of nearby apples (or other fruit). That's useful trivia, but of course most of the time when we hear about "bad apples" it's in the metaphorical sense of the word. Still the principle behind the phrase – that one "bad" member of a group can "spoil" the bunch – is a meaningful one, particularly in the community association context.

"Bad" unit owners can make life miserable for their neighbors, as we have discussed many times in the past, but they aren't the only ones. A "bad" Board member can be just as troublesome, if not worse than, a misbehaving unit owner. Board members stand in a fiduciary role – and owe duties of loyalty and care to the association they serve. When a member of the Board goes "bad," the consequences are often worse as result of these obligations. In addition, the Board often has access to confidential information, association funds and also maintains a degree of power over the enforcement of the governing documents. In this position, the potential for truly "bad" acts – misappropriation of funds, unauthorized and unlawful dissemination of confidential information, selective enforcement of rules and regulations, etc. – is significant. On top of that, presumably most Board members have been elected by earning the trust and confidence of their neighbors and peers. A breach of this trust not only creates resentment, it may create liability and expense for the association as well.

So how does one deal with "bad" Board members before they create real problems for the community? Well, the first step is to identify them. Throughout this article I've had the word "bad" in quotations. That's because I was trying to stay with the metaphor even though to me it sounds juvenile to call a trustee "bad," – like something my two-year-old daughter might say for lack of a more descriptive or colorful adjective. Yet the real reason I've highlighted the term throughout is because the word "bad" can mean many different things in the Board member context. A "bad" trustee may be dishonest, self-dealing, reckless, belligerent, oppressive, apathetic, obdurate or any number of other things. In our experience, we have had the good fortune of dealing with mostly "good" trustees – those who assume the often thankless position with genuine interest, attention and the community's best interests at heart. However, we have seen the opposite as well: those who seek to serve for the wrong reasons, or who have abandoned the right reasons somewhere along the way. Boards must be vigilant for these individuals, as their actions can taint the ownership's perception of the entire Board, in addition to causing actual problems for the association.

If you have identified a "bad apple" in your bunch, you have to decide how best to deal with him. Occasionally, an honest conversation – rather than confrontation – behind closed

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doors about the offensive behavior may help to right the ship. Depending on the nature of the bad actor's conduct, however, more drastic measures may be required. Generally, if there is consensus among the other Board members that it is only ***one*** of their number who is "bad," it may be possible (and less disruptive to the community) to seek his or her resignation. As counsel, we have made demands upon individuals "requesting" their resignations – lest the association explore more aggressive methods to address their "bad" actions. This can be a face-saving measure for the individual in question, as well as a more economic and expedient route for the association.

If worse comes to worst, however, the association may have to consider formal removal of the "bad" member pursuant to its governing documents. Most documents – whether trusts or by-laws – provide a mechanism for removing Board members. The best of these provisions allow for removal "with or without cause." Some provisions require a "due process" hearing before the Board or association prior to removal, and many require a vote of the ownership. If you find yourself in a position where you have to remove a Board member, it is critical to carefully consult the governing documents to ensure that you follow the correct procedure. Assuming that you do abide by the terms of the documents, the courts of this Commonwealth have generally upheld removals as proper acts.

One final point comes up in the context of small associations: duplex or triplex style condominiums, where there are two or three trustees and obtaining a "majority" can be difficult if not impossible. In these situations, one "bad" apple is a particular curse – as the lone "good" trustee may find it impossible to properly administer the association. Fortunately, even in such circumstances as this, there may be a remedy at hand. In the recent case of *Hancock v. Chambers,* 85 Mass. App. Ct. 1106 (Mass. App. Ct. 2014), the Appeals Court upheld the removal of a duplex condominium owner as a trustee of the association. The governing document in the *Hancock* case provided that a trustee could be removed either "(a) with or without cause by the vote of the Holders of the majority in interest of the Beneficial Interests, but such removal shall take effect only when approved by vote of a majority of the Trustees then in office, exclusive of the Trustee or Trustees to be removed; or (b) for cause by vote of a majority of the Trustees then in office." The trust also provided that "[a]t any meeting of the Trustees, a majority of the Trustees then in office shall constitute a quorum" and that trustees could act "by a majority vote at any meeting at which a quorum is present. In no event shall a majority consist of fewer than two Trustees…" The defendants in the case argued that the removal of a trustee was improper because it occurred at a meeting without a quorum.

The Appeals Court didn't bite. Instead, they ruled that "[b]ecause the trust at issue has only two trustees, literal application of these provisions would render impossible the removal of Chambers as trustee. Neither method of removal under [the trust] would be feasible. Pure obstinacy would guarantee that the majority of trustees would never reach the required number of two. By refusing to attend a meeting at which the plaintiffs sought her removal, a trustee could ensure her permanent place as a trustee." Rejecting this outcome as contrary to "common sense," the Court concluded that the plaintiffs properly removed Chambers as trustee…" where the plaintiffs, as the owners of one of the duplex units, were "'the Holders of the majority in interest of the Beneficial Interests'" and one of the plaintiffs was "a majority of the Trustees then in office, exclusive of the Trustee or Trustees to be removed." This ruling offers an important tool for individuals who find themselves stuck in a small condominium with a rotter for a co-trustee. So don't let "bad apples" spoil your barrel – whether it's big or small.

Can your "cease and desist" letter be used against you?

By: Kimberly Alley, Esq.

It happens. Your employee leaves to join a competitor. But you have rights under restrictive covenants of the employee's non-compete, non-solicitation or confidentiality agreements. Should you let the new boss know? More importantly, if you do - will your "cease and desist" efforts come back to haunt you?

According to a recent Massachusetts Superior Court decision, your communications warning the new company of the potential for litigation may not be used against you. These warning letters may constitute a protected (and therefore, inadmissible) communication pursuant to the "litigation privilege."

The "litigation privilege" is a legal protection traditionally afforded to attorneys for their communications made during the course of representation. This privilege provides protection that shields an attorney from civil liability to non-clients for communications made in the course of good faith litigation. The litigation privilege is often asserted in defense of defamation claims against an attorney for statements made during the course of litigation.

This privilege, however, does not just apply to attorneys' communications or defamation cases. In August 2014, a Middlesex Superior Court judge found that the litigation privilege protected an employer's cease and desist communication in an employment dispute. In *Pegasystems, Inc. v. Manning*, the Court recognized that "[t]he litigation privilege applies not only to statements by attorneys but also to 'communications by a party' as long as the other conditions of the privilege are present."

In *Pegasystems*, an employee brought suit against his past employer after it sent a cease and desist letter to the employee and his new employer. The letter claimed that the employee misappropriated a customer list and solicited former co-workers in violation of restrictive covenants in the employment agreements. As a result, the employee was terminated from his new employment due to concerns about potential litigation. He sued the former employer for tortious interference with business relations, misrepresentation and violations of c. 93A. The court dismissed the claims because the litigation privilege prevented liability for the cease and desist communications.

The key to obtaining the protection afforded by the litigation privilege is to ensure that cease and desist statements are made in the context of litigation. Therefore, it is essential that such communications appropriately reflect serious contemplation of litigation to assure application of the privilege.

When prepared properly as a privileged document, the cease and desist letter can be an effective tool for avoiding litigation costs by prompting settlement discussions *before* litigation ensues. A carefully crafted cease and desist letter drafted by an attorney will save you both the headache and cost of future litigation.

Re-verifying Occupancy in a 55 And Over Association

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

A recent case involving a Cooperative Association attempting to evict tenants who failed to comply with the 55 and over requirement has led to the Housing Court in Weston, Massachusetts finding that the Association had no procedures in place to update the verification of the 55 and over occupancy requirement and that the initial qualification process alone was inadequate under the Housing for Older Persons Act (HOPA).

By way of background, HOPA requires that every two years an Association must re-verify the information generated by the original survey or other procedures to qualify for the 55 and over exemption. HOPA on its face requires that any of the following may be used for proof age:

- Driver's License;
- Birth Certificate;
- Passport;
- Immigration Card;

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• Military identification;

• Any other official government identification that shows a date of birth; and

• A document (such as an affidavit, certification in lease or purchase agreement, etc.) signed by any member of the household aged 18 or older asserting that at least one person in the unit is 55 or older. This document does not have to be signed under oath.

HOPA also allows an Association to rely on the following if a resident refuses to provide verification of age:

• Government documents such as a local government household census (not the national census) that show that the unit is occupied by a person aged 55 or older;

• Prior forms, applications or other information verifying the ages of unit occupants;

• Affidavits from individuals not in the household but who have personal knowledge that an occupant is 55 or older. The affidavit must state how the individuals have personal knowledge of the age of the occupant and be signed under the penalty of perjury.

With respect to the two years re-verification requirement, Associations are not required to obtain copies of documents already submitted by occupants for verification purposes, but they must confirm that those residents included in the initial verification continue to occupy the unit. Associations will meet the 55 and over requirement under HOPA so long as the immediate eighty percent (80%) of the units continue to meet that requirement.

In our experience, many Associations although required under the condominium documents themselves and certainly under HOPA, fail to re-certify and should take immediate strides to accomplish the 55 and over certification or re-verification.

Any questions regarding this issue can be addressed to Charles A. Perkins, Jr., at cperkins@perkinslawp.com

Who is this Robert Guy Anyway?

A Very Brief Primer on Parliamentary Procedure

By: Scott Eriksen, Esq.

For many New England community associations, the fall means more than just apple-picking, cool weather and leaf-peeping. It also means association meeting time, and very often at those meetings you may hear the board, management or legal counsel invoke the wonder of ***"Robert's Rules of Order."*** If you are like most people, you may have never heard of Robert and his Rules before, or if you have, perhaps only in passing. While the subject may seem a bit esoteric, rules of parliamentary procedure – of which Robert's version is perhaps the most well-known and oft-used – are very handy in facilitating an organized, productive meeting.

We will come back to the important points of parliamentary procedure in a minute but first: seriously, who is "Robert" anyway? Henry Martyn Robert was raised in Ohio, graduated fourth in his class from West Point in 1857 and served in the Corps of Engineers during the Civil War. Robert's claim to fame – his Rules of Order – originated here in the Commonwealth while Robert was living in New Bedford. Legend has it that Robert authored the Rules in response to some difficulty he had leading a church meeting which devolved into chaos over abolitionist concerns. Determined not to face an angry, Yankee mob unprepared again, Robert penned the first version of his now ubiquitious rules.

So that's Robert in a nutshell – West Point alum, general, and engineer by training. A man who sought and created a method to instill order, form and efficiency at meetings. Now, back to the Rules themselves. First, a reminder, Robert's Rules is but one manual of parliamentary procedure. To say a meeting is going to be run in accordance with Robert's is to commit to that manual. Often times it is more accurate to say that a meeting is going be run in accordance with some level of parliamentary procedure. The level of formality may depend on the nature of the meeting, the size of the group and the participants' knowledge of formal rules like Robert's. However, almost all meetings of owners warrant some level of formality to ensure a timely and effective review of the important matters at hand. So without further ado, our recommendations and pointers on implementing formal procedure at your next meeting:

1. One Size May Not Fit All: Meeting formality is a sliding scale. Too much can be just as troublesome as not enough, and size matters when it comes to determining how best to proceed. Meetings with fewer participants (board meetings) may be run effectively with less formality, while too little formality at larger meetings may lead to delay, confusion and chaos. Adopt an approach that works for the size of the group involved.

2. Be Consistent: Once you have settled on an approach to running the meeting, stick with it. Changing tack over the course of a single meeting will only lead to disruption.

3. Know Your Documents: The association's governing documents are important in determining the application of rules of parliamentary procedure. What constitutes a quorum? What vote is necessary to carry an action? Are proxies allowed? The answers to these questions are typically set forth in association's governing documents and individuals charged with overseeing a meeting should be familiar with their implications.

4. The Motion: The motion is the basic building block of conducting formal business at any meeting. Under Robert's Rules, the motion, made by an authorized member of the body, should be the starting point of virtually all discussions, votes or actions taken at a meeting. Recognized individuals may make a motion by simply stating: *"I move to discuss the association's budget for Halloween decorations…"* or *"I move that we discuss hiring Sno-Be-Gone to do our plowing this winter…"* Most motions require a second in order to proceed. That is, another member of the body will say *"I second the motion regarding the Halloween decorations,"* or more simply *"I second the motion."* Once this has been completed, the subject has been "put in play" and formal action may be taken. That is motion practice simplified to the extreme. Depending on how closely you follow Robert's Rules, motions can be tricky. Some motions are debatable, while others are not. There are thirteen ranking motions. There are main motions, subsidiary motions, privileged motions, incidental motions, and bring back motions. It's enough to make one's head spin. For our purposes, suffice to say that a motion and a second are the "kickoff" of most discussions, actions and votes at meetings.

5. General Organization of Meetings: For larger groups, an organized structure to a meeting will help move things along and keep everyone on topic. We recommend circulating an agenda in advance of the meeting to serve as a roadmap of what will be covered. The meeting is called to order at the appropriate time by the chair (usually a member of the governing board) or a moderator (perhaps counsel or a professional parliamentarian). A quorum must be established to take formal actions at the meeting. Once this has been completed the substantive topics of the meeting –discussions, votes or otherwise – should proceed in accordance with the agenda.

6. Voting: When a motion is made and seconded, the chair can put certain questions to a vote of the assembly. The question (sticking with the example above, "Whether to increase the budget for Halloween decorations") is put to the assembly and then subject to debate. The chair or moderator calls upon members of the assembly in turn – giving them "the floor" – to speak for or against the question. All debate should be confined to the question at hand. Once all of the members of the assembly who wish to speak have done so, the question is put to a vote. Votes may be conducted by show of hands, voice or ballot. As noted above, the necessary vote depends on the governing documents.

7. Keeping Minutes: Minutes are an important record of all meetings. A member of the governing board or, in some cases, a manage-

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ment agent should be designated to take minutes. The minutes should, at a minimum, include the following information: the type of meeting (annual, special, etc.), the name of the association, the location of the meeting, the date and time the meeting was called to order, whether a quorum was established, descriptions of all motions, actions and votes taken, and the time of adjournment.

8. And Last, But Not Least: After a long night, perhaps the most awaited action of any meeting is adjournment. A motion is made to adjourn, seconded, put to the body and – assuming everyone present has had enough fun – the meeting is closed.

Entire books have been devoted to the subject of parliamentary procedure, and this article is only the proverbial "tip of the iceberg." The goal here is to provide a handy (but brief) overview of some important points and tips to help keep meetings in order. We strongly suggest that those interested in the subject dig deeper, and we would be happy to provide our list of recommended reading on the subject.

Enjoy the fall, and have happy, productive meetings!

Indemnification Provision is Void as Against Public Policy as it Applies to a Developer

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

The freedom of contract is not an absolute freedom – occasionally, public policy will outweigh the general right that two consenting parties have to enter into agreements with each other. So said the Middlesex Superior Court in its Memorandum of Decision and Order in the case of *The Board of Trustees of the Gates of Greenwood Homeowner's Trust v. Gates of Greenwood, LLC, et al* (Middlesex Superior Court Docket No. MCV2013-04714-F).

In *Gates of Greenwood*, a Board of Trustees of a condominium association brought suit against the Gates of Greenwood, LLC (the "Developer") for, among other causes of action, breach of fiduciary duty stemming from the Developer's role as the original trustee of the association. The Developer thereafter filed a third party complaint against the unit owners of the association pursuant to an indemnification provision included in the text of the association's declaration of trust.

Like many developers, the Developer in *Gates of Greenwood* had attempted to limit its liability to the owners of the condominium for certain activities. Accordingly, the declaration of trust of the condominium was drafted to include certain exculpatory provisions which provided that the trustees of the association would be entitled to indemnification for claims brought against the trustees for an action in contract or in tort. As the Developer was also the initial trustee of the condominium association, the Developer attempted to utilize the indemnification provision to protect itself from any liability.

The Board moved to dismiss the Developer's third party complaint against the unit owners based on the fact that the indemnification provision in the trust document was void as a matter of public policy. The Middlesex Superior Court sided with the Board. The Court noted that while generally speaking, parties enjoy a freedom of contract – "a freedom into which [the courts] should be loath to interfere" – there are occasions upon which this freedom must be checked by public interest concerns. That is, parties' freedom to contract is not absolute. "It is 'universally accepted' that public policy sometimes outweighs the interest in freedom of contract, and in such cases the contract will not be enforced." (citing *Feeney v. Dell Inc.*, 454 Mass. 192, 199-200 (2009)).

The Court noted that the type of indemnification provision involved in this case was generally held to be enforceable absent overreaching of fraud. Notwithstanding this, however, in relying on two other decisions of the Superior Court the Court found that the instant exculpatory provision as it related to the Developer was void as against public policy. The Court noted that at the time the Developer drafted the documents, the Developer also served as the sole trustee of the condominium association. Therefore, the Developer was in a position of wearing two very different "hats." The Developer's fiduciary duty to the condominium association in this case conflicted with the Developer's own self-interest as the developing entity. The Court found it troublesome that the indemnification provision, if enforced, would allow the Developer as trustee to breach its duty to the association in favor of protecting its own interest. Accordingly, the Court concluded that under the particular and peculiar facts presented in this matter the indemnification clause violated public policy.

The Board of Trustees of the Gates of Greenwood Homeowner's Trust v. Gates of Greenwood, LLC, et al; Middlesex Superior Court Docket No. MCV2013-04714-F. A copy of the Court's Memorandum of Decision and Order can be obtained from Cindy Napoli (cnapoli@perkinslawpc.com).

Congratulations to Our Clients on Their Purchase of the Groton Inn!

We congratulate our clients and friends - Rich Cooper and Chris Ferris - on their recent acquisition of the property at 128 Main Street, Groton, the former location of the historic Groton Inn. The Groton Inn was constructed in 1678 and was one of the longest continuously operated inns in the United States. The list of historic persons who left their names on the Groton Inn's register includes Presidents Ulysses S. Grant, Grover Cleveland, Theodore Roosevelt and William Howard Taft. Andrew Carnegie and Paul Revere also stayed at the historic property. The Inn was acknowledged to be an important part of the Underground Railway, and one of the first meeting places of the Masons.

Over the past 30 years, the property had fallen into a general state of disrepair and on August 2, 2011, the main inn building was lost to a devastating fire. Soon after the fire, Attorney Anctil began working alongside John Amaral of Omni Properties, LLC and Rich and Chris to create plans to acquire and redevelop the property. For projects of this magnitude the Town of Groton requires concept plan approval followed by approval of the various boards and committees within the Town. Attorney Anctil lead the team of historic preservation consultants, civil engineers, environmental scientists, architects, landscape architects and traffic engineers. While the permitting process was challenging, officials and voters from the Town of Groton warmly received the project and approved the proposed plans.

When completed, the property will contain 29 rooms in the main building which has been designed to mirror as closely as possible the original structure. The inn will also include a 60 seat restaurant an additional 10 units to the rear of the main building. The design team focused on honoring the beauty of the original buildings.

We were proud to be associated with this world class development. We wish Rich Cooper and Chris Ferris the best with this wonderful project.

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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