From the Law Offices of
PERKINS & ANCTIL P.C.
ATTORNEYS AT LAW
Spring 2014
LAW QUARTERLY

IN THIS ISSUE

ANNOUNCEMENTS

We hope that this newsletter finds all of you in the midst of a fabulous spring after a long winter. We have a number of wonderful programs/events for you to attend. Please mark your calendars and do not hesitate to contact us with any questions. We hope you take advantage of these valuable programs.

SAVE THE DATES

- **2014 New England Condo & Apt Expo Tuesday, May 20, 2014**, 10:00 am – 4:30 pm, Boston, MA, Booth 326 https://ne-expo.com/
- **Parliamentary Procedures Seminar Saturday, May 3, 2014**, 8 am – 4:00 pm, Showa Boston Institute for Language and Culture, 420 Pond Street, Jamaica Plain, MA Bill Gillmeister 508-344-6325 bylawbill@calltoorder.us
- **New Hampshire Condo Forum & Expo Wednesday, May 7, 2014,** Holiday Inn, 172 North Main Street, Concord, NH http://caine.org/ProgramEventRegistration
- **21st Annual CAI New England Golf Tournament Monday, June 16, 2014**, Charter Oak Country Club, Hudson, MA http://caine.org/ProgramEventRegistration
- **CAI New England Regional Cape Cod Forum & Expo**, **Friday, June 20, 2014**, 4:00 – 7:00 pm DoubleTree by Hilton, Cape Cod, MA http://caine.org/ProgramEventRegistration

"Winds of Change"- More Potential Legislative Changes Impacting Condominiums in New Hampshire

By: Gary M. Daddario, Esq.

If you caught the Scorpions reference in that title, good for you. Like me, you have fond memories of the 80's. At present, however, changes are happening at quite a pace in New Hampshire. Many such changes have an impact on community associations. Some such changes have been the subjects of prior articles. Those will receive a brief update here. Others are more recent and will be explained to the extent of available information.

As per my prior article on the subject, the Superior Court Rules underwent some fairly substantial changes. At present, adapting appears manageable. In some cases (e.g. the filing of "Complaints" subsequently followed by "service"), are even preferable. Further, the Superior Court staff has, in my experience, been very helpful when clarification or assistance has been needed.

Legislative happenings abound in New Hampshire at this time. I previously reported on HB 1594, a bill to create property manager licensing. The latest news is that this bill was referred to interim committee for study. This move effectively "tables" this bill until the 2015 session. HB 1595 is the bill that would create a formal condominium dispute resolution board as a new governmental entity involved with community association disputes. After a mid-March executive session, this bill has been referred for interim study. It appears that New Hampshire legislators are taking note of the fact that a new governmental board and the operations thereof will have significant expenses and, therefore, a financial impact to the State that deserves due consideration.

Two newer bills fall on either side of the "condo friendly" line. HB 1115 would exclude community association assessments from protection under a unit owner's homestead filing. This piece of legislation would assist community associations by making clear that a unit owner's homestead would offer no protection against lien enforcement procedures aimed at securing the association's assessments. HB 1283, however, presents a new restriction on community associations' ability to pursue and enforce their liens. HB 1283 provides that if an association's charter lapses then, even upon revival, the association cannot pursue back dues. In fact, this bill would also render invalid any actions taken by the association between the lapse and the revival. Although we likely all agree that it is best for associations to properly handle their administrative affairs, HB 1283 holds the potential to impose problematic penalties. For instance, if by whatever error a lapse does occur, there will be a period of time for which association members have no obligation relative to their dues. Query how this works out when the association must continue to pay the association's expenses? Note that HB 1283 has been referred from the House with an "ought to pass" recommendation.

Another agent of change comes in the form of Federal legislation. The United States House Bill known as H.R. 3370, the "Homeowner Flood Insurance Affordability Act" was recently passed by the Senate. At the time of this writing, the Act is being sent to President Obama for signature. Being Federal in nature, this legislation will have an impact on people and properties in other states as well. This new legislation is aimed at avoiding some of the problems that would have been presented through the application of 2012's Biggert-Waters Flood Insurance reform Act. Chief among the concerns presented by Biggert-Waters was the fact that flood insurance rates

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for those with waterfront properties drastically increase under that statute. Specifically, under Biggert-Waters, flood insurance premiums increase to the level estimated as the price that would be charged by private companies providing such insurance without the benefit of taxpayer subsidies. The results have been premium increases that, in some cases, were multiples of the former premium. Some such increases have threatened property owners' ability to continue to own the real estate. In the end, H.R. 3370 may result in a reduction in the cost of flood insurance that allows some owners located in flood zones to avoid a forced sale.

What You Didn't Know Could Hurt You:

Read This Before Purchasing Your Condominium Unit (or after if it's too late)

By: Scott Eriksen, Esq.

Congratulations, you are about to be the proud new owner of a condominium unit in Massachusetts! My first home was a 700 square foot condominium unit in a three-unit row house. It was conveniently located near great restaurants and within walking distance of my office at the time. Despite its small size, it felt like a castle – my castle. The thrill of first time ownership was a wonderful feeling, and condominium ownership comes with many benefits: shared expenses for common maintenance, professional property management (in many cases) and a sense of community to name just a few. But for the uninitiated or uninformed – as I was when I purchased my unit many years ago – condominium ownership may also be laden with unpleasant surprises.

Sure, we all know that there are monthly fees to pay, but that's just the tip of the iceberg. Do you know if there are restrictions on pets, parking, storage or smoking? Is there a wait-list to rent your unit? What about a right of first refusal? Can you operate your home-based business in the unit? If you don't like what the board has to say about your leaving wet sneakers in the common hallways after a run in the rain, do you have any recourse when they fine you?

These are questions that many folks often don't even think about until ***after*** they have already invested a substantial sum of money in the purchase of their new home. As counsel for numerous condominium associations, we are all too familiar with circumstances where unit owners – believing in the sanctity of home ownership and their rights to do as they please within those confines – run head-long into costly disputes with their boards. Most, if not all, of these spats are avoidable with a proverbial ounce of prevention. By reading your condominium documents (Master Deed, Declaration of Trust/Bylaws and Rules and Regulations) ***before*** you buy, you can save yourself a lot of trouble in the long run.

Now, I know that these documents are long, boring and overrun with unintelligible legalese and jargon (I know because I read and write them for a living). But in the hour or two it takes you to slog through them, you could potentially save yourself hundreds or thousands of dollars, not to mention aggravation and unrest. And while it would be best to read the entirety of the documents, I'll offer a hint for those short on time or patience: if nothing else, at least skim through the whole thing to find the use restrictions and prohibitive covenants. These are usually the problematic spots for the unwary, and here are some obvious (or perhaps not so obvious) examples to consider:

- **Pets, Pools and Parking.** The three "P"s. Most people don't miss these. Make sure Fluffy, your 120lb Rottweiler is welcome and that you have access to both resident and visitor parking if necessary. Read the rules about recreational facility usage if applicable, and make sure they work for you.

- **Rental Rules.** Is the unit an investment? If so, are you positive that you can lease it? It's difficult to make money on vacant rental property, and so it is imperative that you make sure you have reviewed the rules on leasing. Is there a wait list or a limit on the number of rental units in the condominium? Are there other investor limitations? If properly incorporated in the governing documents, rental restrictions have been deemed enforceable and can have serious economic consequences for the unwary.

- **Smoking.** We have seen a considerable increase in associations adopting no smoking provisions which may apply to both units and common areas. Obviously this could be troublesome for the owner who just can't quit.

- **Home Business Limitations.** Just because the zoning bylaws of the municipality in which the unit is located say you can run your piano teaching / home day care / herbal supplement sales business out of the unit doesn't necessarily mean that you can. We have successfully enforced restrictions preventing the operation of businesses in units where the governing documents specifically prohibit such use.

- **Signs, Decorations, etc.** Do you take Clark Griswold-esque pride in your holiday decorations? Do you like to fly the old alma matter banner from the balcony or in front of the door? This may be a problem (especially if a member of the board attended a rival institution). In all seriousness, while these issues do not have the same economic consequences as rental or business restrictions, the disputes they spur are no less heated.

Regardless of our personal feelings on the appropriateness of a given set of restrictions, the courts of the Commonwealth have been clear and consistent. "Central to the concept of condominium ownership is the principle that each owner, in exchange for the benefits of association with other owners, 'must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.'" Noble v. Murphy, 34 Mass. App. Ct. 452, 456 (Mass. App. Ct. 1993) (citing Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975)). "Those who submit real estate to the condominium regime of c. 183A may impose reasonable restrictions on the use of units, and persons who contemplate acquisition of a condominium unit can choose whether to buy into those restrictions." Woodvale Condominium Trust v. Scheff, 27 Mass. App. Ct. 530, 533 (Mass. App. Ct. 1989) (noting Franklin v. Spadafora, 388 Mass. 764, 771-773 (1983)).

It is also important to be aware that a unit owner who violates his or her condominium documents is more often than not responsible for the costs of the association's efforts to enforce the documents. Fines, costs and even attorneys' fees can quickly add up to thousands of dollars over even "minor" infractions. While there are certainly situations where unit owners have triumphed in challenging board action or invalid restrictions, these "wins" may be pyrrhic victories given the costs involved.

The notion that one should have the freedom to do what one wants in one's home is – as they say – as American as apple pie and baseball. But for better or worse, the courts across the country have also said, in effect, "you bought into it, you should have known better." If this seems like a harsh result, think of the flipside: what about the owners who purchase because there is a prohibition on smoking or pets? Is it fair to them that someone else breaks these rules?

Like many things in life, condominium ownership can be a great thing if you do your homework. My advice is to take the time to do it. Condominium ownership is a choice, the courts have said, and it is our job as buyers to make it an informed one.

The 2014 CAI National Law Conference

By: Gary M. Daddario, Esq.

During January of 2014, I once again attended the CAI National Law Conference. It is always a valuable experience, as the information obtained there may serve as a prediction of legal developments that we will experience here in New England. For the sake of memorializing the experience and sharing information with those unable to attend, I now write on various seminars from the conference.

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Case Law Update

As always, this session, presented in two parts, was entertaining and informative with respect to condominium-related cases decided throughout the United States. While George E. Nowack, Jr., Esq. and Wilbert Washington II, Esq, continued their tradition of making a lively presentation of this information, there was a change in the "Case Law Update" lineup. Specifically, the cases are now researched, collected and summarized by Richard S. Ekimoto, Esq. This year, multiple cases were decided on the following "trending" topics: amendments of constituent documents; assessments; and association powers.

Ethical Issues for Condominium Attorneys

This seminar served as a valuable refresher of the ethical rules that all attorneys must abide by during our practice. The presentation was engaging as the seminar was delivered through a series of hypothetical situations that presented ethical questions. At the conclusion of the audience participation in each section, the presenters highlighted the specific ethical rules involved and reviewed the specific text of those rules with the attendees. The link to the condominium industry came through the fact patterns of the hypotheticals. Each dealt with the attorney's ethical obligations when there are multiple parties involved in the case. In the condominium context, attorneys often deal with multiple parties even on the same side of the case. For instance, as legal counsel to the association's board, an attorney has board member clients but may also regularly deal with the board's property manager and, in some situations, even a particular service vendor in addition to property management. Additional questions are presented when an attorney represents an association board but the unit owner on the opposing side of the case believes that the association's legal counsel owes them some sort of duty by virtue of their membership in the association.

Panel of Pundits

The "Panel of Pundits" is another regular among the offerings at the Conference. The Panel is both entertaining and largely informative. A variety of industry experts take their seats "center stage" and provide their responses and insight to questions posed by the attendees. Since the questions come from the audience, there is a wide variety of topics addressed. Further, since even experts sometimes take different approaches, the panelists each provide unique perspectives and advice. This year, questions came on topics including, but not limited to: use of social media; changes in law practice over time; dealing with bullies; unit owner lawsuits; FDCPA issues; smoking restrictions; marijuana; and operational policies of the board. Credit must be given to the industry professionals who serve on the panel as they not only volunteer their time and effort but also share their knowledge.

Keynote Speaker- Dan Abrams

This year's keynote speaker was Dan Abrams. If the name sounds familiar, it may be because he is a television co-host on Nightline. In addition, Dan is an author and legal commentator. Dan capitalized on his own experience by speaking about effective strategies for dealing with the media. In the condominium industry, we occasionally see a radio or news story about a sympathetic unit owner subject to foreclosure or a unit owner displaying a flag in violation of an association's rules. As legal counsel to the association, it is helpful for us to implement effective strategies for dealing with the media attention.

Dealing with Defamation in the Community Association

This seminar dealt with issues surrounding defamation lawsuits. Covered topics included the parties that may be entitled to set forth such a claim, the types of activities and statements that would support such a claim and the damages aspect of these lawsuits. The discussion also brought to light potential avenues for defense of a defamation suit. In the condominium context, potential for defamation claims abounds. Unit owners may verbally communicate negative commentary about the board. Unit owners may also engage in such behavior towards one another. Property management may be involved with such communications as either the recipient or the subject matter thereof. When associations gather for open meetings, the potential for defamation issues increases. Legal counsel must be prepared to handle such situations and should properly advise clients regarding the issue as well.

The Trouble with Weed

Turns out, this seminar had nothing to do with landscaping! Seriously though, anyone who has watched any form of newscast lately is aware that marijuana ("weed") is starting to be legalized (or less criminalized) in several states. This, of course, raises questions and concerns for associations. As with many issues, use of marijuana at an association will involve a balancing act relative to the rights and obligations of multiple parties. Most concerns relate to the smoke and the smell associated with the use of marijuana. Such concerns can now be alleviated or eliminated through use of a broadening array of weed-related products. The active chemical desired by those using marijuana may now be ingested in edibles or pills or inhaled via a cleaner vapor (as opposed to the usual smoke). However, other concerns include safety, security and the potential for related criminal activity. Tough questions are presented when associations try to discern: whether smoke travel is excessive due to construction defects; if marijuana might be considered a reasonable accommodation to a disability; if use can be prohibited via rules or other association authority. Interestingly, Federal law on marijuana has not changed. Thus, on a Federal level, it remains illegal.

Federal Case Law Update

This brief but important portion of the Conference is dedicated to keeping attendees informed of Federal level lawmaking. This year's national issues included: Flood Insurance (addressed by the Biggert-Waters Act which provides for more reasonable premiums); Disaster Recovery Assistance (addressed through a new funding bill with instructions for FEMA to equalize treatment of community owners and single-family owners in a disaster area); Finance Reform (addressed through dealings with Fannie, Freddie and FHA).

Best Practices for Community Association Record Keeping

This seminar was presented by a panel that included both legal counsel and property management. During the program, I couldn't help but think that the information presented would be helpful to virtually every association. The seminar covered the need for the association's record keeping to "dovetail" with the needs of legal counsel on issues that have any potential to develop into legal claims. If forced to deal with a dispute as a legal matter, the association's attorney will need to present sufficient and convincing evidence both to the opposing side and to the court. Accordingly, the association's record keeping can be key. Well documented unit owner complaints and requests for maintenance, as well as the responses thereto, can go a long way towards establishing the facts of a claim or defense regarding construction or maintenance at the association. Similarly, cases involving enforcement of the rules will benefit from accurate and consistent records demonstrating the unit owner's breach and the association's attempts to obtain remediation.

Collections: The Perfect Storm

This seminar covered a review of the negative impacts of the weak economy, the real estate "crash", the foreclosure "boom", the more stringent standards and policies of FHA, the increasing FDCPA claims brought against creditors/collectors and other issues that make the present day circumstances we face the "perfect storm" for the collections industry. Audience participation was helpful, as attendees shared their problems and any effective strategies that they have developed. The ability to collect the budgeted assessments remains vital to associations' survival. The circumstances described above, and others such as increasing attacks on priority liens continue to increase the challenges for association attorneys. Practitioners

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must be aware of developing trends and law and need to periodically review practices and procedures for compliance.

When is a Tax Return Not a Tax Return?

Summary by: David R. Chenelle, Esq.

This is the very question being asked by bankruptcy practitioners in the District of Massachusetts. In two recent cases, decided within 24 hours of each other, the answer has become much more clouded. The reason why this is such an important issue, is a result of how the Bankruptcy Code treats tax obligations, and whether tax debt owed can be discharged through the bankruptcy process.

In one of the cases, Anthony M. Gonzalez vs. Massachusetts Department of Revenue, 489 B.R. 1 (2013) J. Hoffman was faced with this very question. In this jointly administered decision, both Debtors filed their state income tax returns late, and thereafter filed for relief under the U.S. Bankruptcy Code seeking a discharge of their past due tax obligations. Particular attention was given to the section of the Bankruptcy Code which excludes certain categories of debt from discharge, including certain tax liabilities.

Pursuant to 11 U.S.C. §523(a)(1)(A) and (B) tax liabilities would be discharged IF the respective tax returns were filed on time and more than 2 years after the filing of the bankruptcy petition. While this rule has many subtleties, the actual date a tax return is filed is a fact based result and typically not disputed. Consequently, the key dispute within the cases fell on the actual definition of what a tax return is. Defined within the Bankruptcy Code, §523(a)(19) as: "For purposes of this subsection, the term 'return' means a return that satisfies the requirements of applicable non-bankruptcy law (including applicable filing requirements)…." each party argued a different meaning.

It was the Department of Revenue's position ("DOR") that a late-filed Massachusetts income tax return was not a "return" that satisfied the applicable requirements of Massachusetts law, and thus regardless of how many years may have elapsed would not be dischargeable in bankruptcy. From the Debtors' perspective, it was argued that so long as the DOR had not assessed a liability, the filing date of a return did not determine if the return in question fell under the definition of §523(a)(19).

Ultimately, J. Hoffman decided in favor of the Debtors finding that although the returns were filed late, they fell under the two year rule, and accordingly the tax obligations were discharged. Thereafter the DOR appealed to the United States Bankruptcy Appellate Panel for the First Circuit. (the "BAP")

After full consideration on the matter, the BAP, on March 6, 2014 affirmed the Bankruptcy Court's finding that the Debtors' late returns were discharged.

The second case, was Timothy P. Perkins vs. Massachusetts Department of Revenue, (In Re Perkins, 10-31470 HJB) and involved the same questions as the Gonzalez case above. After a hearing on the matter, J. Boroff, issued an unpublished decision adopting the analysis of J. Hoffman in Gonzalez and found in favor of the Debtor. The DOR thereafter appealed the decision, but chose to appeal to the U.S. District Court, District of Massachusetts. ("USDC")

In a decision issued by J. Young, the issue once again centered on the definition of a "return", but this time with different results. J. Young found that the definition of a "return" under §523(a)(19) that "the term 'return' means a return that satisfies the requirements of applicable non-bankruptcy law" required that the tax return must be filed under the applicable filing requirements of the State. Therefore, if filed after the April 15th deadline imposed by state tax laws, the return is not a return for purposes of discharge.

Although both cases are now under further appellate review to the First Circuit Court of Appeals, the issue remains unsettled for practitioners in the Bankruptcy Court who are left with an unwinnable dilemma on how to properly advise clients that have state tax obligations from late filed tax returns. Ultimately, since there have already been other Circuit Court Decisions with results on both sides of the argument, the issue will likely have to be settled by the U.S. Supreme Court.

Pre-Employment Discrimination Claim Pitfalls in Job Postings and Interviews

By: Kimberly A. Alley, Esq.

Your company invests substantial resources instituting employment practices to ensure an equal opportunity workplace and minimize the risk of costly discrimination claims. But do your pre-employment practices inadvertently still expose you to discrimination claims by non-employee applicants? The chances are that they probably do.

Employment discrimination claimants are not limited to just employees. The laws prohibiting discrimination apply regardless of employment status.

So how can you get to know an applicant without risking a discrimination claim? Ask only neutral questions that pertain to the "essential job functions" of the position. This means that your postings and interview questions must avoid any reference to legally protected categories that include: gender, pregnancy, religion, sexual orientation, race, disability, union activities, military discharge status, age, national origin and even criminal history.

What statements can give rise to a discrimination claim? More than you would expect. Risky pre-employment practices include: 1) advertisement postings that reference "mother's hours," "recent college graduates," "U.S. Persons Only," and "those with criminal records need not apply;" 2) interview comments concerning "young lady" and "overqualified;" and 3) requests for information about child care arrangements, length of commute, birthplace or family background, maiden name, photographs, medical information or sick leave use, past worker's compensation claims, and even smoking practices.

An inquiry concerning an applicant's gender, religion and age may only be made if there is a "bona fide occupational qualification" for the question, such as a minimal legal age for serving alcohol. Even then, the inquiry must be limited. As to age, the only acceptable question is whether the applicant is over the legal age requirement. Race and disability inquiries are strictly prohibited, although an employment offer may be conditioned on a satisfactory medical examination if required for all similar employees. Criminal background inquiries are a minefield after the 2010 "Ban the Box" law and must be tread with care.

The "getting to know you" phase of evaluating a prospective employee requires careful navigation. When in doubt, leave it out of your job postings and interview questions until you have reviewed the legal implications with a legal professional.

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.
www.perkinslawpc.com

Perkins & Anctil, P.C.
6 Lyberty Way, Suite 201
Westford, Massachusetts 01886
978-496-2000
info@perkinslawpc.com