Spring 2015

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

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L A W Q U A R T E R L Y

ANNOUNCEMENTS

Perkins & Anctil is pleased to present the next two seminars in their educational series. Our well received seminars have been filled to capacity, so don't miss these learning/networking opportunities. Register at www.perkinslawpc.com.

June 18, 2015 Real Estate Boot Camp, 8:00 am – 12:00 pm at 6 Lyberty Way, Westford, MA. This third seminar in the Real Estate series will cover information from the Registry of Deeds, Home Inspections, Appraisals, Title V and more. www.perkinslawpc.com

September 12, 2015 Condominium Roundtable Fact Finding Event. 8:00 am – 12:00 pm at The Radisson Hotel, Chelmsford, MA. This annual event presented with representatives from the Community Assocations Institute provides condominium associations and property managers the opportunity to interact with industry leaders. During the event, a fact pattern will be presented by the panel and discussions will follow regarding how to address the issues. Attendees will rotate from table to table and receive input from the industry professionals.
http://www.caine.org/ProgramEventRegistration/EventFull.asp?EventID=340

June 10 2015, New Hampshire Condo Forum 8:00 am - 12:00 pm at the Holiday Inn, Concord, NH. Perkins & Anctil is proud to be one of the sponsors of this NH Condo Forum. The Community Association of New England chapter will address current challenging problems for New Hampshire Communities today.
http://caine.org/_documents/Newsletter/Attachment/NewsletterAtt343.pdf

Paid Sick Leave Law Effective July 1, 2015

By: Kimberly A. Alley, Esq.

On July 1, 2015, Massachusetts' Paid Sick Leave Law, M.G.L. c. 149, §148C goes into effect. The new law significantly impacts all employers.

Under the new law, Massachusetts' employers with 11 or more employees will be required to provide up to 40 hours of paid sick leave per year to each employee after July 1, 2015. Employers with fewer than 11 employees will similarly be required to provide up to 40 hours of sick leave, although the sick leave may be unpaid.

Employees are entitled to accrue one hour of sick leave for each 30 hours worked. Employees may accrue up to 40 hours of sick leave per year. They also can carry over up to 40 unused hours of sick leave to the following year. However, an employee may not use more than 40 hours of sick leave in any one-year period regardless of carry over. Moreover, unlike vacation leave, employers are not required to pay employees for their unused sick time upon separation from employment.

Employees are entitled to begin accruing the mandatory sick leave time the later of either their hire date or July 1, 2015. Although employees may begin accruing leave immediately upon hire, they may be required to wait 90 days after hire before using their accrued sick leave time. Employees may also make up missed work in lieu of using accrued sick time if both the employer and employee voluntarily agree to such an arrangement.

Accrued sick leave time may be use to: 1) care for a physical or mental illness, injury, or medical condition affecting the employee or the employee's child, spouse, parent, or parent of a spouse; 2) attend routine medical appointments of the employee or the employee's child, spouse, parent or parent of a spouse; or 3) address the effects of domestic violence on the employee or the employee's dependent child. Employers are prohibited from taking any adverse action against employees as a consequence of using accrued sick time for these purposes.

As of July 1, 2015, employers who have not previously provided their employees with sick leave that complies with the new law will need to do so. It is critical that all employers review their existing leave policies to ensure compliance. Please contact us if you need assistance with updating your

employment policies or any other employment law need.

Children and Community Association – It's Not All Fun and Games

By: Scott Eriksen, Esq.

Life with children is, for me, incredibly fun and fulfilling. Being a dad is the most rewarding undertaking of my life, and even though my oldest is not yet six, it's hard to recall life before fatherhood. The best parts of my days almost always involve at least one of my children, and the worst parts invariably have nothing to do with either of them. Yet as devoted as I am to my own children, I understand that kids are not for everyone at every time.

Let's face it, children can be loud, boisterous, reckless, uncompromising, juvenile (by definition), exasperating and uncontrollable. In short, children can make for pretty horrible condominium residents. In a community where four to six inch walls are all that separate you from sleep or exhaustion, sanity or madness, a child or two could be anyone's worst nightmare. As both father and an attorney who advocates for harmony on behalf of my community association clients, I can appreciate that. I understand that it is in everyone's best interest to implement and enforce reasonable rules and covenants regarding noise and the use of common facilities and units to promote peace and enjoyment at your community. But a word of warning: targeting minors when promulgating or attempting to enforce certain rules can be fraught with more trouble than even Dennis the Menace himself could have ever summoned up.

Take the recent federal Department of Housing and Urban Development ("HUD") case ***Secretary v. Greenbrier Village Homeowners' Association, Inc***. Greenbrier Village is a 462 unit homeowners' association in Minnesota and home of Ms. Elaine Gustafson. In 2010, Ms. Gustafson obtained custody of her two minor (7 and 9 years) grandchildren. At Greenbrier at the time there was a rule – evidently known as the "***children rule***" (which should have been a massive red flag from the start) – which prohibited children from playing in any association common areas. This severe restriction was relaxed somewhat in July, 2011 (after Ms. Gustafson's grandchildren came to live with her) so as to prohibit the riding of any bicycles, tricycles, scooters, skateboards, skates and rollerblades, as well as playing, picnicking, and sunbathing in the common areas.

Shortly after the rule change, Ms. Gustafson received multiple violation notices, apparently as a result of her grandchildren playing on the common area grass or landscaping. In September 2011, the Greenbrier board rescinded the 2011 (relaxed) common area rule, citing recent changes in discrimination laws. Inexplicably, however, they nevertheless continued to threaten to fine Ms. Gustafson relative to her grandchildren's activities in the common areas. In April 2012, the property manager sent another violation notice to Ms. Gustafson and, later that month, the Board placed notices on the community bulletin boards stating: "Kids may not play in the garage, driveway, parking lots, or by the pond. If kids are in the grass, they may not dig, ride bikes, slide down hills, or in any way hinder the growth of the lawn. They cannot play in the trees or planted areas and may not jump off balconies." These posted notices also included an admonition that the sounds of children playing near a building can be disturbing to other residents.

Well, it seems that about did it for Ms. Gustafson. In July 2012, she filed a complaint with HUD alleging discrimination on the basis of familial status. HUD investigated the matter and determined that Greenbrier had sent 13 (an unlucky number for them, indeed) violation notices citing the ***children rule*** to families with children. No violation notices concerning the restrictions were sent to households without minor children, and HUD found no evidence of any notice being given to an adult for violating the rules against using sidewalks or grass, or for playing in the courtyards or for riding bicycles in the common areas. As a result of its findings, HUD issued a report which found "reasonable cause" that Greenbrier (together with its management agent and the individual property manager) were in violation of the Federal Fair Housing Amendments Act (the "FHA Act"). The U.S. Department of Justice then initiated a discrimination action against the Association (and management agent) for violating the FHA Act by making "written and verbal statements indicating a preference, limitation, or discrimination based on familial status" in connection with their treatment of Ms. Gustafson and her grandchildren.

Long story short: in March of 2015 (almost three years after this ordeal began), the parties reached a settlement. The price tag after all that time was well beyond milk money - Greenbrier ended up on the hook for ***$10,000.00*** in civil penalties payable to the United States and a total of ***$100,000.00*** to six families with children who experienced discrimination. Greenbrier was also forced to implement an anti-discrimination policy, and its Board members and manager were directed to undergo training on the FHA Act. All of this, mind you, is in addition to the untold expenses paid by Greenbrier to its attorneys and the unquantifiable headaches associated with the multi-year federal action. In summary, a severe outcome for an association that – one would hope – was merely trying to promote community accord and enjoyment for its residents.

Some readers may reflect on this and say, "Well, of course. That outcome is to be expected. No association should engage in such blatant and uneven mistreatment families with young children." But the problem with that view is, Greenbrier is in no way unique when it comes to outdated, improper or unenforceable policies. We have seen far too many documents that contain age-specific regulations or rules which target the behavior of children. For example, while no longer as prevalent, so-called "adult swim" rules at associations with pool facilities were often commonplace. Rules regarding the use of certain amenities, particularly recreational facilities, are often laced with provisions which read: "no one under X years of age may…" Many of these provisions may be stale – relics of governing document boilerplate implemented decades ago – but some surprisingly come up in new documents as well. Wherever or whenever they are found, however, they should not be ignored.

While federal and state courts have held that certain age restrictions may be appropriate to the extent that they are designed to protect the health and safety of residents (regulating

unsupervised use of gym equipment or pools is a good example of this), we counsel our clients to avoid or, if necessary, eliminate age related qualifiers in their rules, regulations and covenants. It behooves boards to review their documents and policies to make sure there are no prohibitions, restrictions or rules that target or could be construed to target "minors," "children" or "individuals under 18/16/14/etc." The last thing any board wants to do is to make a federal case, literally, out of child's play.

Fannie Mae and Federal Housing Finance Agency Are Certainly Not the Friends of Condominium Associations

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

As most readers are aware, in the Commonwealth of Massachusetts condominium associations have a six month super priority lien over a first mortgage holder in collecting delinquent assessments. Until the Drummer Boy v. Britton case this assessment was rolled over every six months, allowing associations to protect multiple six-month periods by filing successive actions in court.

That is the old news. The latest news is that Fannie Mae and FHFA have filed an action to set aside a foreclosure by an entity that was approved by the Nevada Supreme Court. Essentially, these entities are claiming that federal law preempts the estate condominium act and even the six month super priority lien cannot be used to foreclose on a mortgage held by Fannie Mae and FHFA.

This preemption is based on claims related to the FHFA acting in furtherance of its statutory obligations as regulator and conservator of Fannie Mae and Freddie Mac. The National CAI has been involved in this matter and will to continue to keep you updated with any new information.

A View from San Francisco and CAI's 36th Annual Community Association Law Seminar

By: Scott Eriksen, Esq.

In January I travelled to CAI's 36th Annual Community Association Law Seminar. I have been fortunate to attend the seminar for three years running, and can truly say that it has been an informative experience each time. It is inspiring to hear from some of the most well respected counselors in the field and fun to commiserate with colleagues who, despite geographic differences, face the same difficulties that we do. The seminar is also a fine spot to learn a new community association joke, like this:

A man falls ill and goes to see his doctor. The doctor runs a battery of tests on the man and determines that the man's condition is terminal.

"I'm sorry," says the doctor, "you only have one year to live."

The man is horrified: "Doctor, that's terrible news! There must be something I can do to prolong my time."

The doctor pauses in thought. "Well, there is one thing…"

"What is it?!" the man asks.
"Buy a condominium and join the board," the doctor replies evenly.

"I don't understand Doc, will that make me live longer?"

"No," replies the doctor, "but it will be the longest year of your life."

Now for some of the more serious highlights from the seminar:

Construction Defect Recovery Post Great Recession: One unfortunate outcome of the Great Recession has been a rise in construction defect claims. Whether developers leave projects incomplete, cut corners, file bankruptcy or simply disappear, the impact takes a toll on owners. The old maxim that you can't get blood from a stone rings true. Insolvent declarants (often special purpose entities) may not be worth chasing. However, that doesn't mean that an association will be left holding the bag. Insurance is often a potential source of financial recovery for unit owners, and developer insurance isn't the only place to look. Errors and omissions insurance policies for design professionals may also bear fruit.

'Bored' Meetings? Not with Jim: While a lecture on parliamentary procedure may seem less enjoyable than a trip to the dentist, Jim Slaughter's easy, southern manner and knack for presenting made for an engaging session. Jim focused on effective ways to implement parliamentary rules without getting bogged down in the minutiae. He discussed the importance of a good agenda, the utility of proxies, and offered advice on what do to when you don't get a quorum. I strongly recommend a visit to Jim's website, www.jimslaughter.com, for a wealth of information including charts and handouts to help you run (in Jim's words) a "darn good" meeting.

Air What?: I'd never heard of *Airbnb* before last summer when one of our associations discovered that a unit owner was operating a nightly B&B. For those of you who aren't aware, *Airbnb* bills itself as "a trusted community marketplace for people to list, discover, and book unique accommodations around the world - online or from a mobile phone." Anyone can list their condominium unit for rent on an extremely short term basis (often a single night), and be matched with willing guests. In my client's case, we were fortunate enough to achieve swift compliance with an existing, robust rental restriction, but not all associations are so lucky. The session "*Rental and Occupancy Restrictions under Fire: Keeping Those People Out*" explored the challenges of drafting and enforcing rental policies. While carefully constructed provisions, duly adopted in the governing documents, can be effective tools for maintaining association harmony, overreaching or unlawful attempts to curb rentals may expose an association to unintended liability.

Anticipate the Future: This year's Key Note speaker was Gerry Riskin. Recognized as "Canada's professional firm management and marketing guru," Gerry delivered a thought-provoking lecture on the likely evolution of the legal industry in the years to come. As with all commercial enterprises in the Internet Age, technology has disrupted traditional models of legal practice and forced practitioners into a new digital-Darwinian arena where "complacency is the greatest enemy." Services like RocketLawyer, Shake, Axiom and LegalZoom are the "unseen competitors" who threaten the status quo. Gerry's message: don't be afraid to propose ***imperfect*** change and take action. Whether or not you think that

apps will replace attorneys in the years to come, Gerry's message of adaptation is powerful, and one that professionals would do well to heed.

National Case Law Update: The annual case law update provides a "hit list" of the year's important jurisprudence from across the nation. Presenters George Nowack and Wil Washington have an erudite, witty delivery that makes even Fair Debt Collection Act cases worth listening to. Among this year's many noteworthy cases:

Warren v. Delvista Towers Condominium Ass'n, Inc.: In this Florida case a unit owner, suffering from depressive disorder and PTSD, requested an accommodation a "no pets" policy. In support of his request, he sent a letter explaining his disorder and attached his psychiatrist's recommendation. The association denied the request as "unreasonable" on account of the fact that the dog requested was a pit bull. The owner sued, claiming the association violated the Fair Housing Amendments Act. The court held that a request for an assistance animal cannot be denied on the basis of breed, but may be denied if the specific dog presents an actual danger to health and safety of others that cannot be reduced by another reasonable accommodation.

Wyman v. Ayer Properties, LLC: One of the local decisions to make the big stage, this is an important case for all associations dealing with construction and design defects. In *Wyman*, the Massachusetts Supreme Judicial Court held that the so-called "economic loss rule" did not apply to damages to the common areas resulting from initial design or construction defects. The "economic loss rule" generally prevents recovery for damages for defects in initial design or construction alone – damages are ***only*** warranted to the extent that those defects have caused ***other*** damages (such as personal harm or injury to other property). Fortunately, the SJC concluded that the rule is not applicable to damage caused to the common areas of a condominium building, paving the way for recovery in such cases.

Porte Liberte II Condominium Ass'n, Inc. v. New Liberty Residential Urban Renewal Company, LLC: This case is useful authority for the concept of after-action ratification. A New Jersey condominium association filed suit against a developer and contractors to recover damages for common area defects. The defendants sought summary judgment on the basis that the association had not obtained the proper unit owners' authorization before bringing suit. The court held, however, that the owners' vote authorizing lawsuit ***after it had been filed*** ratified the association's action.

In summary, this year's seminar was yet again an educational and entertaining experience, and our firm looks forward to attending next year's seminar in New Orleans.

Attorney Kimberly Alley Invited to Speak at a Joint Program for Plaintiffs and Defense Trial Attorneys

By: Kimberly A. Alley, Esq.

Perkins & Anctil's Attorney Kim Alley was invited to join a panel of skilled trial attorneys on April 29, 2015 speaking on trial advocacy skills. Kim's lecture was part of a collaborative educational program presented jointly by the Massachusetts Academy of Trial Attorneys (MATA) and Massachusetts Defense Lawyers Association (MDLA). Kim shared her 20 years of jury trial experience with members of the trial bar that included both plaintiffs and defense attorneys. Kim's practice in Maryland has given her a unique opportunity to interact with jurors post-trial that has historically been prohibited in Massachusetts. Recent changes in Massachusetts will soon allow attorneys in the Commonwealth to similarly interact with jurors post trial. Accordingly, trial attorneys across the Commonwealth gathered to learn from Kim's unique experience. Kim's litigation practice includes employment, construction, personal injury and criminal law in both Maryland and Massachusetts.

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

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