From the Law Offices of

Summer 2010

PERKINS & ANCTIL P.C.

ATTORNEYS AT LAW

LAW QUARTERLY

IN THIS ISSUE

This summer appears to have flown by, probably as a result of the constant heat and humidity throughout the same. However, this does not mean that the fall will be any cooler at Perkins & Anctil.

First, on October 2, 2010, in conjunction with CAI, we are participating in our annual roundtable. This event will be held from 8:00 a.m. until noon at the Radisson Hotel and Suites located at 10 Independence Drive, Chelmsford, Massachusetts. As in the past, we sponsor this event so that the same will not cost any fees to any individuals or companies that would like to attend the same. Please contact Claudette Carini from CAI, at ccarini@caine.org or at (781) 237-9020 and mention Perkins & Anctil so that she may coordinate your attendance. This year we intend to have speakers discuss general legal matters, collection matters as well as individuals from the insurance field and experts that deal with reserves and building defects. We hope to see you there.

We have also launched our new web-site and invite you to visit the same at www.perkinslawpc.com.

Finally, our newest partner, Gary Daddario, has now been confirmed as a member of the Board of Directors of CAI New Hampshire and remains Chairman of the Legal Committee until _____.

As we stated, there is plenty going on at Perkins & Anctil and we hope to see you at our fall event.

CAI Attorney Committee Hosts Guest Speaker

By Gary M. Daddario, Esq.

As a Co-Chair of the Attorney Committee of CAI New England, I have made efforts to make the meetings of the "Atty Comm" both interesting and educational. At our May meeting, attendees had the pleasure of discussion with a guest speaker, Attorney Maura T. Healey, Chief of the Civil Rights Division of the Office of the Attorney General. As a condominium resident herself, Attorney Healey understands the dynamics and operations of condominiums. As Chief of the Civil Rights Division, Attorney Healey provided valuable insight as to how condominiums may deal with unit owner disputes in a manner that does not run afoul of unit owners' rights.

During the meeting, members of the Attorney Committee and Attorney Healey discussed numerous topics that routinely appear in the condominium context. Attendees were afforded the opportunity to make inquiries on proper rule enforcement procedures, avoiding discrimination claims, "reasonable accommodations" as may be required for disabled unit owners and proper construction of rules that necessarily deal with age (e.g. requirement that residents below a specific age be accompanied by an adult at the pool). During the enforcement discussion, the common concern of cooking odors disturbing neighbors was addressed. Although many are familiar with the notions of "ethnic cooking" or regional recipes, Attorney Healey clarified that such activity is not so intrinsic to ethnicity as to be outside of the realm of reasonable and neutral restrictions. For example, Attorney Healey opined that a rule generally prohibiting any odor caused by one unit from negatively impacting the common areas or other units, if consistently enforced as to all members of the community, would be a valid, non-discriminatory rule.

In the reasonable accommodation context, Attorney Healey opined that unit owners must make a submission demonstrating entitlement to the same. Although details of a medical condition need not be discussed, the law provides requirements for "disabled" status and those seeking a reasonable accommodation must meet the requirements. In addition, a reasonable accommodation must have a connection to the specific disability and, in some manner, alleviate the impact of the disability. Reasonable accommodations, as the name implies, must actually be "reasonable" under the circumstances. A proper analysis may include consideration of alternatives that would alleviate the impact of the disability with less burden on the party providing the accommodation.

Without specific legal requirements or clear precedent to work from, Attorney Healey advised that rules necessarily dealing with age must also be reasonable and must achieve a legitimate goal such as safety. Pool rules that limit access without adult supervision may be reasonably designed to reduce the risk of an accident due to drowning.

As a follow up, Attorney Healey and the Attorney Committee Chairs plan to explore the possibility of a further discussion on these topics with the Commissioner of the Massachusetts Commission Against Discrimination. Note that neither Attorney Healey's comments at the meeting nor this article are provided as legal advice. Parties dealing with these topics should consult their own legal counsel.

MCAD Decides Ramp Case

By: Charles A. Perkins, Jr.

The Massachusetts Commission Against Discrimination (the "MCAD") has recently rendered a Decision in a handicap access ramp case and ruled against the Condominium Association regarding the same.

In this case, the unit owner had requested a reasonable modification from the Condominium Association, to wit: the ramping of a front entryway of five (5) steps or less. The Board responded by allowing the unit

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owner to undertake the ramping at her expense. After some back and forth, the unit owner eventually had the work done but it was done in a negligent manner. The unit owner was later advised that this might be the responsibility of the Association and filed a complaint with the MCAD regarding the same.

After a ruling against the Association by the Hearing Officer, the full Commission affirmed the same providing that the Board had an obligation under General Law Chapter 151B to pay for the ramping subject to five (5) steps or less. Although there is an economic hardship provision in the statute, the MCAD stated that the Association either raised the same late or failed to meet the burden regarding the same. The MCAD also awarded $25,000 for emotional damages and $1,700 for out-of-pocket damages.

As an interesting side note, the MCAD also ordered training of each Board member annually for the next five (5) years along with the adoption and publication of a policy setting forth the Board's position in dealing with discrimination matters.

Last month President Obama signed H.R. 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act into law.

Of particular importance to Condominium Associations, this voluminous piece of legislation (also known as Public Law No: 111-203) extends and clarifies the Protecting Tenants at Foreclosure Act (PTFA). There are estimates that nationwide as many as forty percent of the families that face eviction due to foreclosure are renters. (See National Housing Law Project, http://www.nhlp.org). As such, your Condominium Association may face a situation where the Association is foreclosing on a tenant occupied unit to collect unpaid common area fees. If the Association decides to bid on the unit and ultimately purchases the unit at foreclosure, the Association will take on the role of landlord and will become subject to the applicable provisions of the new Dodd-Frank Wall Street Reform and Consumer Protection Act and the PTFA.

The PTFA was enacted May 20, 2009 and requires that owners acquiring property through foreclosure honor existing leases. This means that a Condominium Association would need to honor a lease between a former unit owner and his or her tenant(s). The PFTA provides that tenants with term leases may not be evicted until the end of their lease terms and not without a 90-day notice. It is important for a Condominium Association to keep this provision in mind as it would certainly impact the Association's ability to sell the unit if this was the Association's goal. The provision does allow a new owner who seeks to occupy the unit as a primary residence to terminate the lease with a 90-day notice; however, this exception does not seem to apply to a Condominium Association because the Association would not be "occupying the unit as a primary residence". The PFTA further provides that an owner (i.e., Condominium Association) must give a 90-day notice to tenants with no leases or leases that are terminable at will. The PFTA also affords additional protections to Section 8 tenants.

On July 21, 2010, the Dodd-Frank Act became law and extended the PTFA until December 31, 2014. Section 1484 of the Dodd-Frank Act clarifies that notice of foreclosure means, "the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed." Therefore, the Dodd-Frank Act confirms that the PTFA protects all bona fide (good faith) tenants that entered, or will enter, into a lease agreement before the transfer of complete title to the new owner (Condominium Association). As such, an Association could face a situation where a unit was not leased to a tenant at the time a collection action was filed or at the time the Association obtained a judgment and order authorizing the Association to foreclose on the unit or even in the days leading up to a foreclosure and still be a position to become a landlord. It is difficult to say whether this scenario will arise with any frequency and whether the "complete title" language in the statute will require judicial clarification, however, it is important that Condominium Associations and Managers be aware of this new legislation.

Governor Signs Legislation Regarding Calculation of Percentage Interest

By: Charles A. Perkins, Jr.

Governor Patrick signed into law a bill that amends the Massachusetts Condominium Act as it relates to the calculation of percentage interest in general along with the issue concerning the percentage interest based on affordability.

The calculation of condominium fees has been based on M.G.L.c.183A, §5, which provided that the percentage interest would be calculated by the approximate relation of the fair value of the unit on the deed of the Master Deed to the then aggregate fair value of all units.

It failed to recognize the long standing practice of developers to use square footage as a basis of calculating percentage interest. It also was silent on the issues surrounding affordable units.

The amendment allows the condominium fees to be assessed either on the percentage interest or if stated in the Master Deed or an amendment thereto, based on the approximate relation that the area of the unit bears to the aggregate area of all units which may take into account unit location, amenities in the unit and limited common areas and facilities benefiting.

This is not likely to have an effect on preexisting condominiums as any change would require the consent of all unit owners whose common expense assessment is materially affected. However, it may affect new associations and legitimize a past practice regarding the calculation of common area fees.

In regards to restrictions imposed as a result of an affordability requirement, 183A has been amended to allow this type of calculation and further, that the same may be readjusted after the restriction has been terminated by a vote of seventy-five percent (75%) of the unit owners or such other with the consent of fifty-one percent (51%) of the first mortgagees who have given notice to the association that they request to receive such notices from the association.

The bill was sponsored by Citizens Housing and Planning Association ("CHAPA") and was supported by the CAI Massachusetts Legislative Action Committee.

Governor Signs the Permit Extension Act of 2010

By: Charles A. Perkins, Jr.

Recently, the Governor of Massachusetts has signed the Permit Extension Act of 2010. The passage was part of the economic development reorganization package. The Permit Extension Act of 2010 (the "Act") will extend state and local permit deadlines for almost all real estate developments whose approval was in existence between August 15, 2008 and August 15, 2010 for a period of two (2) years beyond the current lawful term of the approval. Excluded from the Act are comprehensive permits issued by a Board of Appeals pursuant to Chapter 40B, or a permit, license, privilege or approval issued by the Division of Fisheries and Wildlife for hunting, fishing or agriculture.

Massachusetts Supreme Judicial Court Abandons "Natural Accumulation" Rule For Determining Liability for Slip and Falls on Snow and Ice

By: Christopher S. M. Driscoll

On July 26, 2010, the Massachusetts Supreme Judicial Court announced its decision in *Papadopoulos v. Target Corporation*. The case involved a slip and fall accident in the parking lot of the Liberty Tree Mall in 2002 where the plaintiff had tripped on a piece of ice that had frozen to the pavement. Prior to this decision if, the ice or snow on which the plaintiff had tripped was seemed to be a "natural accumulation," this barred recovery as the defendant was deemed not to be responsible. Landowners in Massachusetts will now be required to exercise reasonable care in clearing their property of snow and ice so that lawful visitors to the property will not injure themselves in a fall.

The "natural accumulation" rule or "Massachusetts" rule as it was known was a vestigial remnant of 19th century tort and property law. The rule had its origins in a series of cases decided in the 1880s, when the amount of due care that a landowner owed to a person who visited the property depended on the relationship between the landowner and the visitor and the reason the visitor was on the property. For example, a landlord had no duty to a tenant to maintain any area of the property that was leased to the tenant, as the lease transferred along with the property the responsibility to maintain the property in a safe manner. The landlord could only be responsible if they failed to disclose the existence of some hidden danger. However, if the person injured was an invitee, which was defined as a person invited onto the property by the landowner for the property owner's benefit (e.g. a shopper at a store or an employee working at the store) then the landowner had to keep the property in a "reasonably safe condition in view of all the circumstances, including the risk to others, the seriousness of the injury, and the burden of avoiding the risk." The law also created separate categories and differing burdens of care for licensees (a person who was on the property at the plaintiff's invitation for "convenience and care") and trespassers.

Over the past several decades, the Massachusetts courts, along with most other courts across the country, have rejected the tenant/invitee/licensee/trespasser distinction and the differing burdens of care. Instead the courts have imposed a unified standard of care which most closely resembles the duty of care owed to an invitee. Only adult trespassers do not receive this level of protection. The last remaining vestige of the old rules was the natural accumulation rule. Under this formulation, a property owner could only be found responsible for an injury to a person that occurred on their property that was caused by slipping on the ice or snow if the judge or jury found that the snow or ice was an artificial or unnatural accumulation. The Supreme Judicial Court pointed out that this rule had several problems. First, all of the other states in New England require that property owners use reasonable care in clearing snow and ice so that visitors do not injure themselves.

Second, it was often very difficult to determine what was and what was not a natural accumulation, as several factors such as the passage of time, the traffic over snow which would compress it and make it uneven and icy, or even efforts to remove the snow could transform the natural accumulation into an unnatural one. Removal efforts, even when done negligently, could in certain circumstances avoid liability even when they "foreseeably increase[d] the risk of mishap...." this was a truly strange result which ran contrary to the rest of tort law.

Third, despite the fact that snow and ice are an "open and obvious" danger, the fact that they are open and obvious is unrelated to whether or not the accumulation is natural or unnatural. Additionally, even though the danger is visible and a visitor can take steps in theory to protect themselves, the court noted that "it is reasonable to expect that a hardy New England visitor would choose to risk crossing the snow or ice rather than turn back or attempt an equally or more perilous walk around it." Therefore the "open and obvious" rationale does not really support the natural accumulation rule at all.

The court did state that differently types of property owners will have to take different steps to satisfy the reasonable care standard depending on the circumstances that they face. "The snow removal reasonably expected of a property owner will depend on the amount of foot traffic to be anticipated on the property, the magnitude of the risk reasonably feared, and the burden and expense of snow and ice removal. Therefore, while an owner of a single-family home, an apartment house owner, a store owner, and a nursing home operator each owe lawful visitors to their property a duty of reasonable care, what constitutes reasonable snow removal may vary among them."

Additionally, they court's decision is given immediate effect, and applies to all cases and claims not yet brought that are not barred by the statute of limitations or by entry of a judgment. That means that the new standard will apply to all cases involving a slip and fall on ice or snow that are currently pending in the state courts plus any new claims that occurred within the last three years.

This decision could impose a greater liability on condominiums to ensure that snow and ice are removed from sidewalks, walkways, building entrances, ect. that are common areas. Condominiums should take the following steps in response to this decision:

1) Check with their insurance carrier to ensure that they are carrying both the proper types and amounts of coverage in case of a slip and fall accident that occurs on snow or ice

2) Ensure that that there are indemnification provisions in the contracts for snow removal services where the contactor agrees to pay for all accidents caused by the contractors negligence in failing to properly remove of snow and ice

3) Make sure that the snow removal contractor hired by the condominium has adequate insurance and has name the condominium as a covered party under the policy

About Our Law Firm

Perkins & Anctil, P.C. is one of the foremost firms concentrating in all facets of real estate law, including condominium law; condominium conversions; developer and lender representation; representation before town and municipal boards; landlord/tenant matters; and real estate litigation (978)496-2000. www.perkinslawpc.com

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