Summer 2015

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

IN THIS ISSUE

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

ANNOUNCEMENTS

Perkins & Anctil is pleased to present the next seminar in our educational series. These seminars have been filled to capacity, so don't miss these learning/networking opportunities. Register at (978) 496-2000 or at 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

Lines in the Sand: Enforcing Rules in the Wake of Forbearance

By: Scott Eriksen, Esq.

If you live in a condominium, chances are there is at least one restriction in your association's governing documents that you consider Draconian, outdated or otherwise unnecessary. Maybe it is an outright prohibition against all business uses (even no-traffic, home office type uses) or a twenty pound weight limit on permitted animals. Unfortunately, you may have only recently learned of these restrictions despite having closed on the unit months, years or even decades before. If you had been made aware of such rules prior to purchasing the unit, they may have given you pause, but it's too late now.

Now imagine that one day you and your children see a sad-eyed puppy sitting in a pet shop window and decide to take him home. He starts off – as all puppies do – under the weight limit. But like all puppies, he grows and soon exceeds the limit, if only by a bit. So maybe you approach the board president, who happens to be a friend, and ask that the board make an exception – just this once – for your thirty pound dog. You impress upon the board how well-trained and quiet your dog is, and plead that they permit you and your family to keep him at the unit. It is only ten pounds after all. Receptive to your pleas, the board concedes. And then maybe they do this a second time and a third, fourth, and so on until there are many animals living at the association who exceed the weight limit.

Maybe this all goes well until one day an owner decides to purchase an American pit bull terrier. The board – which may be of new composition from when you pled your case – is outraged. They send a notice to the owner demanding the removal of the animal from the property and impose a fine. When that fails to secure compliance, they involve legal counsel and commence an enforcement action. In his defense, the owner argues that though the pit bull is technically prohibited by the weight limit, he is the victim of selective enforcement. He offers that the board has consistently (perhaps systematically) declined to enforce the weight restriction. The judge hearing the case looks sternly at association counsel and asks: "Is this true counselor?"

This hypothetical situation represents an all-too-common occurrence for condominium law practitioners, and inconsistencies like this can make for troublesome cases. Clear and reasonable rules are essential, but the rules themselves are insufficient to keep the peace. Equally, if not more important, is how associations *enforce* their rules, and the principles of consistency and equity should always guide a board's conduct. Waffling on enforcement can create the appearance of disparate treatment, even if there is no malicious intent to single out certain individuals from the group. The perception of targeted or selective enforcement can wreak havoc on association harmony, and expose associations to potential liability. Boards would do well to strive for

predictability and uniformity in their enforcement efforts, and to stick by proper policies for dealing with violations.

That said, what happens when benevolent flexibility is no longer appropriate (as in the case above with the pit bull)? Can the Board take a stand after months or years of casual or non-enforcement without exposing itself to claims? In the recent decision of *Villas in Whispering Palms v. Tempkin*, the California Court of Appeals said yes.

Whispering Palms is a large planned community in San Diego where the governing documents impose a limit of one dog per unit. The documents also afford the board the authority to grant certain "variances" from the rules of the association. As in the hypothetical situation above, it appears that Whispering Palms was generally lenient with the one dog per unit policy and in the early 2000s, the board discovered that many unit owners had two or more dogs. The board decided to "grandfather" existing animals, but issued a policy that after one of the animals in a two dog unit passed or moved out, the owner would not be allowed to replace it. "Violations" of the one-dog policy continued, and in 2005 the board surveyed the owners to see if they wanted to keep the one-dog limitation. The results of the survey indicated that a majority of owners still wanted a one-dog restriction, and so once again the board implemented a "grandfathering" policy and stated from that point forward, the one-dog rule would be strictly enforced. Thereafter, at least two individuals were cited for violations of the new policy.

Then, in 2010, Mr. Tempkin moved into the community. He already had one dog and, shortly after moving in, acquired a second dog. The board sent Mr. Tempkin several violation notices and invited him to a board meeting to discuss the issues. Mr. Tempkin requested permission to keep both animals, but the board denied the request and began fining Mr. Tempkin in early 2012. Shortly thereafter, in May, 2012, the association filed suit against Mr. Tempkin and sought an injunction to remove one of the dogs from the property. The trial court ruled in the association's favor and Mr. Tempkin appealed.

On appeal, Mr. Tempkin stated that the board acted unreasonably by not granting him a variance when they had been frequently given in the past. He claimed the board's decision was unreasonable and in bad faith – effectively arguing that he had been unduly singled out.

The California Court of Appeals applied a two-prong test for determining the reasonableness of the board's action. First, they asked whether the reason for withholding the variance was rationally related to the protection, preservation or proper operation of the property and the purposes of the association as set forth in its governing instruments. The second prong of the test was whether the board exercised its power in a fair and nondiscriminatory manner. The Court noted that reviewing authorities will generally uphold a board's action so long as it was made in good faith to advance association interest and is consistent with the governing documents and public policy.

Applying this test to Mr. Tempkin's case, the Court found that the association had acted appropriately, and upheld the trial court's decision. In the Court's view, the mere fact that the board had granted variances to others in the past did not preclude them from denying Mr. Tempkin's request. The record reflected that once the board made the decision to "strictly" enforce the one-dog rule, there was evidence to support that they did so in a uniform fashion. The Court also noted with import the broad discretion afforded the board under the documents to grant or withhold variances.

The *Tempkin* case, while not binding in the Commonwealth, is instructive for associations who have previously exercised leniency but are now considering tighter control. Flexibility, after all, is necessarily a two-way street and it only stands to reason that what was once reasonable may become problematic. Lines in the sand should be carefully drawn, but need not be immutable. While I do not mean to diminish the importance of consistency and equity, it is worth reflecting on the fact that reasonableness does not always mean unyielding and absolute enforcement of black letter rules.

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.

How far will a $100.00 court sanction push you? Answer: Pretty far!

Summary by: David Chenelle, Esq.

The story begins when Kevin Charbono filed for protection under the U.S. Bankruptcy Court, specifically a Chapter 13 case on August 21, 2012. Upon the filing, the Court appointed Lawrence P. Sumski as Trustee ("the Trustee"). As a brief description, a Chapter 13 case involves the filing of a Chapter 13 Plan that in essence requires the Debtor, in this case Mr. Charbono, to make monthly payments to the Trustee over a 3 to 5 year period of time.

Several months following the filing of his bankruptcy case, the Court Confirmed Mr. Charbono's Chapter 13 Plan which contained additional terms and conditions in which he was to follow. One such term was the ongoing requirement that Mr. Charbono was to provide a copy for each of his federal income tax returns filed during the pendency of his bankruptcy case. The returns were to be provided to the Chapter 13 Trustee within 7 days of being filed with the taxing authority. It was also noted within the Plan that should the Debtor file for an extension to file his tax returns that the extension must be provided to the Trustee as well. It was upon the Confirmation of the Debtor's Chapter 13 Plan, with the listed these additional terms, that it became an order of the court. (See 11 U.S.C. § 1327(a))

As the Debtor's 2012 federal income tax return was due to be filed on or before April 15, 2013 the Trustee sent a letter in January to the Debtor and his counsel reminding them of the Debtor's obligation. As the 15th of April approach, the Debtor and his wife filed a timely extension request with the Internal Revenue Service but did not

provide it to the Trustee within the required 7 day period. Having not received either a copy of the Debtor's federal return or extension request, the Trustee filed a motion with the bankruptcy court informing it of the Debtor's failure to comply with the Court Order. The motion sought to either have the case dismissed; or in the alternative, for the Debtor to pay a $200.00 sanction. The Debtor objected and belatedly provided a copy of the extension request to the Trustee.

By the time the matter was heard at hearing the Trustee did not push for dismissal of the case but rather for the sanctioning of the Debtor: arguing that his failure to abide by the Court Order required, at a minimum, that he be sanctioned! Contrary to the Debtor's opposition the Court agreed with the Trustee and sanctioned the Debtor the sum of $100.00! The Debtor's Appeal to the U.S. District Court followed. The question posed to that Court was does a bankruptcy court have the inherent power to punitively sanction a party for noncompliance of a court order.

Once again, over Mr. Charbono's objection the U.S. District Court confirmed that the Bankruptcy Court was within its discretion to sanction Mr. Charbono for his failure to abide by the Court Order. The Court further evaluated whether the act triggering the sanction had to have an inherent "intent" component in order to properly apply a sanction. Finding that only a sanction involving the payment of attorney's fees warranted a specific intent, the Court upheld the Bankruptcy Court award of $100.00.

Not wanting to submit, Mr. Charbono then appealed to the United States Court of Appeals for the First Circuit. On June 15, 2015 that Court issued its 20 page decision upholding the decision of both the U.S. Bankruptcy Court and the U.S. District Court!

The caveat to this case is that the Chapter 13 Trustee and the Debtor's counsel's positions were both based on principal and conviction: battling each other from June of 2013 to when the First Circuit Court of Appeals issued its decision on June 15th, 2015. This was a two year process that netted the successful party an award of $100.00! No decision has been made on whether an appeal will be made to the U.S. Supreme Court!

Supreme Court Allows Disbarred impact Claims

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

The U.S. Supreme Court has recently ruled in a 5-4 decision that the Fair Housing Act allows discrimination lawsuits based on disparate impact. Disparate impact is a legal theory that prohibits practices that have an adverse impact on members of a protected class even if there is no intentional discrimination.

This theory is not new. Many Federal Courts across the country have allowed disparate impact cases to move forward in the courts. Although this could have a far reaching effect, the Justice who wrote the majority opinion indicated that the Court should avoid interpreting disparate impact liability to be so expansive as to inject racial considerations into every housing decision.

The case which is entitled Texas Department of Housing and Community Affairs, et al v. Inclusive Communities Project, Inc. dealt with a disparate impact claim targeting a Texas housing agency for awarding tax credits to construct affordable housing more often in the minority inner city areas of Dallas as opposed to white suburban neighborhoods.

The case was remanded to Texas with the court indicating that the case may be seen simply as an attempt to second guess which of two reasonable approaches the housing authority shall follow.

We will continue to keep you apprised of all developments including claims which attempt to use this theory.

Reminder: New Massachusetts Leave Laws Are Now In Effect

By: Kimberly A. Alley, Esq.

Attention Massachusetts employers; Have you reviewed your company's employment practices in the last year? If not, it's time! Three new Massachusetts Leave Laws are now in effect.

The Domestic Violence Leave Law went into effect on August 8, 2014 and applies to employers with 50 or more employees. This law governs notice and leave requirements relating to victims of domestic abuse.

The Parental Leave Law went into effect on April 7, 2015 and applies to employers with 6 or more employees. It extends the Massachusetts Maternity Act to men.

The Earned Sick Leave Law went into effect on July 1, 2015. Employers with 11 or more employees are required to provide paid sick leave that complies with new requirements. Employers with fewer than 11 employees must provide unpaid sick leave consistent with the new law.

It is important that you review your employment policies to ensure that your company is in compliance with these three new leave laws. Please feel free to contact us if you have questions concerning your company's employment practices.

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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