From the Law Offices of

PERKINS & ANCTIL P.C.

ATTORNEYS AT LAW

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LAW QUARTERLY

IN THIS ISSUE

WE PROUDLY ANNOUNCE

Gary M. Daddario has become a partner of the firm, and that **Tricia L. DelBove** has recently become associated with the firm.

The CAI National Law Conference Was Tops... Now for the Bottom Line

By: Gary M. Daddario, Esq.

During January 2010, I had the privilege of attending my first CAI National Condominium Law Conference. The conference was held January 21-23 in Tucson, Arizona and was well-attended by members of CAI, condominium attorneys and others in our industry from all over the United States. During the conference, I had the opportunity to "compare notes" with condominium attorneys from New Hampshire, Georgia, Ohio, California, Florida and Hawaii, among others. We were able to share our views and information on the "hot topics", trends, cases and solutions for handling various condominium issues. In addition, we all had the opportunity to attend many lectures on a variety of topics. Below is a sample of the lectures I witnessed and the "bottom line" lessons from them.

"National Case Law Update"- This lecture provided an overview of the meaningful condominium-related cases decided across the country this year. Though some are humorous, even a brief recitation of the individual cases would be beyond the scope of this article. **Bottom Line:** Litigation against condominiums, possibly as a side effect of the economy, is increasing. Courts are taking a practical approach to complex issues and consulting the constituent documents of the associations in question. Courts are seeking to enforce the documents as written.

"National Legislative Update"- This lecture provided an overview of the meaningful legislative changes that have occurred or are being considered across the country. Again, particular reference to pieces of legislation is beyond the scope of this article. It does appear that consideration of finances, tenants, property management licensing and environmental issues are common. **Bottom Line:** Locally, we have the benefit of CAI's Legislative Action Committee ("LAC"). The LAC tracks legislation effecting condominiums and, where necessary, takes action to protect the rights of associations. Note that a recent example would be the quick action taken by the LAC which resulted in condominiums being spared from filing corporate tax returns.

"Mortgage Guideline Changes"- This lecture provided a presentation of the many and significant changes to the mortgage guidelines of Fannie Mae and Freddie Mac, as well as the changes to the guidelines relative to mortgage insurance through FHA. These entities currently account for approximately 30% of the mortgage market. As the economy continues to struggle, this percentage could increase. Condominiums must now receive project approval in order for units to be eligible for these types of mortgages/mortgage insurance. Project approval requires compliance with a wide variety of requirements relating to the units, the status of construction, unit ownership and association finances, including the budget and the reserves. Project approval will also demand compliance with insurance requirements and a letter from legal counsel. The "legal letter" will issue after a review of the association's status as to compliance with law, both as pertains to the terms of the constituent documents and in operation of the condominium. Certain financial issues or the existence of litigation involving the condominium would trigger more substantial review.

Bottom Line: The changes will take effect on February 1, 2010 and, absent project approval, render condominium units ineligible for a large percentage of the products of the mortgage market. The approval process will take time, effort and approximately $3,000.00 in expenses. Associations that wish to remain eligible for these mortgages/mortgage insurance should prepare an action plan and a financial plan for managing this issue. Project approvals will last two (2) years. Thereafter, an association would need to seek re-approval.

"Avoiding Fraud"- This lecture presented various recent cases of fraud in associations, the elements of fraud and methods for avoiding it. Again, at least in part as a result of the struggling economy, fraud appears to be on the rise. Examples were provided of associations suffering fraud at the hands of professional property management, on-site employees and board members. Sample cases involvedfraud that occurred through straightforward theft, corruption, asset misappropriation and falsified financial statements. The "fraud triangle" predicts that fraud occur when: 1)pressure or incentive; is coupled with 2) opportunity; and 3) a rationalization for the act. A condominium cannot control the pressure or incentive or the rationalization of potential fraudsters. As such, condominium communities must protect themselves from fraud by seeking to minimize the opportunities for it. **Bottom Line:** Among other prudent measures for trying to minimize opportunities for fraud, associations should: segregate duties and require checks and balances as to financial statements; require dual signatures for withdrawals; segregate reserve funds; obtain duplicate bank statements or independently verify the financials; require financial reconciliation by someone other than the association's check writer(s); check actual invoices and receipts regarding payments to

vendors, etc.; reduce credit lines of any credit or debit cards used on behalf of the association; obtain appropriate insurance coverage; and have annual CPA reviews.

"The Insurance Audit"- This lecture provided an overview of the types of coverage that condominium associations need and the types of policies in which such coverage may be obtained. Distinctions between "imbedded" and "stand alone" coverage were discussed, as were "exclusions" and "buy backs". Other topics included "full replacement cost", "all risk"versus "specified perils", "deductibles", "pollution", "mold", "flood/windstorm", "umbrella", "fidelity" and "crime" as relates to possible insurance coverage. Of course, the interplay between the association's "master" policy and the unit owners' individual policies was also discussed. **Bottom Line:** Proper insurance is crucial if the association is to recover from a disaster, be it one of natural circumstances, property destruction or dishonest acts. Every association should take the time to thoroughly review coverage with their insurance agent in order to procure the policies, deductibles, buy backs, etc. that will best protect the association from the wide variety of risks faced by associations. Further, associations should require proper coverage relative to vendors, managers and unit owners in order to maximize the chances of full recovery in the widest variety of circumstances.

"Derivative Action Litigation"- Condominium unit owners wishing to sue the Association over issues of common rights or engage in litigation involving the Association's rights must do so through the derivative action process. The requirements for this process appear in both State and Federal Rules of Court. Among others, the potential litigant(s) must issue pre-litigation notices and demonstrate an attempt at resolving the issue. Thereafter, in filing suit, litigants must produce particular documents verifying compliance with the applicable rule. **Bottom Line:** Absent special circumstances, the authority to engage in litigation involving the association's rights is reserved to the governing board. If forced to defend a lawsuit, an association may quickly obtain dismissal of the claim(s) if legal counsel is able to demonstrate a failure of the litigants in their process relative to the derivative action rules.

"War Stories"- This lecture provided an overview of extreme cases. Whether we refer to the case in which the unit owner sent boxes of excrement to legal counsel and the judge, or that in which the attorneys received threats of physical harm, or the one in which a unit owner began running a firearms dealership out of his unit because the county involved did not require a permit, the reality is that extreme cases happen and they can be dangerous. **Bottom Line:** The association and/or legal counsel must take potential threats seriously. In dealing with threats or other extreme behavior, the association and/or legal counsel should involve the police and the municipal, state or federal agencies that may be necessary to address the issue.

Hopefully, you now feel as though you too have experienced the National Law Conference. If you were actually in Tucson when I was, you would have experienced record cold, steady rain, hail and a tornado warning, but that is another story...

Lobisser Offers Some Good News For Unfinished Condominium Developments

By: Scott C. Owens, Esq.

A decision of the Supreme Judicial Court last year in *Lobisser Building Corp. v. Planning Board of Bellinham* (SJC-10316), is welcome news for developers and associations of phased condominium developments in which construction may have stalled. In Lobisser, the SJC held that a special permit for construction of a phased condominium had not lapsed, even after an eighteen-year delay between phases.

In 1985, the Planning Board of Bellingham issued a special permit to allow the development of an 84 unit condominium development. The development was to be completed in four phases of 21 units each. The special permit provided that no more than 21 units be built in each of the four years following the approval of the permits, but otherwise placed no time limits on the project.

The 21 units of Phase I were completed in 1986. The 21 units of Phase II were completed in 1987. In 1988, as a result of sewer capacity issues, the project stalled. Even after the sewer issues were addressed in 1989, development of Phases III and IV did not resume.

In 2005, the association voted to revive the development rights that had expired under the Master Deed. The rights were sold to a developer who sought a modification of the original special permit to complete the remaining phases. The Board denied the modification, claiming that the rights under the special permit had lapsed.

Citing G.L. Chapter 40A, § 9 and the town by-laws, the Board explained that construction or substantial use must commence within a certain time after issuance of a special permit. In this particular case, the time limit for construction or substantial use was one year as set forth in the town by-laws.[1] The Board's decision stated that Phases III and IV had not commenced within the requisite time period and, thus, the special permit had lapsed as to those phases.

The developer filed suit challenging the Board's decision as to the lapse of the special permit. The Land Court agreed with the Board that the special permit had lapsed as a result of the failure to commence construction or substantial use of Phases III and IV.

On direct appeal to the Supreme Judicial Court, the SJC overturned the decision of the Land Court holding that the construction or substantial use requirement was not property applied on a phase-by-phase basis. Because the original developer had begun the first two phases within the requisite time period, the special permit had not lapsed.

In handing down its ruling, the SJC warned that nothing in its decision prevented boards from conditioning special permits on completion of all phases within a specified period of time. Further, the SJC suggested that delays in development of future phases may require the later phases to comply with newer density, use, building code and safety regulations that may not have been in place at the time the permit was approved. Despite the developer's successful appeal as to the lapse of the special permit, the developer was still required to go back to the Board for approval of its proposed modifications.

Given the limitations of the result in *Lobisser*, developers and associations of unfinished condominiums are well advised to review their documents and processes carefully. First, after this decision, boards may be more inclined to include time limiting language in the conditions of their special permits. Second, development rights that may not have lapsed under the zoning statute may nevertheless have lapsed under the condominium documents (or vice versa). Proper revival of development rights will be a key step to future development even if the permits remain valid. Finally, investigating the current zoning and building regulations to ensure that nothing has changed to render the project untenable will be an important part of a prospective developer's due diligence. Please contact us if you have any questions regarding these aspects of reviving stalled condominium developments.

[1] Had the by-laws been silent as to a time limit for construction or substantial use, the two year limit set forth in the G.L. Chapter 40A would have applied.

New Hampshire Supreme Court Rules That Landlord Cannot Disconnect Tenant's Cable

By: Christopher S.M. Driscoll, Esq.

In 1979, the New Hampshire legislature adopted RSA 540-A:3 which prohibits landlords from engaging in acts against their tenants that would force the tenants to leave the rental premises without going to the courts to get permission to evict the tenant. These types of acts are commonly known as "self-help," and both the legislature and the courts in New Hampshire have taken strong steps to curb these activates, which are seen as abusive and designed as an end run around the procedural rights afforded to tenants under the law.

RSA 540-A:3, I states that "[n]o landlord shall willfully cause ... the interruption or termination of any utility service being supplied to the tenant including, but not limited to water, heat, light, electricity, gas, telephone, sewerage, elevator or refrigeration...." In the case before the court, a landlord had cut off the cable to a tenant after they had filed for eviction proceedings in the local court and had learned from the cable company that the tenant was receiving cable through an "illegal" connection. The central issue decided was whether cable was a utility within the meaning of the statute. The court ruled that cable was such a protected utility, as cable is comparable to the types of utilities specifically mentioned as examples in the statute. The court went on to note that "many people access essential telephone service, the Internet, news information and entertainment by way of cable. The unlawful termination of a tenant's cable television service would be a means of accomplishing a self-help eviction, the very evil the legislature meant to deter."

Violations of RSA 540-A:3 can lead to the awarding of damages of at least $1000 per violation, plus attorney's fees and costs under New Hampshire's consumer protection statute. A knowing violation can lead to the court doubling or tripling the amount of the award. Each day the violation continues can be considered as a separate violation, and damages can be awarded for each violation.

The case citation is *Lally v. Flieder*, 2009 WL 3489392 (N.H.).

Massachusetts Appeals Court Holds That Homeowner's Association Dues Could Be Capped at $20 Per Year

By: Tricia L. Delbove, Esq.

In an unpublished opinion, the Massachusetts Appeals Court recently decided that homeowners' association dues could be capped at $20 per year based upon a restriction contained in the homeowners' deeds. In *Popponesset Beach Association, Inc. v. Duffy*, a homeowners' association brought suit against two homeowners to recover several years worth of unpaid association dues consisting of maintenance and improvement costs. The two defendants were among over 500 homeowners in the "private community" of Popponesset Beach in Mashpee.

The deeds contained a provision that required homeowners to contribute toward the annual expenses of the community based upon their proportionate share in the development. However, the provision specifically limited the contribution to $20 a year per lot. The actual language of the provision is as follows: By the acceptance of this deed, the grantees . . . agree to pay the grantor, its successors or assigns, their proportionate share to be determined on an equitable basis by the grantor, its successors or assigns, but not to exceed the sum of twenty dollars a year per lot of the annual expenses for maintenance, servicing and general improvement of the whole development . . . .

In addition, the developer also inserted specific language into the deeds that was intended to allow the developer (and later the association) to enforce, construe and modify this restriction. The association relied on this "modification provision" as a basis for increasing the homeowners' payment obligations above $20 year, per lot.

The defendants argued that they had a "right to rely on the twenty dollar ceiling spelled out in their deeds". The Massachusetts Appeals Court agreed stating that "[p]lain words are to be given their plain meaning." The Court determined that it would be inconsistent for the deeds to state that $20 is a maximum charge for maintenance, servicing and general improvement if the deed language could then be interpreted to allow the association to increase that charge.

The case citation is *Popponesset Beach Association, Inc. v. Duffy*, 74 Mass.AppCt. 1119, 2009 WL 1755970 (Mass.App.Ct.))(Unpublished Disposition).

Court Rules in Favor of Condominium on Parking Case

By: Charles A. Perkins, Jr., Esq

Recently, the Worcester Superior Court in a case entitled *The Board of Trustees of the North High Gardens Condominium Trust*, et al v. Jeanne Y. Curtis, et al, ruled that two (2) parking spaces which had been conveyed at the Association to a unit owner and then to a subsequent unit owner were actually unlawful and the same must be returned to the Association. In the *North High Gardens* case, the Association conveyed two additional units to a unit owner. When the unit owner sold the unit, he sold it with the initial parking space but held onto the additional three spaces. This went on for a period of approximately six (6) years. The Association took the position that since the spaces which were conveyed by the Association to the original unit owner were appurtenant to the unit, that the property interest was severed once the same was conveyed to a subsequent unit owner. The subsequent unit owner also made claim to the spaces.

The Court, in a detailed analysis of the prior law in effect to 183A and the current law concluded that the half law was in effect and a one hundred percent (100%) vote of the unit owners was required on behalf of the Association to convey the spaces to the unit owner.

This, of course, leaves open claims by the original owner for damages.

WHEN THE WALLS COME TUMBLING DOWN

What Should Happen After a Total Casualty Loss

By: Scott C. Owens, Esq.

A recent decision by a Real Estate Bar Association arbiter held that insurance proceeds to compensate condominium unit owners for a total casualty loss were to be first apportioned among the owners in accordance with their respective percentage interests before being applied to any outstanding lien obligations of the respective unit owners. Although the decision has no precedential effect, the decision provides the only guidance on an issue that has managed to avoid formal clarification in the Commonwealth.

In early 2009, a six-unit, townhouse condominium was entirely destroyed by fire. No approval of the unit owners was received to rebuild the condominium and the trustees commenced the process of partitioning and terminating the condominium in accordance

Continued

with G.L. Chapter 183A,§ 17(b)(1), which states that "net proceeds of a partition sale together with any common funds shall be divided in proportion to the unit owners' respective undivided ownership in the common areas and facilities."

Unfortunately, the term "net proceeds" is not defined in the condominium statute. This alleged lack of clarity presented an opportunity for the two condominium trustees, one was "upside down" on a unit and the other had little or no equity in another, to try to improve their financial situation.

The trustees argued that their role as insurance trustees required them to pay off the existing mortgages on all units before disbursing any proceeds to unit owners. They took the position that "net proceeds" in the statute were the proceeds remaining after the payment of all unit owners' mortgage obligations.

Represented by the attorneys of Perkins & Anctil, P.C., one unit owner led the charge to dispute the trustees' proposed action. The owner argued that each unit should be credited with one-sixth of the proceeds and that each owners' obligations should then be paid from that owners' one-sixth share.

Relying on the trustees' process would have resulted in an unfair windfall to those owners with higher loan obligations. Not only would they have received the benefit of increased debt relief, but they would have received an equal share of the net proceeds. Effectively, owners with lower debt loads would have been subsidizing the payment of those owners with higher debt.

The arbiter, retired Land Court Judge Leon Lombardi agreed with the owner's counsel. In his decision, Judge Lombardi cited several key provisions raised by the owner's attorneys.

First, the arbiter relied on the key principal of real estate law: an owner cannot give away any more rights in a property than he himself possesses. Thus, the mortgage rights given by the respective unit owners were limited to those owners' one-sixth interests in the common areas and facilities of the condominium. The mortgagees took their rights subject to the condominium documents, which set forth the respective percentage interests, and knew or should have know what they were getting as collateral.

Second, the arbiter relied on the numerous provisions of the condominium statute which require common expenses and common profits (and "common funds" after a casualty) to be apportioned among the owners in accordance with their respective percentage interests. Unit owners agree to pay their respective shares of common charges, but do not accept responsibility for the private loan obligations of their neighbors.

Third, the arbiter limited the "uncontrolled discretion" afforded the trustees by the By-Laws to only those matters not otherwise specified. While the trustees wanted to apply their broad discretion to the distribution of insurance proceeds, Judge Lombardi agreed with owner's counsel that the trustees had no discretion where the condominium statute and settled real estate law were clear.

The weakness of the trustees' case was highlighted in an exchange between Judge Lombardi and the attorney for the trust. Throughout the hearing, counsel for the unit owner insisted that adherence to the statute's scheme for distribution according to percentage interest was necessary to produce consistent results. Judge Lombardi asked how the trustees might distribute the proceeds if the units were unencumbered by mortgages. Instead of giving the obvious answer that the proceeds should be disbursed in accordance with percentage interests, the attorney for the trust suggested that the trustees would have the discretion to distribute the proceeds "equitably," looking perhaps at the purchase prices paid by respective owners for their units.

At the end of the day, Judge Lombardi rendered the only decision that would protect unit owners from overreaching trustees and would provide predictability to the post-casualty process for winding up a condominium's affairs.

Please feel free to contact the attorneys of Perkins & Anctil, P.C. if you have any further questions regarding this decision.

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

Perkins & Anctil PC
6 Lyberty Way, Suite 201
Westford, Massachusetts 01886
Perkins & Anctil PC
978-496-2000