*Winter 2016*

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

LAW QUARTERLY

**IN THIS ISSUE**



## ANNOUNCEMENTS

Perkins & Anctil is pleased to welcome Attorney Rhonda L. Duddy to our Real Estate Department. Rhonda brings over 20 years of real estate conveyancing experience to the Perkins & Anctil Real Estate Team. We are honored to have Rhonda on board and believe she will be a considerable asset to all our clients.

**Thursday, April 28, 2016 A powerful "How to" Seminar Designed to help Realtors Grow Their Businesses.** Learn how to increase the volume of your real estate brokerage business from experts who specialize in marketing and advertising for realtors. Location: Northeast Association of Realtors, 6 Lyberty Way, Suite 204, Westford, MA 01886 Call Perkins & Anctil at 978-496-2000 to register.

## Water is Coming

**By: Scott Eriksen, Esq.**

The *Game of Thrones* fans among you will have heard the ominous words of House Stark, "*Winter is Coming*," used to warn against the imminent cold and precipitation of everyone's favorite season. Just as they do in George R.R. Martin's epic fantasy series, these words herald an unpleasant truth for many community associations and managers alike: winter will bring bitter, freezing temperatures, ice and snow. Yet as all managers and boards know, it is the water associated with winter that has proven to be the real enemy to owners across the Northeast, particularly during last year's unprecedented snowfalls.

Guarding against this winter, and the water, is of paramount importance to all our clients, and one area of particular vulnerability is abandoned or vacated units. Forsaken or neglected units, which may be owned by banks, often present a considerable understated threat to communities. In associations where units are conjoined or attached, freezing temperatures can burst pipes and sprinkler lines in areas adjacent to these empty units. The damage from these bursts is seldom confined to the empty unit alone, typically permeating to other units or common areas.

It is important that associations and managers identify and properly stabilize these units to avoid water damage, but access can be tricky and laden with traps for the unwary. Can the association or agent simply barge in and turn on the heat? What if the owner returns and claims (truthfully or not) that property is missing from the unit? What if that property is irreplaceable – a family member's Medal of Honor, priceless artwork or other heirlooms? How can proactive associations and managers shield themselves from the potential liability associated with such claims?

For starters, the good news is that both the Massachusetts Condominium Act (M.G.L. c. 183A) and most condominium documents authorize associations and their agents to enter into units in order to address health and safety emergencies and to take certain preventative or remedial action. Specifically, M.G.L. c. 183A, Section 4(2) provides that "[t]he organization of unit owners, its agent or agents shall have access to each unit from time to time during reasonable hours for the maintenance, repair or replacement of any of the common areas and facilities therein or accessible therefrom or for making emergency repairs therein necessary to prevent damage to the common areas and facilities or to another unit or units…" In the face of quickly dropping temperatures, we advise clients that they may have the immediate authority to enter a unit and take necessary remedial action under the terms of the documents and applicable law.

However, very rarely if ever will the access provisions in the governing documents fully protect an association from potential claims by the unit owner related to trespass, damage to personal property or theft. The most conservative course of action to protect oneself against such claims would be to obtain a court order to enter and act. Unfortunately, however, court action is also likely be more costly and less expedient than proceeding in reliance on the provisions of the condominium documents.

If an association does not elect to obtain a court order, and intends to rely on the provisions of its documents and applicable law, we strongly suggest that the association comply with the following procedure:

1. Send notice. The first step in the process, except perhaps in extreme emergencies, should be to send notice to the owner/bank of the intended access/preventative work. To the extent that the governing documents call for a specific time period, consider whether this is realistic in light of the threat of water damage and modify the notice as necessary.

2. Obtain a locksmith. This will prevent damage to the unit upon entering and allow you to secure the unit afterwards, which is something that should also be done.

3. Obtain a police detail or private security guard. An objective, third-party individual will be will be extremely valuable if the unit owner attempts to claim that the unit or their belongings were damaged or are missing. Be sure the "guard" is there to witness the entire event from opening the unit to securing it upon completion. Be sure that they see everyone entering and exiting the unit and whether or not they are carrying anything in the process. Be sure that they know you will require an affidavit, after-the-fact, stating that they were there, witnessed the entire event and can verify that nothing was damaged or taken during the process.

4. Bring a camera. Video is best, but photographs are an acceptable alternative. Use the camera to create evidence of the condition of the unit as you found it and as you left it. Use the camera only on areas visible in plain sight within the unit and do not release the images.

5. Minimize the personnel involved. Beyond property management and/or board members and the "guard," limit the people involved to those necessary for performance of the required work. Be sure that any vendors document their own invoices well and enter, perform services and exit as efficiently as possible.

We realize that taking all of these steps requires time, effort and expense, and that the association may be restricted in light of emergency situations. However, we believe these steps are minimal compared with the time, effort and expense of dealing with a potential claim.

## Disaster Assistance Equity Act

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

**Attorney Charlie Perkins Requests Readers to Contact Their U.S Representatives About the Disaster Assistance Equity Act, HR 3863.**

Charlie forwards this email from the Community Associations Institute's Government Affairs Department:
Representative Steve Israel (NY) is the lead sponsor of the **Disaster Assistance Equity Act,** H.R. 3863. This bill amends the Stafford Act to provide assistance for common interest communities, condominiums,

and housing cooperatives damaged by a major disaster. **Please contact your Member today and ask them to contact Representative Israel's office today to become a co-sponsor of H.R. 3863**, so this legislation may move forward and provide the critical relief to community associations in time of a disaster.

The Stafford Act is the governing authority for federal disaster response programs administered by the Federal Emergency Management Agency (FEMA). The Act provides FEMA an expansive toolkit to support state and local government disaster mitigation, planning and response operations. It also establishes FEMA as a key partner for state and local governments in long-term disaster recovery, helping devastated areas rebuild stronger, safer and more resilient communities.

FEMA has failed to adapt its programs to the changing patterns of community development and consumer housing preference. Community association housing is one of the fastest growing forms of home ownership. Across the nation, close to 70 million people live in a condominium, housing cooperative or homeowners association. FEMA has failed community associations by inconsistently interpreting regulations that prohibit associations from qualifying for funding for federal disaster response and recovery programs. Community association homeowners pay the same federal taxes and are denied FEMA funding, while those not living in community associations eligible. This legislation is critical for creating fairness in the wake of a federally declared disaster. **Please urge your Member to contact Representative Israel's office today to become a co-sponsor to H.R. 3863.** Thank you for taking action on this.

## Who's the Boss? Joint Employer Liability Risks

**By: Kimberly A. Alley, Esq.**

The landscape of employment law changed greatly over the course of 2015. With the enactment of the Earned Sick Leave Law, Parental Leave Law and Domestic Violence Leave Law, Massachusetts' employers face increased compliance obligations and liability risks. These risks are further compounded by a National Labor Relations Board ("NLRB") decision which expanded the scope of liability for employers to include the potential for two employers to be held jointly liable for an employee's claims.

In *Browning Ferris Industries of California*, the NLRB concluded that two distinctly separate employers were jointly liable to certain employees because the employers shared sufficient control over the essential terms of employment. *Browning Ferris* concerned collective bargaining relative to maintenance service employees at a recycling company that contracted with a staffing services company for the employees.

For the first time, the NLRB considered "indirect control" to be the main factor in determining whether a joint employer relationship existed. This decision reflects a drastic departure from decades of established precedent. Specifically, the NLRB found that a company may be a joint employer of a single workforce if they have the opportunity to share or codetermine matters governing the essential terms and conditions of employment.

Prior to this decision, two employers were determined to be joint employers only when they exerted such direct and significant control over the same employees that they shared or co-determined matters concerning the essential terms and conditions of employment. Direct control included the right to hire, fire, discipline, supervise and direct employees. Such control had to be actual, direct and substantial. Indirect control was not previously a factor for imposing employer liability.

Now, pursuant to the NLRB, "otherwise sufficient control exercised indirectly – such as through an intermediary – may also establish joint employer status." Any employer that indirectly determines the number of workers for a project, assignments, scheduling, overtime, or the manner and method of performance may be subject to joint employer liability. Moreover, simply reserving the right to control an employee's conduct is sufficient to create a joint employer relationship for purposes of liability – regardless of whether that control was ever exercised.

This conclusion creates a very slippery slope for employers such as condominium associations and property management companies that jointly direct a pool of condominium service employees. Contractual provisions between

the association and property management company concerning control of custodians, landscapers or other certain employees, as well as informal arrangements that allow both to determine performance aspects relative to such employees, may result in unintended joint employer liability.

This decision also creates the potential for small employers with 6 employees or less to be subject to discrimination charges in the Massachusetts Commission Against Discrimination ("MCAD") at no cost to the employee. Traditionally, employees of companies with fewer than 6 employees were required to file a discrimination lawsuit at their own cost against the employer. Employees now may assert joint employer liability and claim that the MCAD's 6 or more employee requirement is satisfied by the combined number of employees of both employers.

The precise effect of the *Browning Ferris* decision on Massachusetts employment matters is yet to be seen. 2016 will likely bring clarification concerning just how far Massachusetts is willing to extend such joint employer liability for indirect control. In the meantime, employers who may appear to share control over employees will need to be mindful to clearly establish the employment relationship – or lack thereof – to minimize their joint employer liability risks.

If you have concerns over specific joint employer risks or other employment issues within your company, please feel free to call our attorneys to discuss further.

## Service and Support Animals Survey

We all know that a dog may be one man's best friend, but to many condominium associations a dog can be a hassle, nuisance or even a liability.

Visit our web site to read more and participate in our survey.

### 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.
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