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

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IN THIS ISSUE

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

Announcement

Saturday, September 22, 2018, 8:00AM – 12:00PM

Perkins & Anctil is pleased to present our annual **Condominium Roundtable Seminar**. Have recent changes in state legislation brought to light new problems for your condominium association? These and other timely issues are on the agenda.
Location: The Westford Regency, 219 Littleton Road, Westford, MA 01886
Visit our website at www.perkinslawpc.com for more information and to register.

Massachusetts and New Hampshire – The Legislature Never Sleeps…

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

Both the New Hampshire and Massachusetts Legislatures have been busy lately. The New Hampshire Condominium Statute known as 356:B has been amended in three different Sections.

The first amendment pertains to ballots and requires that ballots be cast during the vote of the association and they should be counted using a tally sheet. Also, the amendment to the statute requires that ballots and tally sheets must be made available for examination upon a request for a recount by any owner participating in the vote immediately following the announcement of the results. During any examination or recount, one or more members of the Board of Directors and at least one additional owner, other than the requesting parties, shall be present.

The second change clarifies if a vote of the unit owners is required in the event of any emergency special assessment. Prior to this amendment, upon receipt of a vote by 2/3 of the members of the Board, the Board was able to promulgate a special assessment in the event of an emergency, without a vote of the unit owners. The New Hampshire legislature has defined an emergency as a situation that requires immediate action by the Board of Directors when a danger to the structural integrity of the common areas is discovered or the life and safety of unit owners is a risk or is required by a court order to respond to any legal or administrative proceeding brought against the association which could not have been reasonably foreseen by the Board when preparing and distributing the annual operating budget.

Finally, the New Hampshire legislature closed a loophole which was created as a result of the case known as Lilac Lane Unit Owners LLC. This case allowed a developer to avoid the time limitations set forth for conversion of convertible land by simply failing to use statutory terms for future developable land. The amendment to the New Hampshire condominium statute prevents a developer from possessing open ended development rights. It also prevents the developer from assessing unit owners with a tax burden for convertible space which a developer could theoretically leave unconverted for a limited period of time.

The Massachusetts legislature has also been busy and unfortunately for condominiums, two of CAI's bills which would have dealt with construction defects and anti-litigation provisions did not pass. The Legislative Action Committee (LAC) was surprised as it was informed that at least one of these bills looked like it would make it to the Governor's desk. It appears that these bills were delayed with many other bills out of some internal struggles between the House and Senate and time simply ran out. However, the LAC hopes that it still may be able to secure passage of one or both of these bills through the informal session process, geared toward non-controversial matters, which is scheduled to take place twice per week for the rest of the year.

The LAC was successful in opposing

a number of bills which did not get passed including the clothes line bill, the Ombudsman bill, and the electrical vehicle charging stations bill.

Helping Residents Help Themselves

By: Scott J. Eriksen, Esq.

Condominium living at its best is a community of neighbors with common interests sharing costs and cooperating to enhance their property values and quality of life. Oftentimes, unfortunately, it is something less than this idyllic notion. Sometimes, far less.

Over the years, I have handled many cases involving individuals who have repeatedly made life miserable for those around them. Noise, nuisance, human waste, you name it – some folks are just not fit for condominium living. Yet of all of the issues that we've handled, some of the most challenging involve the aggressive personalities. The bullies. The problem, from an association standpoint, is that oftentimes the bully is not really an association problem in the sense that his or her actions are targeted against a single owner or family.

From a board's perspective, these can be very challenging cases. It is true that a board has an obligation to enforce the covenants and restrictions set forth in the governing documents and to be sure that the condominium is not a hostile environment, but inter-owner exchanges can be difficult to substantiate. Many times, the evidence is of the "he-said, she-said" variety, and the exchanges between the parties cut both ways. We advise boards to be cautious about committing resources to one-on-one disputes, or to weaponize condominium enforcement procedure for the benefit of a single owner without compelling evidence of violations. But how does a board deal with a case where there is no dispute that one individual has very clearly violated multiple covenants and rules and enforcement action is proper.

For the purposes of this article, and to protect the innocent and not-so-innocent, I've created a hypothetical Mr. Hyde based upon real-world examples. Consider this: Mr. Hyde has made it his mission to do everything in his power to upset his downstairs neighbors. In the beginning, it was loud stomps around the apartment at all hours and a complete disregard for quiet time rules. When the neighbors below him politely asked him to rein in these activities, he berated them with vulgar language and decided to target them for having challenged him. The noises continued (worsened, even) and then when the same residents complained to the board and a letter went out from the association, Mr. Hyde visited the neighbors below in response. He banged on their door and threatened them with harm if they reported him again. Later, when they were at the common area pool, he approached them and cursed at them in front of their young children. The victims, understandably upset and frightened, implored the board to take further action. So the board initiated legal action to enforce the documents.

Unfortunately, the action by the association to enforce the governing documents alone does not satisfy the victims of Mr. Hyde's antics. They continue to suffer from his behavior, are afraid to use common amenities, and have suggested that if the board does not resolve the issue soon, they may have to bring an action against the association. This is also something that we often see: one unit owner complaining that the association is not doing enough to curb the bad behavior of another.

What else can the association do, the board asks? They've already initiated suit against Mr. Hyde and even obtained an injunction to prevent his violations. The fact that he persists in his campaign of terror troubles the board, certainly, but they are not law enforcement nor should they assume such responsibility.

In these cases, it is important that the board remain vigilant and diligent in the context of covenant enforcement, but that may not be enough. We have found that the most effective way to combat aggressive or threatening behavior like this is not to leave it to the board alone, but to prompt the victim to become an ally in the fight as well: to help the victim help himself.

One very useful tool in this context can be the Harassment Prevention Order. Massachusetts General Laws c. 258 allows individuals to obtain protective orders if they are suffering from certain harassment, including: "three or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property"; or, "a single act that by force, threat or duress causes another to involuntarily engage in sexual relations"; or, "a single act that constitutes one of 12 enumerated crimes involving sexual assault, stalking or harassment."

Most often when I have seen or suggested relief under this statute, it has been premised on situations involving "three or more acts of harassment". In such situations, the individual seeking the order must prove that: (1) there have been three or more acts; (2) each act was aimed at him or her and was willful and malicious; (3) the acts were done with the intent to cause fear, intimidation, abuse or property damage; and (4) the acts *have in fact* caused fear, intimidation, abuse or property damage. If the court finds that the complaining party can meet its burden of proof on these elements, the statute provides that

the judge may issue orders directing the violator: (1) to refrain from "abusing or harassing" the plaintiff; (2) not to contact the plaintiff; (3) to remain away from the plaintiff's household or workplace; and/or (4) to pay restitution for directly-resulting losses.

In my experience, residents suffering from consistent abuse perpetrated by another resident have been successful in securing a 258E order in appropriate circumstances, and that these orders afford more compelling leverage to the benefit of the victim than action by the association alone. In one case on which I worked, a resident was successful in securing a 258E order against his upstairs neighbor for ongoing noise and nuisance issues. When the defendant subsequently persisted in the offending behavior, the local police department arrested her for violation of the order and she was ultimately tried and convicted of multiple criminal violations and prohibited from residing at the condominium. From the association's perspective, the outcome was a boon: the owner who suffered most at the hands of this violator was able to secure more effective relief quickly and at no direct cost to the community at large. In summary, while boards should always take complaints of violations seriously and take appropriate measures to enforce the reasonable restrictions set forth in their governing documents, they need not go it alone when it comes to all violations. Enlisting help of those who stand to suffer the most harm is an important and effective way of sharing responsibility for bad actors and securing a swift and acceptable outcome.

The New Pay Equity Law is Now in Effect – Are You Ready For It?

By: Kimberly A. Alley., Esq.

In 1945, Massachusetts became the first state to pass an equal pay law. On July 1, 2018, Massachusetts drastically expanded that law with the enactment of the Pay Equity Law. This law requires all employers to take immediate steps to ensure comparable positions pay men and women equally. It also prevents employers from asking job applicants about their salary history before extending an offer. The law imposes substantial penalties.

Under the new law, an employee can sue his or her employer if paid less than a member of the opposite sex for comparable work. If successful, the employee is entitled to recover twice the difference in compensation, as well as all attorneys' fees and costs. The legal fees alone can be substantial even if the difference in compensation is not.

The new law expands equal pay requirements and dramatically broadens the definition of "comparable" work. The act defines jobs as comparable if the tasks require substantially similar skill, effort, and responsibility and are performed under similar working conditions. A disparity in compensation paid to male and female employees for comparable work will be deemed a violation unless the employer demonstrates that the disparity stems from 1 of the following 6 factors: (1) a compensation system based on seniority, (2) a merit-based compensation system, (3) a compensation system based on productivity, (4) differences in job-related education, experience, or training, (5) geographic location, or (6) travel requirements.

The good news for employers is that the new law contains a safe harbor provision that allows employers to protect themselves proactively by conducting self-audits and instituting corrective measures to remedy the disparities. Pursuant to the safe harbor provision, an employer has an affirmative defense if it has conducted a good faith, reasonable self-evaluation of its pay practices within the previous three years and before the filing of a civil action.

The Massachusetts' Attorney General's Office recently released guidelines for employers to assist in their understanding and compliance with the new law ("Guidance"). The Guidance clarifies the new law, including the following issues:

- The law applies to ***all employers*** regardless of location or size with employees in Massachusetts except employees of the Federal Government.
- The law applies to all employees who work primarily in Massachusetts regardless of hours worked, state residency, telecommuting or other position status.
- Calculations of equivalent benefits may include the value of benefits the employee does not take advantage of (such as health or life insurance, tuition reimbursement, or retirement contributions).
- Differing pay rates may not be corrected by bonuses or other benefits.
- Part-time and full-time employees may receive differing hourly rates and benefits.
- An employer may inquire about a job applicant's ***desired*** compensation ***but not past wage*** history.

- An employer may show "reasonable progress" toward eliminating unlawful pay disparities in defense of a claim if it demonstrates it has taken meaningful steps after self-evaluation based on the nature and degree of progress in relation to the scope of disparities, employer's size and resources, and ability to eliminate disparities altogether within reasonable time.

If you have not taken steps to ensure your business pays comparable employees equally, it is imperative to do so immediately to protect your company from costly claims. Please contact Attorney Kim Alley at Perkins & Anctil, P.C. if you need assistance in conducting a self-evaluation or have questions concerning the new Pay Equity Law.

HUD Liability for Creating a Hostile Environment and Act of Discrimination

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

Are you concerned about your Association's liability in the event it fails to take action when a sex offender/dangerous person occupies a unit in your community?

This specific set of circumstances happened recently at an association on Cape Cod resulting in a claim against the Association by a unit owner for failure to warn residents about the sex offender.

The Association attempted to remove itself as a party to action by filing a motion for summary judgment. However, while the Court did not find the Association directly liable in this case, it allowed the matter to proceed to trial. This decision calls in to question the potential liability of Associations and their obligations under the HUD *quid quo pro* hostile environment rule.

In 2016, HUD adopted a rule which imposed liability on the associations under certain circumstances where a third party commits harassment in a situation where age or gender are not a factor. The Federal Legislation Action Committee has opposed this rule and provided HUD with a White Paper arguing its position in opposition to this rule.

CAI stated its belief that HUD has abandoned a long-standing precedent where courts require a demonstration of intent to discriminate in certain fair housing complaints, which is a significant departure from established jurisprudence resulting in increased exposure to associations where none previously existed.

CAI advocates two substantial positions. The first of which pertains to a case where it was determined by HUD that a defendant in a *quid quo pro* hostile environmental case must have acted with a discriminatory motive or intent to be liable for hostile environment housing discrimination

Second, absent dealing with the aforementioned issue, CAI asked HUD for guidance regarding three specific issues.

1. Clear communication of association liability under the rule;
2. A description of lawful acts an association may take to comply with the rule; and
3. A description of any discriminatory actions HUD does not intend for associations to follow in order to comply with the rule.

This is a potentially significant area of liability and we will continue to monitor this type of legislation on behalf of our condominium clients.

About Our Law Firm

Perkins & Anctil, P.C. is a leading firm in all facets of real estate law. Our diverse experience includes all aspects of condominium and community association law, real estate conveyancing (including the representation of numerous local and national lenders), developer representation (from the municipal approval process through the sale of property), landlord-tenant matters and real estate litigation. In addition we offer years of industry experience in general litigation and bankruptcy cases, as well as the full spectrum of employment related matters. Our attorneys have been acknowledged for their expertise in Massachusetts and New Hampshire. We encourage you to set up an initial complimentary meeting with us.
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