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

SAVE THE DATES!

Saturday, September 28, 2019, 8:00AM – 12:00PM
Perkins & Anctil is pleased to present our annual **Condominium Roundtable Seminar**. Understand hot legal topics, insurance issues, electric car charging stations, solar energy and more. These and other timely issues are on the agenda.
Location: The Radisson Hotel & Suites, 10 Independence Dr, Chelmsford, MA 01824

The Massachusetts Appeals Court Reaches A Practical Conclusion Concerning Lender's Rights after Developer Defaults.

By: Robert W. Anctil, Esq.

On May 15, 2019, the Massachusetts Appeals Court held in *Trustees of the Beechwood Village Condominium Trust v. US Alliance Federal Credit Union* ("*Beechwood*") that where the holder of a mortgage partially releases its construction mortgage on individual condominium units, the release acts as a discharge of the unit and the common areas of the condominium. As such, the lender's partial release of the developer mortgage prevented the lender from exercising its rights to develop the remaining unbuilt condominium units.

The question presented in *Beechwood* was what right does a lender retain when the developer defaults on a mortgage where the lender issued partial releases on the individual sold units. In *Beechwood*, *US Alliance Federal Credit Union ("Lender")* granted a mortgage in the amount of 4.7 million dollars. The developer constructed the infrastructure, created a master deed and sold 54 of the 79 of the age restricted single family detached condominium units for this association located in Rockland, Massachusetts.

The developer sold the first unit in 2007 and by 2011 all development ceased despite the remaining 25 unsold units. Since the infrastructure is substantially complete, the right to develop the remaining units is a very valuable asset. The condominium association filed suit in the Massachusetts Land Court for the purpose of determining whether it or the lender had the right to develop the remaining condominium units. The Land Court determined that the lender had the right to construct the remaining units. The Land Court reasoned that the Lender's partial discharge of the mortgages released only the individual stand-alone lots (units) where the houses were located, but not the associated common areas where the future lots (units) would be built. The Beechwood Condominium Association appealed the Land Court decision and the Massachusetts Appeals Court reversed.

The *Beechwood* case raises interesting legal issues with potentially serious consequences for purchasers of new condominium units, builders and lenders. In this case, if the condominium association obtains the required votes, it will be able to complete the development and sale of the remaining units.

By way of background, in Massachusetts, the superiority of recorded documents follows a first in time priority regime. As such, a first mortgage will have priority rights over all other subsequently recorded documents. Often times priority rights focus on payment obligations of the respective mortgage holders. However, this is not always the case. For example, where a landowner grants its neighbor an easement to access property, if a lender's mortgage is recorded prior to the recording of the easement and the lender forecloses, the easement would be eliminated.

In *Beechwood*, the lender granted the developer a mortgage, the developer built the infrastructure, constructed some of the units, recorded the master deed, and sold 54 units. After the sale of each of the individual units, the lender issued a partial release of its mortgage. The Lender argued that since the mortgage was recorded prior in time to the master deed, the lender had the right to foreclose. In addition, the lender argued that its partial releases acted to discharge only the individual unit and not the associated common areas.

The Association argued that if the Appeal's Court were to rule for the Lender, that the after recorded master deed would be eliminated. Had the Appeals Court ruled in favor of the lender, the rights of all of the unit owners would be placed in doubt, including the mortgages granted on these units to the individual purchasers.

The Beechwood Condominium Trust argued that the lender's release acted as a release of all its mortgage interest in the common areas. It based its position on the fact that all of the unit deeds included an undivided interest in the common areas and the lender granted a partial discharge of its mortgage on the units which, by definition in the master deed, included an interest in the common areas. The Appeals Court agreed with Beechwood.

The situation presented in *Beechwood* is generally avoidable through the creation of what is called a "subordination agreement." A subordination agreement is a document signed by the lender and the developer which acknowledges that the lender's mortgage does not have priority over the subsequently recorded master deed. In essence, the subordination agreement acts to alter the traditional recording priority system as discussed above. With a subordination agreement, a foreclosure of the developer's mortgage does not eliminate the master deed.

At Perkins & Anctil, we have represented countless developers and lenders of new construction condominium associations. Whether representing a developer or a lender, we always insist on subordination agreements. It is our opinion that subordination agreements protect the interests of the developer, unit owners and all lenders providing financing. As to developers, a subordination agreement allows buyers to purchase units without fear that a foreclosure will eliminate the master deed. As to the lenders, P & A is careful to ensure that the lender's interest includes property rights and very broad development rights. Proper drafting of the documents places all parties on notice of their respective rights.

The consequences of the *Beechwood* decision are significant. If the Appeals Court were to decide in favor of the lender, all financing for individual units may have stopped. Simply put - a lender cannot risk financing a unit where the master deed could be eliminated through foreclosure. In addition, lenders for developers are put on notice of the importance of drafting proper provisions to protect their rights should the developer default.

P&A would like to acknowledge the efforts of fellow Community Association Institute Attorneys Ellen Shapiro and Thomas Moriarty for their well-earned victory on behalf of Beechwood.

The New Paid Family and Medical Leave Act: Here's What You Need to Know… and Fast.

By: Kimberly A. Alley, Esq.

It's called the "Grand Bargain" and was signed by Governor Charlie Baker into law in June 2018. The new Paid Family and Medical Leave Act ("PFML Act"), M.G.L. c. 175M, creates a statewide program for eligible employees to receive up to 12 weeks of paid family leave and up to 20 weeks of paid medical leave, with a maximum of 26 total family and medical leave weeks in a benefit year.

The leave program is funded through a state wide trust fund created by premiums paid by employees, employers and the self-employed. It applies to all employers with more than one employee, although employers with private paid family and medical leave benefits and protections that provide equivalent or greater benefits than the PFML Act may apply for an exemption from the law.

<u>Critical Dates</u>:

First and foremost, it is critical to be aware of the impending deadlines. Although the new law initially required certain deadlines which began as early as May 31, 2019, the Massachusetts Department of Family and Medical Leave ("DFML") granted a brief reprieve of those deadlines in early May 2019.

Currently, employers are required to notify their current employees and certain independent contractors by June 30, 2019 of the new law. Failure to do so may result in a $50 per employee fine for the first offense and a $300 per employee fine for subsequent violations.

Employers seeking an exemption from remitting first quarter PFML contributions based on their equivalent private leave programs now have until September 20, 2019 to apply for *and obtain* DFML approval for the exemption. This extension, however, only applies to first quarter contribution exemptions and *only to employers with approved requests*. An employer who does not apply for an exemption or whose application for exemption is denied must still begin contributions on July 1, 2019.

Employees will be eligible to take PFML leave for most covered conditions on January 1, 2021, and for all conditions by July 1, 2021.

<u>How the Program is Funded</u>:

A state-wide Trust Fund will provide funding for the leave. Contributions to the Trust Fund will be made by employers who are required to establish withholding from payroll contributions. Initially the contribution rate will be .63% of all employee wages or other qualifying earnings. An employer is required to make the payroll deduction from all employee wages and amounts paid to IRS Form 1099 Independent Contractor workers if they make up more than 50% of the employer's company workforce. Of this .63% contribution, .52% is allocated to fund medical leave benefits and .11% is allocated to fund family leave benefits.

Employers with fewer than 25 employees may deduct the entire .63% contribution from the employees' wages. Employers with 25 or more employees, however, must bear a portion of the medical leave contribution. Those employers may deduct the full family leave contribution of .11% from employees' wages, but no more than 40% of the .52% medical leave contribution from the employees' wages.

<u>Key Provisions</u>:

The PFML applies to all non-governmental employers and employees without any minimum requirements as to period of employment or work hours. It also applies to independent contractors if more than 50% of an employer's company workforce consists of such IRS Form 1099 contractors.

To receive benefits, an employee must have cumulatively received wages from all employers during the 12-month period prior to their application that equals or exceeds 30 times the employee's weekly benefit amount, and

equals or exceeds $4,700. Former employees remain eligible for PFML if their leave start date begins within 26 weeks after termination of their employment.

Beginning in 2021, covered employees will be eligible to take up to 26 total weeks of paid leave in a benefit year as follows:

Up to 12 weeks of family leave for the birth, adoption, or foster care placement of a child; to care for a family member with a serious health condition, or because of a qualifying exigency arising out of a family member's active military duty orders.

Up to 20 weeks of medical leave for the individual's own serious health condition. Upon to 26 weeks of family leave to care for a family member with a serious injury or illness incurred or aggravated in the line of military duty.

The weekly benefit amount will be based on a formula that considers the employee's own average weekly wage and average weekly wages throughout the state. The initial maximum benefit will be capped at $850 per week.

PFML will run concurrently with other types of statutory leave such as the program created by the Federal government entitled Family Medical Leave Act ("FMLA") and Massachusetts parental leave. It may be taken intermittently except for bonding with a child following the birth, adoption or foster care placement. If the leave is foreseeable, an employee must provide at least 30 days-notice before beginning or returning from the leave. Employers are not required to allow employees to continue accruing vacation or sick time during a PFML absence.

The PFML provides employees with job protection during their leave. Upon return, an employee must be restored to the same or an equivalent position with the same status, pay, benefits, length of service credit and seniority.

Actions For You:

It is essential that employers are prepared for the rapidly approaching implementation of the new PFML Act. You must act immediately to properly notify your employees and all applicable independent contractors in writing of the new law by no later than June 30, 2019.

You also must begin making the required contributions to the Trust Fund by July 1, 2019, unless your company has applied for *and received* an exemption. You have until September 20, 2019 to apply for and receive an exemption, but if denied, you are responsible for contributions beginning on July 1, 2019.

Contributions for the first quarter are due to be remitted to the Commonwealth by October 31, 2019. Employers must register with the Mass Tax Connect system to remit contributions and file quarterly reports.

It is crucial that your company is fully educated about the new law and remains alert for the final PFML regulations. Please contact Attorney Kimberly Alley at Perkins & Anctil, P.C. if you need assistance with drafting notices or otherwise ensuring your company's compliance with the new PFML Act.

Aging Community Issues from The 2019 CAI Annual Conference and Expo: Community Now

By: Scott J. Eriksen, Esq.

In May of this year, I was fortunate to attend the 2019 CAI Annual Conference and Expo in Orlando, Florida. The event, bills itself as "the only event tailor-made for community association leaders and professionals," where attendees from across the country "discover worldwide trends and issues shaping today's community associations, managers, and management companies right now and learn how to apply new ideas and strategies as soon as [they] get home."

The Conference offered an illuminating and engaging opportunity to hear from managers and board members from around the nation as to how they deal with the types of issues, many of which my clients face each day. The sense of commonality in the joys and challenges we all experience as community association members, managers, or professionals is particularly fulfilling for me – and the hope that we can all share perspectives and wisdom to improve upon the interactions of others is an ideal to which our firm holds fast.

In the spirit of sharing insight, I wish to offer some of my notes and thoughts from the lecture that I co-presented with Attorney Ellen Shapiro (of Goodman, Shapiro & Lombardi, LLC). The program, entitled "*Navigating Unique Challenges Facing an Aging Resident Population*" highlighted the unique considerations and challenges facing residents, board members, and managers of aging communities (particularly 55+ and other age-restricted communities). It was a pleasure to speak before managers, board members and other professionals, and to participate in an interactive dialogue about these important issues.

We spoke, for example, about the "Boomerang Child" and how policing age restrictions can be an uncomfortable (but important) task for board members. We also lamented the "Failing Fire Risk" and the many sad incidents of "warehousing" where individuals who are not well suited to independent living can create a nuisance (or worse, danger) for their neighbors. The audience participation element of the presentation was particularly rewarding for me, as it was both affirming and edifying to hear how others, throughout the country, have handled some of the same problems that my clients deal with on a regular basis.

What follows is a brief summary of the lecture component of our presentation. Should any of our readers be interested in our *PowerPoint* or outline handout from the conference session, we would be happy to provide them to you.

The United States Population is Aging… and Community Associations are Too!

According to U.S. Census data, by 2030, all Baby Boomers will be older than age 65. This will expand the size of the older population so that ***1 in every 5 residents*** will be retirement age, by 2030.[1] Aging Boomers means that within just a couple of decades, older people are projected to

[1] See https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html.

outnumber children for the first time in U.S. history according to the U.S. Census Bureau.

People aren't the only ones getting older, their properties are too! The median age of owner-occupied homes is 37 years.[2] We also discovered that while newer homes are more likely to be owned by younger generations, homes built before 1980 are mostly owned by Baby Boomers (age 55 or older). Now, for individuals, age may just be a number, but for community associations, aging populations and aging infrastructure can lead to some really unique challenges.

HOPA and the Establishment of Aging Communities

The Housing for Older Persons Act of 1995 ("HOPA") went into effect on December 28, 1995. As many of you may already know, HOPA amends the federal Fair Housing Act to effectively permit community associations to discriminate on the basis of familial status in housing, by requiring that residents be of a certain age (typically 62+ or 55+). An association's "age-restricted" status may be a considerable draw for those looking to retire in a community of similarly situated individuals, but there are important considerations for board members and managers of these communities to remember.

Among these considerations, is the requirement that communities conduct age verification surveys. Under HOPA, 55 and over communities must, at least every other year, determine the occupancy statistics of each unit, and identify that at least one occupant of each unit is 55 years of age or older. Copies of the reliable documentation evidencing that the requirement has been met must be retained by the association. The failure to properly enforce and confirm the age-restrictions can lead to a loss in the protections under HOPA, and thus jeopardize the association's status as an "age-restricted" community.

Boards should also be aware of local restrictions or covenants in the condominium documents that impose more stringent requirements than HOPA. These requirements may be stricter in terms of who can and cannot lawfully own or reside at condominium units.

Health and Safety Concerns at Aging Communities

As alluded to above, combining aging residents with aging properties can create unique and challenging health and safety concerns. One of the issues we discussed was "warehousing" – which is the term commonly used to describe the act of leaving an aging resident in a community or nursing facility without any family support. Warehousing is an issue that we as community association attorneys see all too often. Warehousing can be uncomfortable, difficult and costly to address.

The fact is, most condominium communities are not established as "assisted living" and thus do not have the appropriate support and infrastructure to meet daily needs of failing individuals. Despite this, many of our association clients have faced challenges arising from aging residents who pose a health and safety threat to themselves, other residents or the association. When a board or management learns that an individual is in danger (or a danger), it will likely become necessary to take some action in order to guard against liability. Boards and management should tailor their approach to these situations on a case-by-case basis, and should explore all means of resolution. We often contact family members, seek help from various governmental agencies, and if all else fails we file an action in Court where we request the appointment of guardian to ensure compliance with the association's governing documents.

Budgeting, Physical Repairs and Other Considerations at Aging Communities

Health and safety issues aren't the only concerns facing aging communities. Humor columnist Erma Bombeck wrote of the perils of aging in October 1983: "We had an expression for it, 'Don't buy any green bananas.'" It turns out this mindset, and the fact that many 65+ individuals live on fixed incomes, can be a real challenge to effective and necessary budgeting and financial planning. Since aging residents may have limited financial means, increasing condominium fees to address infrastructure repairs or replacements can be difficult. On the flip side, however, deferred, delayed or avoided maintenance can increase the risk of liability (and thus, lead to yet more cost). A triage approach to financial and infrastructure planning may be necessary, but boards and management should not put off important physical plant maintenance and should build an adequate reserve as well.

Another topic that often comes up in the context of aging communities relates to the association's obligation to grant reasonable modifications under federal or state law. In a nutshell, a "reasonable modification" is a physical or structural change made in order to afford a handicapped person full enjoyment of his or her home. "Reasonable modifications" can include alterations to interiors and exteriors of dwellings, and also to common areas. Depending on the location, cost, nature of the facilities and other factors, the process for dealing with these requests can be a complicated analysis. Generally speaking, federal law makes it unlawful for any person to refuse "*to permit, at the **expense of the [disabled] person**, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises…*" 42 U.S.C. § 3604(f)(3)(A) [Emphasis added]. Note, however, state law may be different – the applicable Massachusetts statute (M.G.L. c. 151B) requires the *association* to pay for modifications under certain circumstances.

Conclusion

In summary, there is usually no shortage of issues to consider at ***any*** community association, but those communities where aging residents mix with an aging physical plant can present a host of heightened or unique challenges for boards and managers. For those readers who live at or serve one of these communities, it may be worthwhile to consider the materials from my presentation.

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[2] The following data and information is from the NAHB. http://eyeonhousing.org/2018/08/half-of-us-homes-built-before-1980.