KMK KASS, MITEK & KASS, PLLC

Newsletter

A newsletter on general legal matters

www.kmklawyers.com Summer 2017

LET'S BUILD A BIG WALL

By: Benny L. Kass, Esq.

"Let's build a great big wall around our property," the board president told the directors of his community association. "We have too many cars taking shortcuts through our streets to get to the main highway," he pointed out. "And we have no security at night, I often see strangers wandering over our grounds. Furthermore, our neighbors down the street have a gated community, so why not ours," he added.

"Can we do this?" asked one of the directors. "I agree it's needed, but it will cost a lot of money. Don't we need the approval of those who voted us into office?" he asked.

That is the $64,000 question: what can a board of directors in a community association do on their own and when do they need the advice and consent of the membership?

The technical, legal answer will always be found in the association's legal documents, usually in their Bylaws. In general, there are two different provisions: one is called "Maintenance and Repair" and the other is "Additions, Alterations or Improvements".

For the first, the board generally has full authority to "maintain, repair and replace" the common areas of the property regardless of cost, although in a very few associations there is a dollar cap, above which the board needs the approval of a majority of the owners.

Additions, alterations or improvements, however, usually impose a financial limit on the board's authority, and the members must approve any work over that dollar cap.

(Continued on page 2)

EMOTIONAL SUPPORT ANIMALS - A PIG?

By: Mark M. Mitek, Esq.

In the last few years, you may have noticed more animals flying with their owners on passenger airplane flights. The animal could be a pet, a "service animal" or an "emotional support animal"? The below will provide some general bullet point information regarding such matters.

1. The American Disabilities Act (ADA), a federal law, requires governmental agencies, businesses, organizations, etc., that provide goods and services to the public to make reasonable modifications to their policies when necessary to accommodate people with disabilities. Such ADA requirements do not apply to most community associations (e.g., condominiums and cooperatives) if the condominium or cooperative does not offer or provide services to the general public. In short, if a condominium or cooperative is only for residential purposes, ADA usually does not apply.

2. However, there are also Fair Housing (FH) laws under which housing providers, which include condominiums and cooperatives, need to provide "reasonable accommodations" for individuals with

(Continued on page 2)

In this issue...

(Continued from page 1)

LET'S BUILD A BIG WALL

That's the "technical and legal" definition. The problem is determining what is "maintenance" and what is an "improvement". Take this real life example: a cooperative association here in the District of Columbia had a very old phone system, where an operator answered all incoming phone calls and then literally "plugged" the caller into the appropriate apartment's house phone. Some of us older folks may remember Judy Holliday as Ella Peterson, telephone operator, in "Bells are Ringing".

After many years the cooperative's phone system failed. The board arranged to pay and install a totally different system. They based their decision on "maintenance and repair" and did not seek members' approval. A member filed suit, claiming this was an improvement which needed the vote of a majority of owners. The DC Superior Court upheld the board's decision. According to the Court, while the new system clearly was an "improvement" since it was impossible to replace the old one, this was, in effect, merely a "repair" of the existing system.

In an 1999 Ohio case, the court provided an interesting definition: "an alteration or improvement involves the change of things from one form or state to another, where maintenance contemplates the restoration of a thing to its original condition."

Unfortunately, the court cases are inconsistent. I have read cases with identical facts in which one judge called it an improvement and another said it was maintenance. Even the Internal Revenue Service has struggled with these definitions, but you can get guidance from Publication 523, "Selling Your Home" (free online from irs.gov). According to the IRS, you cannot claim anything as an improvement if, when installed, it has a life expectancy of less than one year.

In addition to determining whether the board needs membership approval, there is yet another reason why it is important to determine in which category the work falls: if it is an improvement, association owners may be able to claim their percentage ownership interest in the amount paid for income tax purposes.

If you bought your condo unit many years ago, it may have increased significantly. Your association has spent a considerable amount of money improving the property. They have added a new roof (or roofs), installed a swimming pool, and made other similar improvements.

In your community association, you own a percentage interest of that association. Let us assume the association spent $300,000 in improvements from the time you bought the property, and that your percentage interest is 1.5. If you multiply your interest times the total improvements, you get $4,500, and this amount could be added to your basis as "improvements." Confirm this with your own tax advisors.

It is surprising to me that many community association owners are not aware of this tax benefit. This is especially helpful for the elderly owner who is selling his or her last property, and does not want to have to pay a lot of tax on the gain that was made. Remember, if the gain is over $500,000 (if you file a joint tax return) or $250,000 for single filers, you have to pay capital gains tax on the overage.

In most community associations, the records should be available as to the total expenditure for improvements on a year to year basis. Please understand that maintenance and repair items are not added to basis, but capital improvements -- generally items which have a useful life of one year or more -- are indeed legitimate items to be added to basis.

Incidentally, the great wall will be an addition, alteration and improvement, requiring membership approval. Why? You did not have a wall before and now you do.

(Continued from page 1)

EMOTIONAL SUPPORT ANIMAL - A PIG?

disabilities, even if the condominium or cooperative is only for residential purposes. Those reasonable accommodations extend to animals that support persons with disabilities. Note – in general, the main difference between ADA and FH Laws is that with FH laws, the owner may be responsible for the costs

(Continued on page 3)

(Continued from page 2)

EMOTIONAL SUPPORT ANIMAL - A PIG?

of the "reasonable accommodation." For example, a unit owner may need and request that he or she be permitted to install a ramp for a wheel chair.

3. In general, a "disability" includes a person who has a physical or mental impairment that substantially limits one or more major life activities. Yes, there can be issues of whether a person has a disability under the law. And people need to watch what they do and say in connection with even questioning if a person has a disability. There can be adverse consequences for asking the wrong questions or even challenging a doctor's disability certification.

4. A disabled person may have a "service animal" or an "assistance/comfort/emotional support animal." There is a difference between a "service animal" (e.g., a dog to help a blind person) as defined under ADA and an "assistance animal" (e.g., a dog or cat for emotional support) as defined under the Fair Housing Laws. A service animal is defined as a dog that has been specifically trained to do work or perform tasks for an individual with a disability. The task must be directly related to the person's disability. An "assistance animal" could be any animal that provides emotional support, well-being or companionship that alleviates the symptoms of disability. Such animals, unlike service animals, are not individually trained.

5. Generally, if a person has a disability (physical, health, emotional, etc.,), a community association, even if an association is only for residential purposes and provides no services to the general public, still must provide reasonable accommodations – which may include permitting that person's service or assistance animal on the property.

6. Unfortunately, yes, some disability laws are being abused or taken advantage of by some (a few) people. An emotional support snake? An alligator? And there are claims that a person can obtain a medical certification from a doctor for a nominal fee ($100) to certify there is a disability, and thus, the need for an emotional support animal. To the point, in some cases, disability certifications are being provided without even seeing the person patient.

7. Some Boards are inclined to challenge whether there is, in fact, a disability, the doctor's certification, etc. If so, the board should pause and beware what can and cannot be done in the process. For example, a Board cannot ask questions as to a person's disability if it is readily apparent or already known. Further, a Board cannot ask for details or medical records of the disability. If errors are made – they maybe at a great price, including not only paying your attorneys' fees, but the attorneys' fees of the claimant. And such may not be covered by association insurance.

8. If a Board does approve the reasonable accommodation (permitting the comfort animal), the Board can have some "reasonable" requirements/restrictions connected, e.g., the dog must be held or on a leash in the common areas, the leash being close to the owner, no excessive dog crying or barking in the unit, especially when the owner is at work or sleeping hours, and the dog has all its vaccinations.

There can be many issues associated with disability matters, even if a building has a no pet policy. And yes, a pig can be an emotional support animal -- with a little snort your way.

IN TERROREM CLAUSES IN WILLS AND TRUSTS

By: Laurie Pyne O'Reilly, Esq.

In Terrorem means what it sounds like: by terror or fear. *In terrorem* clauses, sometimes included in trusts and last will and testaments, are intended to make beneficiaries fearful of–or at least strongly discourage them from--challenging the provisions of the will or trust.

What is an *in terrorem* clause and how does it work? Typically an *in terrorem* clause, also know as a "no contest" or forfeiture clause, is a provision

(Continued on page 4)

(Continued from page 3)

IN TERROREM CLAUSES IN WILLS AND TRUSTS

in a will or trust that penalizes a beneficiary who takes action to contest the will or trust by barring the beneficiary from receiving the gift or bequest left to him or her. A typical *in terrorem* clause states simply as follows:

"If any beneficiary under this Will in any manner, directly or indirectly, contests this Will or any of its provisions, any share or interest in my estate given to the contesting beneficiary, or to the beneficiary's issue, under this Will is revoked."

Are such provisions enforceable? What happens if a beneficiary truly believes she has been improperly treated under the will or trust to the unfair advantage of another beneficiary? What if she believes the Testator made a mistake? Or wasn't competent when he or she signed the will? If the beneficiary sues or petitions the court on such grounds, will he be prevented from getting anything under the will? What if after the lawsuit or petition is filed, it is later withdrawn?

All of these questions are answered by applying the same overarching principal: if the will contains an *In Terrorem* clause, the mere filing of an action contesting the will–even if the action appears to have merit-- may be enough to bar the contesting beneficiary from receiving anything under the will. And once a contest is commenced, withdrawal or dismissal of the complaint may not undo the forfeiture.

The most recent pronouncement on the matter in the District of Columbia is from a 2006 case involving an *in terrorem* clause in a Trust. The case, *Ackerman v. Ackerman Family Trust,* is instructive on the drastic and likely unintended consequences of using such a provision. In *Ackerman*, the son of the creator of a trust (called "the Grantor") claimed he was wronged by the inclusion in the trust of real property his mother had promised would be his. The trust document provided for all trust assets to be divided between the son and the daughter equally. The son believed that the property had been placed in the trust by the trustee, who was the Grantor's son-in-law, against his mother's wishes. The son had evidence of what he claimed was his mother's intention that the property be given to him free of trust. The son's aunt's statements supported his position.

So the aggrieved son filed a complaint seeking relief for the denial of his claimed rightful inheritance, asking the court, among other things to remove the trustee and reform the trust to comport with his mother's intentions.

Pointing to an *in terrorem* contest clause contained in the trust, the trustee filed a counterclaim asking the court to find that by filing the complaint, the son had forfeited all rights as a beneficiary under the trust.

The court agreed with the trustee and ruled that the Son had forfeited his entitlement to receive anything under the trust. So not only did he lose his fight to receive the real property, he lost his entire inheritance.

In ruling in the trustee's favor, the court noted that while different jurisdictions take different positions on whether and when an *in terrorem* clause will be enforced, it is well-established in the District of Columbia that such clauses are valid and enforceable. The court went on to say that such clauses are enforceable even where there is good faith and probable cause in making the contest. To quote the court, "The rule we are bound to apply might have unfair consequences in some situations . . ."

While in the Ackerman case, there was a trial on the merits of the contest, it is possible that a District of Columbia court could throw out the case even before trial. The mere filing of a complaint to challenge a specific provision of a Will or trust could trigger a forfeiture. On the other hand, if the beneficiary is contesting the validity of the entire Will--for example, on the grounds of undue influence or incompetence of the testator--the court would likely hear the case on the merits, and if the challenge is successful, the forfeiture clause would be thrown out with the invalidated will or trust.

(Continued on page 5)

(Continued from page 4)

IN TERROREM CLAUSES IN WILLS AND TRUSTS

The results would likely be different in Maryland where, by statute, a no contest clause is void and unenforceable if probable cause exists to challenge the will. The Maryland Code provides that "If probable cause exists for instituting proceedings, a provision in a will purporting to penalize an interested person for contesting [a] will or instituting other proceedings relating to the estate is void." There are no reported decisions in Maryland on the application of this statute, so what constitutes "probable cause" in this context is unclear. An if the personal representative, or other party, invokes this Code provision as a defense to a Will challenge, who bears the burden of proving that there is or is not probable cause to contest? That is currently an open question in Maryland.

In Virginia, *in terrorem* clauses are both "strictly enforced" and "strictly construed." That said, there have been cases where some lenience to the beneficiary was shown. For example, in a case where the decedent's daughter--unaware that her mother had a will, much less that it contained a no-contest clause--applied to become administrator of the estate, the Virginia court held this was not a violation of the no-contest provision contained in the will.

The takeaway--no matter what jurisdiction is involved– is to know the law and proceed cautiously before engaging in a will contest. And if you are preparing your will or trust, make sure you understand the consequences of including an *in terrorem* clause in it.

CONDOMINIUM OWNER BILL OF RIGHTS AND RESPONSIBILITIES AMENDMENT ACT OF 2016

By: Anthony R. Champ, Esq.

D.C. ACT 21-657 otherwise known as "Condominium Owner Bill of Rights and Responsibilities Amendment Act of 2016" (hereinafter the "Act") was recently enacted by the D.C. Government. The Act will directly affect Condominium Associations and the manner in which they do business going forward. As such, this article offers a brief synopsis of the same.

The first portion of the Act creates the Condominium Association Advisory Council ("CAAC"). The purpose of the CAAC is to act as an advisory body to the Mayor, the Council, and District agencies on matters relating to condominiums located in the District.

The CAAC will be composed of 14 members appointed as follows: one community representative from each of the eight District wards, one community representative appointed by the chairperson of the Committee of the Council that oversees the Department of Housing and Community Development; one community representative appointed by the Mayor; the Director of the Department of Housing and Community Development, or his or her designee; a representative from the community association management industry with at least seven years of experience in the profession, appointed by the Mayor; a representative from the mortgage industry with at least five years of experience in the profession, appointed by the Mayor; and a representative from the legal community who is an attorney licensed to practice in the District and has at least five years of experience representing community associations. appointed by the Mayor.

The community representatives must be residents of the District and must be members in good standing of a unit owners' association for at least one year, with a priority for community representatives with experience on a condominium board. Meetings of the CAAC will be open to the public and shall take place at a public location at least four (4) times a year. The CAAC shall provide a public listing of members by ward, meeting notices, and meeting minutes on a CAAC website.

The Act will also change how condominium associations handle the collection of unpaid assessments going forward. Specifically, Associations are now required when advising the unit owner of its intention to take legal action to collect

(Continued on page 6)

(Continued from page 5)

CONDOMINIUM OWNER BILL OF RIGHTS AND RESPONSIBILITIES AMENDMENT ACT OF 2016

any past due amount owed by a unit owner, to provide a notice to the unit owner to include:

(l) A statement of the account showing the total amount that is past due, including a breakdown of the categories of amounts claimed to be due and the dates those amounts accrued;
(2) Contact information for the individual or office the unit owner must contact to settle the past due amount; and
(3) An enclosure providing information on the availability of resources that a unit owner may utilize, and must be provided in at least eighteen point font.

Thus, Associations, their counsel and Management, should ensure that these additions are incorporated into their existing demand letters.

Similarly, the manner in which Associations foreclose on delinquent unit owners has also been changed. Specifically, a foreclosure sale shall not be held until at least thirty-one days after a Notice of Foreclosure Sale of Condominium Unit for Assessments Due is recorded in the land records and sent by a delivery service providing delivery tracking confirmation and by first-class mail to a unit owner at the mailing address of the unit, any last known mailing address, and at any other address designated by the unit owner to the executive board for purposes of notice.

The Notice of Foreclosure Sale of Condominium Unit for Assessments Due (the "NFSCUAD") shall:
(i) State the past due amount being foreclosed upon and that must be paid in order to stop the foreclosure;
(ii) Expressly state that the foreclosure sale is for either:
(I) The 6-month priority lien and not subject to the first deed of trust a "Super Priority Sale"; or
(II) More than the 6-month priority lien set forth in subsection (a)(2) of this section and subject to the first deed of trust; and
(iii) Notify the unit owner that if the past due amount being foreclosed upon is not paid within thirty-one days after the date the NFSCUAD is mailed, the executive board shall sell the unit at a public sale at the time, place, and date stated in the NFSCUAD.

Additionally, the NFSCUAD must now be accompanied by an enclosure providing the following information:
(i) A statement of the past due amount being foreclosed upon and
that must be paid in order to stop the foreclosure sale;
(ii) A breakdown of the amount being foreclosed on, including
amounts past due for assessments, accrued interest, late charges, all other categories of amounts past due, and the dates those amounts accrued;
(iii) A statement that the amount being foreclosed upon may not be the total amount owed to the unit owners' association and instructions on how the unit owner can request a full account statement;
(iv) Information on the availability of resources that a unit owner may utilize, which shall be in substantively the following form in at least eighteen point font
(v) Any other information the Mayor may prescribe by rule.

The complete foreclosure packet must be sent at least thirty-one days by a delivery service providing delivery tracking confirmation and by first class mail to: the Mayor or the Mayor's designated agent; any and all junior lien holders of record; and any holder of a first deed of trust or first mortgage of record, their successors and assigns, including assignees, trustees, substitute trustees, and MERS.

Lastly, the Act has added the Condominium Association Bill of Rights and Responsibilities This document was created to more thoroughly advise unit owners of their rights and responsibilities in the District.
It reads as follows:
" Condominium Association Bill of Rights and Responsibilities
Every unit owner who is a member in a unit owners' association has certain rights and responsibilities under the D.C. Condominium Act, with some of those rights and responsibilities restated here:

(Continued of page 7)

(Continued from page 6)

CONDOMINIUM OWNER BILL OF RIGHTS AND RESPONSIBILITIES AMENDMENT ACT OF 2016

1. The right to attend and participate in meetings of the unit owners' association held in accordance with the provisions of the unit owners' association's condominium instruments at least once each year, according to and subject to the provisions of D.C. Official Code §42-1903.03(a).

2.The right to observe all meetings of the unit owners' association, committees of the unit owners' association, and the executive board, except for those meetings held lawfully in executive session, and to examine and copy minutes recorded at meetings, according to and subject to the provisions of D.C. Official Code §42-1903.03(b).

3. The right to an opportunity to comment on any matter relating to the unit owners' association during each regularly scheduled meeting, according to and subject to the provisions of D.C. Official Code §42-1903.03 (c).

4. The right to have meetings of the unit owners' association and executive board only be conducted with a quorum present as provided in the governing documents of the association.

5. The right to cast a vote on any matter requiring a vote by the unit owners' association membership in proportion to the unit owner's voting interest, according to and subject to the provisions of D.C. Official Code §42-1903.05.

6. The right to an executive board that in the performance of its duties, is obligated to exercise the care required of a fiduciary consistent with business judgment standard, subject to the provisions of D.C. Official Code §42-1903.08(d) and § 42-1903.09(b).

7. The right to cure any default in payment of an assessment at any time prior to the foreclosure sale by tendering payment in full of past due amounts owed, according to and subject to the provisions of D.C. Official Code §42-1903.13(c).

8. The right to request a statement that sets forth the amount of unpaid assessments currently levied against the unit owner, according to and subject to the provisions of D.C. Official Code § 42-1903.13(h).

9. The right of access to all books and records kept by or on behalf of the unit owners' association, subject to the provisions and limitations of D.C. Official Code §42-1903.14 and the unit owners' associations' condominium instruments".

As you can see, the Act has brought several new changes which will directly impact the manner in which condominium associations conduct business going forward. As such, board members should review the Act and consult with legal counsel if they have any questions.

The articles in this Newsletter should not be considered legal advice. Please contact an attorney in our office if you desire consultation and advice.

KASS, MITEK & KASS

A Professional Limited Liability Company

1050 17th Street, N.W., Suite 1100
Washington, D.C. 20036
Tel. 202.659.6500
Fax. 202.293.2608

email address: firm@kmklawyers.com
www.kmklawyers.com

Benny L. Kass, Esq.
Mark M. Mitek, Esq.
Brian L. Kass, Esq.
Laurie Pyne O'Reilly, Esq.
John H. Brillian, Esq.
Anthony R. Champ, Esq.

Buying a new home or refinancing your existing mortgage?

Let Kass, Mitek & Kass, PLLC handle your real estate settlement.
We offer a full range of settlement services at very competitive prices.
Call or email Brian L. Kass at briankass@kmklawyers.com to discuss or obtain a quote.