

Newsletter

A newsletter on general legal matters

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Fall 2019

TOPA DEVELOPMENT

By: Brian L. Kass, Esq.

As many readers are aware, for quite some time the District has had in place the Tenant Opportunity to Purchase Act (TOPA). In a nutshell, under this Act, if an owner of residential property wanted to sell their property, any tenant(s) in the property had to be provided notice of the proposed sale and given both the opportunity to negotiate their own contract or match any contract already negotiated with a third party. While the Act set forth time lines for the tenants to express an interest in negotiating, these were "minimum" time lines often creating significant delays in reaching settlement and at times creating leverage for tenants to negotiate a better contract.

In addition, the Act allowed the tenant(s) to assign their rights for any consideration they could get, thus creating a unique market for tenants to sell away their rights. Some may have heard stories of the lawyer who started quite a cottage industry negotiating these TOPA rights for tenants. Most would argue that this was not the City Council's intention when the law was created with an eye toward preserving rental housing in the District.

To the great relief of many homeowners (and title insurers) last year the District amended the TOPA law as it relates to single family homes. Under the amended law, effective July 3, 2018, tenants in single family rental units (including condo units) and single family rental units with an accessory dwelling such as a basement unit, are no longer subject to the broad sweeping rights under TOPA. Instead, the owner, or his/her agent, need only send a notice to the tenant(s) - - and the District of Columbia - -

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UNDERSTANDING CONDOMINIUM PARKING SPACES

By: Mark M. Mitek, Esq.

Parking spaces in Condominium communities can be tricky to understand. They can be parking space units, limited common elements, or general common elements.

1. PARKING SPACE UNITS

The declaration of a condominium association defines "units," "limited common elements," and "general common elements." The specific definitions of these terms are usually found in the beginning pages of the declaration. The definition of residential units gives the legal boundaries of the units, for example, dry wall to dry wall and concrete floor to interior surface of the ceiling. As for parking space units, there is also a legal definition. The definition should include reference to the condominium plats and plans, which should identify and show the parking spaces as units, limited common elements, or general common elements.

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advising of the contract for sale. This notice must be issued in the form prescribed by the District. In the event the tenant is 62 or older or has a disability (as certified by a physician or federal government disability award letter), signed their lease before March 31, 2018 and took occupancy by April 15, 2018, they can timely notify the owner and the District and retain certain rights to negotiate a contract with the owner. Only this qualifying tenant has the limited ability to assign their rights under the amended TOPA law.

As stated, these amendments are focused on single-family homes, leaving the law unchanged with regard to rental properties containing two to four units and buildings containing five or more rental units.

Navigating the TOPA process can be tricky and mistakes are often time consuming and costly. Please contact one of our attorneys for more information or assistance with a TOPA filing.

INCREASED RECORDATION/ TRANSFER TAXES

Despite having one of the highest recordation /transfer taxes in the nation, DC recently took steps to further fund the City's budget. Effective October 1, 2019, recordation and transfer taxes on commercial transfers greater than \$2 million have increased from 1.45% each to 2.5% each for a total overall increase from 2.9% to 5%. While this increase may not directly impact many of us, as a point of reference, as a result of this tax amendment, the taxes collected by the District on the sale of a \$3 million commercial property increased from \$87,000 to \$150,000. No doubt that increase in tax will have a trickle down effect to consumers.

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UNDERSTANDING CONDOMINIUM PARKING SPACES

2. LIMITED COMMON ELEMENT PARKING SPACES

Also in the condominium declaration there should be a definition of "limited common elements" with a list of them, e.g., balconies, patios, decks, storage spaces, and sometimes parking spaces. The declaration provisions on limited common elements should also state that the limited common elements are more particularly described on the plats and plans. Thus, the condominium plats and plans as well as the language in the declaration describe and define parking spaces as limited common elements.

3. GENERAL COMMON ELEMENT PARKING SPACES

As for general common element parking spaces, the condominium declaration should also define and describe areas of the condominium that are general common elements, which may include parking spaces. If the parking spaces are not specifically defined as "units" or "limited common elements", then they are "general common elements."

OWNERSHIP ISSUES

1. PARKING SPACE UNITS

Parking space units are owned just like residential or commercial condominium units. That is, the owner has a fee simple interest in the parking space unit. There is a deed recorded in the Land Records where the property is located, showing who owns the parking space unit – just like a residential unit. If the owner wishes to sell the parking space unit, it is handled in the same manner as the sale of a residential unit with a contract of sale, settlement, and the recording of a new deed, showing the new ownership. (Often, but not always, the parking space is sold with the residential unit).

If you own a condominium parking space, an exhibit to the declaration, called the percentage interest table, will show what interest the parking space has in the condominium. For example, if you own a residential unit and a parking space unit, you may have a 2.5% and a .5%

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UNDERSTANDING CONDOMINIUM PARKING SPACES

interest, respectively, in the condominium. You would have the right to vote these interests at association meetings and would be required to pay the common expenses of the association based on these interests.

2. LIMITED COMMON ELEMENT PARKING SPACES

A limited common element parking space, like other limited common elements, allows the unit owner the exclusive right to use the limited common element assigned to his or her unit. However, the owner does not "own" the parking space, but has the right to use it.

The developer of a condominium initially assigns the limited common element parking spaces to unit purchasers. If you buy a unit, and pay more, the developer will assign a parking space to your unit. In some cases, however, the spaces are already assigned in the declaration. In that case, you can't pick the space you want. If, for example, you purchase unit 1, the declaration and plats may already show that parking space 9 is assigned to your specific unit.

If a parking space is a limited common element appurtenant (assigned) to a unit, that owner may assign (sell) the parking space along with his or her unit. Also, a unit owner may sell his or her assigned parking space separately to another unit owner, in which case an amendment to the declaration is recorded in the Land Records showing the assignment of the parking space from one unit to another.

NOTE, if you sell your residential or commercial unit, the assigned parking space conveys automatically with it. Therefore, if you want to sell your space separately, you must sell it and record the assignment before you sell your residential or commercial unit. The condominium declaration and/or condominium laws will provide information and procedures on how to assign limited common elements parking spaces. With parking spaces that are limited common elements or general common elements, there are no separate tax bills to unit owners for such parking spaces.

3. GENERAL COMMON ELEMENT

As for general element parking spaces, they are for the "general" use of all unit owners. You know the saying concerning parking: "If you see a space, you better take it, or someone else will." That is the case in some condominiums where the rule is "first come, first served." In some cases, however, the legal documents of a condominium allow for "reserve" general common elements. In other words, a parking space is reserved for your use, but you do not own it and can not assign it.

MAINTENANCE AND REPAIR OF PARKING SPACES

Depending on whether a parking space is a unit, limited common element or general common element, the responsibility for maintenance and repair may be different. Who is responsible (unit owner or association) is addressed in the condominium bylaws. With parking space units, the owner is usually responsible for maintenance and repair. In some cases, however, the association is responsible, and the expense is passed on to each parking space owner.

Limited common element parking spaces are usually the responsibility of the association, but the bylaws must be consulted for each condominium. General common element parking spaces are always maintained and repaired by the condominium association as a common expense.

**Schedule Your
Complimentary
Estate Planning
Consultation Today!**



Contact:
Kass Legal Group, PLLC
Laurie Pyne O'Reilly loreilly@kasslegallgroup.com
Tel. No. 202-659-6500

TESTAMENTARY TRUSTS

By: Laurie Pyne O'Reilly, Esq.

What are testamentary trusts and how are they used in estate planning?

A trust is loosely defined as an arrangement whereby a trustee holds property for the benefit of another person or persons. Testamentary trusts are trusts established under a last will and testament and come into existence only after death. They are different from living or *inter vivos* trusts which are created during lifetime. A living trust can be revocable or irrevocable, but testamentary trusts are always irrevocable.

Clients are often surprised to learn that they can accomplish their wishes of leaving property in trust after they die without going to the expense and hassle of setting up a revocable living trust (RLT).

While there are some advantages to creating an RLT, they are not for everyone. The primary benefit of having an RLT is avoidance of probate. RLTs provide no tax benefits, although it is a common misconception that they do. In fact, they are considered "disregarded entities" by the IRS and any taxable activity from assets in the trust is attributed to and reportable by the individual grantor or grantors of the trust. To function properly, RLTs require that all property to be passed on to beneficiaries through the trust, for example, bank accounts, real property, and vehicles, be titled in the name of the RLT. So deeds must be prepared and titles changed. This also applies to property acquired after the trust is first established. However, RLT owners frequently neglect to take this step. Forgetting to add a piece of property or bank account to the trust during lifetime, whether acquired before or after the creation of the trust, necessitates probate for any such items, therefore defeating the purpose of the RLT.

A properly drafted last will and testament always includes what is called a residuary clause that directs how any property not specifically designated in the will is to be distributed. So unlike an RLT, there is no concern of forgetting to re-title property if your assets pass via your will.

So how do testamentary trusts come into play? As part of your will you can designate certain assets, liquid or illiquid, to be held by a trustee for your beneficiaries after

your death. A provision in your will establishing the trust will specify what property or portion of your estate is to go into trust. It will also name a trustee to administer the trust and will designate a beneficiary or beneficiaries who will receive payment out of the trust. Restrictions on a beneficiary's entitlement to receive trust benefits can be stated in the trust. For example, a beneficiary can be limited to receiving payments only for certain purposes such as health, education and welfare, or until the beneficiary reaches a certain age.

There are many types of testamentary trusts that can be included in your will. Here are a few common ones:

Marital Trusts

Some testamentary trusts, known as marital trusts, established for the benefit of a surviving spouse (or in DC for the surviving domestic partner) can be used to reduce or eliminate estate taxes. However, they can also be for the sole purpose of allowing the surviving spouse an income stream during his/her lifetime, and then providing for the distribution of the remaining trust assets to children after the surviving spouse dies. This is commonly done in cases where the children of the deceased spouse are not also the children of the surviving spouse. Typically, the income and principal for certain specific purposes can be used by the surviving spouse, and then children or other beneficiaries receive the assets upon the death of the surviving spouse. If the combined estates of both spouses is large enough to be subject to federal or state estate taxes, then a properly set up marital trust established in the spouse's wills can reduce or eliminate those taxes.

Children's Trusts

Also known as minors' trusts, these trusts are set up for children under the age of majority. By law, children cannot own property in their own names until they reach the age of adulthood. Thus, it is important to establish a testamentary trust for any minor that may receive property under the will. While it is possible to designate a "custodian" of property and set up a custodial account for the minor without setting up a trust, the law requires that the assets in a custodial account be paid to the child as soon as he or she reaches the age of majority, ie, 18. With a trust a more advanced age can be selected that the testator thinks is more appropriate for the beneficiary to receive the trust assets.

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TESTAMENTARY TRUSTS

Special Needs Trusts

Also called supplemental needs trusts, these trusts are set up for a beneficiary who, due to disability and low income, is receiving or is expected to receive government benefits. If a beneficiary under a will receives a sum of money or property, it could jeopardize any government benefits the individual is receiving. A special needs trust is designed to protect the beneficiary's inheritance by placing it in the hands of a trustee with directions that the funds can only be used for certain purposes allowed by law.

Pet Trusts

Yes, pet trusts. They have been legally available in DC, Maryland and Virginia now for more than a decade. Prior to that, pets were not considered to have legal status as beneficiaries of a trust. Now you can name your pet as the beneficiary of a testamentary trust and provide funds for their benefit and directions for their care. Typically, a sum of money is designated for the pet and a trustee is named to administer the funds during the pet's lifetime. In addition to providing for how the funds should be used to care for the pet, the trust can provide for any payment that the trustee is to receive for his/her services caring for the pet. A beneficiary would be named to receive any funds that are left after the pet's death.

This is just a brief sampling of some types of testamentary trusts that can be established under a will. For more information about testamentary trusts or how they can be part of your estate plan, please contact us at Kass Legal Group. We'd be happy to assist you or answer 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.

ANNOUNCEMENT



John E. Arness, II joined Kass Legal Group, PLLC in January 2019. This represents a return of sorts for him to the firm, as Mr. Arness worked with Kass & Skalet, P.C. in 1987 in its real estate settlement and condominium association collection practice. He is licensed to practice law in the District of Columbia and Maryland. His current primary areas of practice include Real Estate (Residential, Commercial and Landlord & Tenant), Contract & Lease Negotiations, Civil Litigation (commercial, tort, contract, quiet title and other actions seeking declaratory relief and establishment of legal rights), Transactions (including the purchase, sale, leasing, titling, and transfer of real estate and business interests), Business Law, and Regulatory Compliance issues and disputes.



Michelle L. LaRue joined Kass Legal Group, PLLC in March 2019. Ms. LaRue is licensed to practice law in the District of Columbia, Maryland and Florida. Her primary areas of practice include Real Estate Litigation and Community Associations. The Community Associations practice involves representation of condominium and homeowners associations on all aspects of governance, including dispute resolution, covenant enforcement, contract drafting and review, collection of delinquent assessments, and drafting and review of governing documents.

PREPARATION AND ANTICIPATION CAN BE KEY WHEN TENANT PROBLEMS ARISE - Part 1

By: John E. Arness, II

Owning rental property in the District of Columbia can be financially rewarding. When tenant problems arise, however, property managers, landlords and those that assist them can find themselves mired in the quicksand of the city's esoteric landlord and tenant laws.

Many of you know or have heard it said that the District of Columbia is a very tenant-friendly jurisdiction. With regard to residential tenants at least, I would agree. After experiencing instances of frustration and perceived injustice in some landlord and tenant court proceedings, more than one client or property owner has been moved to declare to me that they will never purchase another residential rental property in the city. Many of the potential difficulties can be avoided, minimized or at least lessened, however, via anticipation and planning in advance of a tenant default situation.

I am reminded from time to time that many landlords do not realize that, with only a few exceptions, residential tenants in the District have essentially lifetime tenancies for their dwelling spaces as long as they pay the legally assessed monthly rent. Our office will get calls from landlords who say they want to evict their tenant because they want to sell their property, or just because the original lease term has expired. I have to tell them that they cannot. Many also are unaware of the many regulatory requirements that attach to operating as a landlord in the city.

Another source of frustration and disappointment is the amount of time it can take to obtain a judgment for possession and to evict a tenant in default. Superimposed over all of these factors hovers the harsh reality that the Court is not necessarily committed to the goal of protecting landlords from further damage and expense. They have to fight for their own protection. So many times, I have wished on their behalf that they had come in for a consultation before a problem arose or an agreement with either tenant or management was reached.

All of this underscores the importance of having access to knowledgeable legal and/or property management

resources to be able to act quickly to enforce a landlord's rights under a lease in the event of a tenant default.

We at Kass Legal Group, PLLC are available to assist with lease enforcement, dispute resolution, regulatory compliance or to evaluate policies, procedures, leases or other documents should those services be desired. Our legal support is multi-faceted and sequentially targeted: first, stop the bleeding; second, remove weapons from the tenant's arsenal and address any landlord or management weaknesses that could inhibit a speedy resolution; third, identify all issues and options available to our clients so that they are in a position to make the best informed business decision concerning how they would like to proceed to protect or advance their interests; and fourth, to take effective action on the client's behalf to implement that business decision and achieve the client's goals. Please let us know if we can help you or your organization. arness@kasslegallgroup.com

Next: **Part 2** – Some things property management companies and self-managing landlords alike should be aware of.

D.C. CONDOMINIUM FORECLOSURE CASE LAW UPDATE

By: Michelle L. LaRue, Esq.

Recently, there have been several cases in the District of Columbia dealing with D.C. condominium and super-priority foreclosures. The primary issue in these cases is whether foreclosures held pursuant to the D.C. Condominium Act are considered "super-priority" foreclosures or foreclosures subject to the first deed of trust, regardless of how the foreclosures were advertised.

The most recent ruling on this issue is in the case of *PNC Bank, N.A. vs. Wilfredo A. Gonzalez-Gutierrez and Jacob Lefkowitz*, Case No. 2015 CA 002362 R (RP), in which Kass Legal Group successfully defended Mr. Lefkowitz. In that case, Mr. Lefkowitz purchased the subject property at a foreclosure sale after Mr. Gonzalez-Gutierrez, the former owner, failed to pay his condominium fees. PNC Bank, the holder of the first deed of trust on the

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D.C. CONDOMINIUM FORECLOSURE CASE LAW UPDATE

unit, subsequently sought to foreclose after the mortgage taken out by the former owner also went unpaid. Mr. Lefkowitz argued that the condominium association's enforcement of its lien for the unpaid condominium fees had priority over and extinguished PNC's first deed of trust. The trial court disagreed with his argument, and determined that the condominium association's lien is subordinate to the first deed of trust if the association forecloses on all unpaid assessments, even if those unpaid assessments include the most recent six months of assessments.

Mr. Lefkowitz appealed the trial court's ruling, and on July 2, 2019, the District of Columbia Court of Appeals issued its decision. In its ruling, the appellate court referred to the case of *4700 Conn 305 Trust v. Capital One, N.A.*, which involved similar facts and issues. In that case, the court was required to determine whether "a lien foreclosed on covering a period in excess of six months of arrearage is properly conceptualized as a split-lien, which includes a six-month portion entitled to a super-priority status under the statute, or as one lien, all of which is considered to be lower in priority to the first mortgage or deed of trust encumbering the unit." The court held that under such circumstances, a split-lien was created and foreclosure on the super-priority lien would extinguish a first deed of trust. This means, in effect, that the condominium association's enforcement of its six month super-priority lien had priority over the lender's first deed of trust, which was therefore extinguished. Accordingly, the appeals court reversed the Superior Court's ruling and remanded the case to Superior Court for further proceedings.

The DC Court of Appeals addresses foreclosure issues on a case by case basis, which means the law is continuing to evolve. This most recent ruling, however, defines the split-lien and how it affects a first deed of trust. Since the law regarding DC condominium foreclosures remains in flux, we recommend that Associations contact one of our firm's community association attorneys for advice and guidance on how to proceed.

IN MEMORIAM



BENNY L. KASS

(1936-2019)

As most of our Newsletter readers are already aware, Benny L. Kass, the senior partner at Kass Legal Group, and longtime Washington, DC lawyer, died earlier this year. Benny practiced law in the DC metropolitan area for well over 50 years. He was a columnist for the Real Estate section of the Washington Post for over 40 years, and more recently for other national newspapers. Over his long career, Benny was a frequent speaker on real estate issues and greatly enjoyed educating people in the law. He was perhaps best known for being a zealous advocate for his clients with a strong belief in fairness and the right of each person to legal representation, no matter how small the claim. Benny loved the practice of law and continued to represent clients until his death.

While Benny's passing was a considerable loss to our firm and the DC community, we at Kass Legal Group continue to build on his legacy. The knowledge base of our attorneys and staff - - some of whom have been with the firm for over 20 years - - continues to grow and everyone at Kass Legal Group will maintain the high quality of representation our clients have enjoyed with the same passion and care that Benny provided.

KASS LEGAL GROUP

A Professional Limited Liability Company

4301 Connecticut Avenue, Suite 434

Washington, D.C. 20008

Tel. 202.659.6500

Fax. 202.293.2608

email address: firm@kasslegalgroup.com

www.kasslegalgroup.com

Benny L. Kass, Esq. (1936-2019)

Brian L. Kass, Esq.

Laurie Pyne O'Reilly, Esq.

John E. Arness, II, Esq.

Michelle L. LaRue, Esq.

Mark M. Mitek, Esq., Of Counsel



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