Newsletter
Fall 2013

McGovern Legal Services, LLC
Solution Minded Advocacy

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A ONE-PAGE TRANSITION SUMMARY

By: Francis J. McGovern, Jr., Esquire

"Transition" is the process whereby a developer turns control of an association over to a member-elected board of trustees.

"Transition" also refers to the process whereby an association evaluates its common property and finances, identifies deficiencies, presents them to the developer and attempts to have the developer cure the deficiencies.

Usually the **"cure"** involves the developer performing repair work, paying the association money so that it can perform the repair work or a combination of repair work and payments.

Timing: It is usually best to put the developer on notice of deficiencies as soon as possible. This does not mean that an Association must limit its claims or rush to finalize a transition settlement; it merely means that the sooner the claims are presented to the developer, the greater the rights the Association may have.

The Team:
The Membership: Unless the Membership Supports the board during the transition process, the process has only a slim chance of success.

The Board: The Board is the decision making body and plays a key role in determining strategy and tactics with respect to dealing with the developer and communicating with the Membership.

The Manager: The Manager is the day-to-day contact for the team members. She or he is the lynchpin between the Board, the Membership and the other professionals.

The Lawyer: The Lawyer works with the board in formulating and implementing strategies and tactics, evaluating the cost of the process versus the expected outcome and negotiating a settlement or litigating to a conclusion.

The Engineer: The Engineer provides the basis for the entire process. Without solid engineering evaluations, no transition can be successful.

The Accountant: Like the Engineer's evaluations, solid Accountant's evaluations are required for successful pursuit of financial claims.

Once the team is assembled, engineering reports, cost to cure reports, transition audit reports and other expert reports are created. The lawyer then presents them to the developer and attempts to negotiate an amicable settlement (more than 90% of transitions are resolved amicably). ■

Now That You Have Your Flu Shot, How is Your Association's Immune System?

By: Damon M. Kress, Esq.

Around this time each year many people get vaccinated against a common but debilitating illness, the flu. If you ask these people why they get their annual flu shot, they may respond with that common expression, "an ounce of prevention is worth a pound of cure." Since prevention is at the forefront of so many people's minds this time of year it is also a good time to determine whether your association is properly immunized against a common but debilitating condition affecting so many communities, the slip-and-fall or trip-and-fall personal injury lawsuit.

One of the most powerful tools an association can use to protect itself against these claims is the tort immunity afforded to community associations pursuant to N.J.S.A. 2A:62A-12. et seq. According to these statutes, as long as the necessary language is included within the Association's bylaws, the association will not be liable in many personal injury lawsuits brought by unit owners for bodily injury occurring on the association's property.

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See, N.J.S.A. 2A:62A-13(a). However, the immunity afforded under these statutes will not apply if the association's willful, wanton or grossly negligent conduct causes the unit owner's injury. See, N.J.S.A. 2A:62A-13(b).

The power of this statutory immunity to insulate an association from liability was recognized by our State Judiciary as recently as September 25, 2013. In the Unpublished Decision in Marion Costa v. Shadow Lake Village Condominium Association, Inc., et al., 2013 N.J. Super. Unpub. LEXIS 2342 (App. Div. 2013) the Appellate Division of the New Jersey Superior Court affirmed the trial court's decision to dismiss a unit owner's claims against the association, and the association's property manager, for injuries arising out of a slip-and-fall on the common property, because a tort immunity provision was included within that association's bylaws. In Shadow Lake, both the Appellate Division and the trial court concluded that the circumstances leading up to the unit owner's injuries may, at worst, be characterized as simple negligence. Fortunately for the association in Shadow Lake, the language within the association's bylaws rendered it immune to such claims.

Although the tort immunity afforded by N.J.S.A. 2A:62A-12. et seq. is a powerful tool against personal injury claims, the overwhelming majority of bylaws implemented by developers during original construction do not include the language that is necessary to secure this protection. If that is the case in your community, tort immunity is only one simple amendment away. According to N.J.S.A. 2A:62A-14(a) tort immunity can be added to any set of bylaws by an amendment approved by a two-thirds vote of the association's membership. Once adopted, the immunity will then apply to any actions for injuries sustained after the date the new bylaw provision becomes operative. See, N.J.S.A. 2A:62A-14(s). Please give us a call if you would like to discuss implementing tort immunity in your association. ■

Leasing Amendment: An Important Tool in Limiting Nuisance Tenants and Delinquent Owners

By: Jaime K. Fraser, Esq.

Many associations unfortunately have to deal with owners who have leased their units to tenants that are disruptive or do not comply with the association's governing documents. Although the association may be able to fine the owner, what is the association's recourse against the tenant? Additionally, what if the owner fails to pay his assessments while the tenant is paying the owner rent?

The best way to regulate the owners and their tenants before they become a nuisance to the community is to pass a leasing amendment.

A leasing amendment requires tenants to comply with the association's governing documents and holds them accountable for their actions. A leasing amendment provides the association with the authority to act as an attorney-in-fact to evict a nuisance tenant if the owner fails to evict the tenant. Another important function of the leasing amendment is that includes an assignment of rent provision. If an owner fails to pay his assessments and becomes delinquent, the assignment of rent permits the association to collect the rent directly from the tenant without becoming the tenant's landlord. The owner remains responsible for all the duties of a landlord, even though he does not collect the rent. However, once the owner is no longer delinquent, the owner resumes collecting the rent and any money that the Association collected in excess of the debt is returned to the owner.

Due to the economic downturn, the number of delinquent units is hurting many associations. These associations pursue collections against a delinquent owner who may have a tenant in his or her unit. Such associations can try to obtain a quitclaim deed or an assignment of rent agreement directly with the delinquent owner. However, the owner at that point is unlikely to agree to assign the rent or provide a quitclaim deed because the owner is making money through the tenant. The association may also seek a court-appointed rent receiver or receiver in aid of execution, which costs more attorneys' fees. After taking actions to collect on a judgment but finding no sufficient assets, the association may even file a motion to permit sale of real property. Regardless of which option the association pursues, the end result is the same: collect rent from a tenant to recoup the association's expenses and debt and collect its ongoing maintenance fees. However, if the association had a leasing amendment, such collection efforts would be unnecessary when the delinquent owner has a tenant in his unit. The leasing amendment' s rental assignment enables the association to collect rent without having to go to court, which saves the association collection costs.

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New Attorney Spotlight

Karen A. Benton, Esq.

Karen is admitted to practice law in New Jersey. She will admitted in New York in December 2013.

Karen attended Bucknell University in Lewisburg, Pennsylvania. She graduated *cum laude* in 2009 with a double major in Economics and Psychology.

Karen attended Seton Hall University School of Law in Newark, New Jersey. During law school she served as a research assistant to Professor Michael Simkovic, researching corporate bankruptcies. She graduated in 2012.

Following law school, Karen clerked for the Honorable Honora O'Brien Kilgallen in Monmouth County Superior Court.

She joined McGovern Legal Services in September 2013.

New Personnel

Lacey Schott, Paralegal

Lacy studied counseling and human services at The University of Scranton, Pennsylvania. She earned her degree with a concentration in childhood development in 2003.

For five years she coordinated services for children with mental health and behavioral needs in the State of New Jersey. Her work with youth involved in the juvenile justice system encouraged her to further explore a career in law.

Lacy sought certification in Paralegal Studies from ABA accredited Raritan Valley Community College and became certified in August 2012, Cum Laude. Lacy joined the McGovern Legal Services team in August 2013.

A leasing amendment essentially pays for itself over time with the rent that is collected from tenants due to its assignment of rent provision. On one hand, this amendment saves the association collection costs from pursuing a delinquent owner who has a tenant in his unit. On the other hand, this same amendment also provides the association with a remedy against a nuisance tenant. Therefore, your association should want to consider adopting a leasing amendment if your association does not already have one. ■

Lessons from Storm Sandy - One year later

By: Patricia Hart McGlone, Esp.

1. FEMA has again extended the deadline to file a proof of loss

If you want to contest the amount of payment from a flood insurance policy or you need to supplement a prior claim with additional information**, the new deadline is April 28, 2014.**

FEMA waived the proof of loss requirement to expedite the claims process for payment of Storm Sandy claims. This applies to Standard Flood Insurance Policies and losses related to Storm Sandy only. Insurance adjusters were permitted to issue payment based on the "evaluation of damages contained in the adjusters report" instead of a proof of loss signed by the insured or an insured-signed adjusters report.

FEMA has stated that if a policyholder wishes to submit a supplemental claim or disputes the amount paid, it may request additional payment by submitting a signed and sworn poof of loss statement as required by the terms of the insurance policy. Initially this paperwork had to be submitted by October 28, 2013. There was concern that additional damage may be discovered during the rebuilding process or there was not sufficient time to gather and submit all of the supporting documentation.

2. It may be time to revise the Association's governing documents

This is a good opportunity for the Association to review its governing documents.

Many Associations were surprised to learn that their documents did not contain a provision for destruction of the property and the procedure for deciding whether to rebuild. If rebuilding involves the common areas, the Association may want to provide that it will retain one contractor to do all of the work.

The sections regarding distribution of insurance proceeds should be reviewed to make sure they meet the needs and desires of the community. The Association should review and understand whether the Association's policy includes coverage for the individual units. Will the restoration after a loss be full replacement, i.e., which would include upgrades that existed prior to the loss or will the unit be restored to builders grade only? The board may want to add a provision regarding payment of the insurance deductible in various situations.

3. Keep good records

Storm Sandy reminded us that good records lead to good claims. The insurance company requires documentation or proof to establish the damage or loss being claimed by the Association. Keep records with the date of purchase or installation, receipts or contracts for the work and photographs of the items. If these records are detailed and easily accessed a claim for payment for the insurance company will be processed faster and with a better result. The Association's inventory should be updated annually as well.

Storm Sandy also reminded us that it is a good idea to keep a backup of all important records off site in the event that original records or computers are destroyed.

Please feel free to contact us with any questions.
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Recent Speaking Engagements

October 10, 2013: We hosted a "Cost Saving Resolutions and Reducing Delinquencies" event at Touch of Italy in Atlantic County. Michael Polulak, Esq. presented along with Ryan Fleming from JGS Insurance.

October 9, 2013: McGovern Legal Services, LLC. hosted a "Reducing Delinquencies" lunch and learn at Taylor Management Company's Somerset office.

October 2, 2013: Francis J. McGovern, Jr. Esq. spoke at the Wilken and Guttenplan Webinar "Collecting Income on Delinquent Units".

September 23, 2013: Michael Polulak, Esq. presented a "Pending Legislation Overview" seminar at the Manchester Coordinating Council in Ocean County.

CAI-NJ Conference & Expo on Thursday, October 24, 2013

Please visit our Booth #420 and Table Top # 3 at the CAI-NJ Conference & Expo on Thursday, October 24, 2013 at Revel Resort and Casino, 500 Boardwalk, Atlantic City, NJ

Jerry Ciaravino passed away on August 23. Jerry was 81 but you wouldn't have known it. Jerry was very active and was a long-serving board member of Olde Oaks Home Owners Association and Raintree Community Association. Jerry's obituary said that he was a Korean War Army veteran and a career truck driver for St. Johnsbury but I knew him as a smart, strong and patient community leader. Jerry will be missed by his family, friends and all of those he served.

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