Legal & Legislative Update 2019

How Will Your Community Be Affected?

BY A J SIDRANSKY

ISTOCKPHOTO.COM

Laws, and the legal decisions that support and enforce them, are constantly evolving and can affect every facet of community life in HOAs, condominiums and co-ops. While law and legal cases can emanate from any of our three levels of government – federal, state or local – most of the developments that affect housing come from the bottom up, with local and state law often defining or redefining what co-op, condo, HOA, and even owners of rental housing may and may not do within the law.

Much of the legislation and case law pertaining to housing derives from the federal Fair Housing Act, which was signed into law by President Lyndon Johnson in 1968 around the time of the civil rights movement. The law exists primarily to protect against race-based discrimination in housing, but it has gone on to represent and promote a much broader range of principles.

Aside from non-discrimination, housing law and legislation also deal with safety, equity, and the ability of local governments to tax real estate owners. This type of legislation and specific case law more than likely originates at the local and state level. Often as a result, individual statutes and cases apply to specific localities. A decision handed down in a New York court may not affect communities in Massachusetts, though a similar case could result in a similar decision in more than one locale. Similarly, a statute may apply to a co-op or condo in one city and not in the neighboring one, resulting in different requirements literally a few miles apart.

Some Recent Examples

According to Mark Hakim, a community law attorney with the New York-based firm Schwartz Sladkus Reich Greenberg Atlas: "Co-ops and condominiums are subject to more and more legislation affecting how they govern. But in a cooperative, where the apartment corporation owns the building and each shareholder lives in an apartment via a proprietary lease, many laws are applicable that do not affect condominium buildings. For example, Local Law 55 of 2018, [which addresses] indoor asthma and allergen hazards in residential dwellings, as well as pest management, went into effect as of January 19, 2019. It applies to all multiple dwelling property owners, which includes co-ops. This law requires the owners to investigate and remediate indoor allergen hazards such as mold, mice and rats, and cockroaches. When it comes to mold, the new law requires contractors who perform mold assessment, remediation and/or abatement services to obtain appropriate training and proper licensing, and also establishes new minimum work standards for mold assessments and remediation activities.

"This is certainly good news intended to assist the affected individuals," he continues, "but can place additional financial and other burdens on a cooperative corporation. While the law does provide exceptions for cooperative corporations when a shareholder and their family resides in the apartment, and does allow the cooperative to shift liability via agreement (which itself may be problematic, since as 'landlord', the co-op corporation is nonetheless liable to ensure that the warranty of habitability is not breached) this new law will certainly require managing agents and boards to investigate whether it applies, and to take action when it does."

Marc Schneider, Managing Partner of the New York-based law firm of Schneider Buchel, mentions a new regulation in New York City that directly relates to the Fair Housing Act as it has been interpreted to protect residents with disabilities. He says: "New York City recently amended the section of the administrative code governing reasonable accommodation, requiring a cooperative dialogue when dealing with a reasonable accommodation request."

Schneider explains that 'cooperative dialogue' means the process by which an entity – in this case a co-op or a condo board – engages in a good-faith written or verbal dialogue to address a particular issue. "It is now unlawful to refuse or fail to engage in a cooperative dialogue with whomever requests accommodation. Not only can you not deny [a reasonable request], you must have a discussion about it with the person making the request."

This change has particular relevance to residents in buildings with policies that exclude certain types of pet ownership – particularly dogs. In truth, it's pretty easy to obtain a note from a doctor claiming a resident has legitimate need for a 'comfort animal.' Schneider explains that there is plenty of evidence of fraud in this area. What's a board to do?

"I have clients who have no-pet policies in their buildings," says Schneider, "and they have to deal with these requests for comfort pets. The unfortunate part of the situation is that there is abuse – and the abuse will continue, unfortunately, because to prevent that abuse the law must be amended in such a manner that those people who truly have need are not penalized."

Upstate New York

Hakim outlines another ordinance that co-op and condo owners in other jurisdictions should pay attention to, as something similar could someday be enacted in their locality. "Another example, which has not yet made its way to New York City, is a law passed in Westchester in December 2018 requiring Westchester co-op boards to advise potential purchasers within 15 days of submission of their purchase application whether or not their application is complete. Once it is complete, [boards] now have 60 days to accept or reject the application. If an application is rejected, the board must send a notice of the rejection to the county's human rights commission.

"For co-op boards that fail to meet the 60-day threshold," he continues, "a fine of $1,000 could be levied for their first offense; a second offense would involve a $1,500 fine, and the human rights commission would levy a fine of $2,000 for a third offense. It does not require the board to articulate any reason for the rejection, however. Rockland County already has a similar law which states that in essence, a board is required to act within 45 days or an application is deemed approved. Obviously, boards should be acting expeditiously, but I am always concerned when absent a discrimination issue or other legally compelling reason, the legislature gets involved with resales and co-op corporations. These could certainly find a way down to New York City in some form in the near future."

Two Cases From New England

Howard Goldman, a partner at the law firm of Goldman & Pease in Needham, Massachusetts, points out two recent cases that demonstrate the ability of the courts to define protections and rights under current law. In the first case, *Trustees of Cambridge Point vs. Cambridge Point*, the Supreme Judicial Court in Massachusetts ruled against so-called 'poison pill' clauses in condominium governing documents that may have been placed there to prevent a condo association from successfully suing its developer. Goldman explains that in the Cambridge Point case, this particular condominium association was left with over $2,000,000 worth of construction defects, but the association's governing documents required approval from fully 80 percent of the ownership in order to sue for damages. The developer still owned 20 percent of the units, which meant 100 percent of individual unit owners would have to approve the suit in order to move forward. In addition, the suit had to be brought within 60 days and the association board had to produce an estimate of what the legal process might cost the association to conduct. The feeling was that owners might be alarmed, if the cost to bring the proceeding appeared more costly than the cost to cure the construction defects.

"New York City recently amended the section of the administrative code governing reasonable accommodation, requiring a cooperative dialogue when dealing with a reasonable accommodation request."

—Marc Schneider

The court ultimately ruled that poison pill clauses were not in the public interest. "The court looked at gross negligence and warranty of habitability to make its judgment," says Goldman. "The decision may be appropriate for the legislature to amend the condo statute to avoid these poison pill clauses." He advises condo associations that if they have this type of clause in their documents, they should amend the documents to remove them.

A second case outlined by Goldman is *Rauseo vs. Board of Assessors*, which looked at the taxation of parking easements. "In Boston, the state began to assess unit owners for their ownership of parking spaces," explains Goldman. "Purchasing indoor parking in Boston is quite expensive – often $40,000 to $100,000 per space – and the City thought they could make some money from this. The defense has always been that the user isn't really the owner; it's an easement. And often the entire parking area is what's called an easement in gross. The second defense is that the space is part of the common area of the condominium. What the court response said was that easements in gross are not actually part of the common area. The court also made the distinction that often these are easements in gross that the developer reserves for itself – not the condominium." The lower court found for the city, and the appellate court affirmed the city's right to tax ownership of parking.

Law and legislation are a living, growing, breathing organism. It's important to watch not only what's going on in your village, town, city, and state, but everywhere else. You never know when a situation in your area will require the same consideration as it got elsewhere. ■

A J Sidransky is a staff writer/reporter for The Cooperator, and a published novelist.