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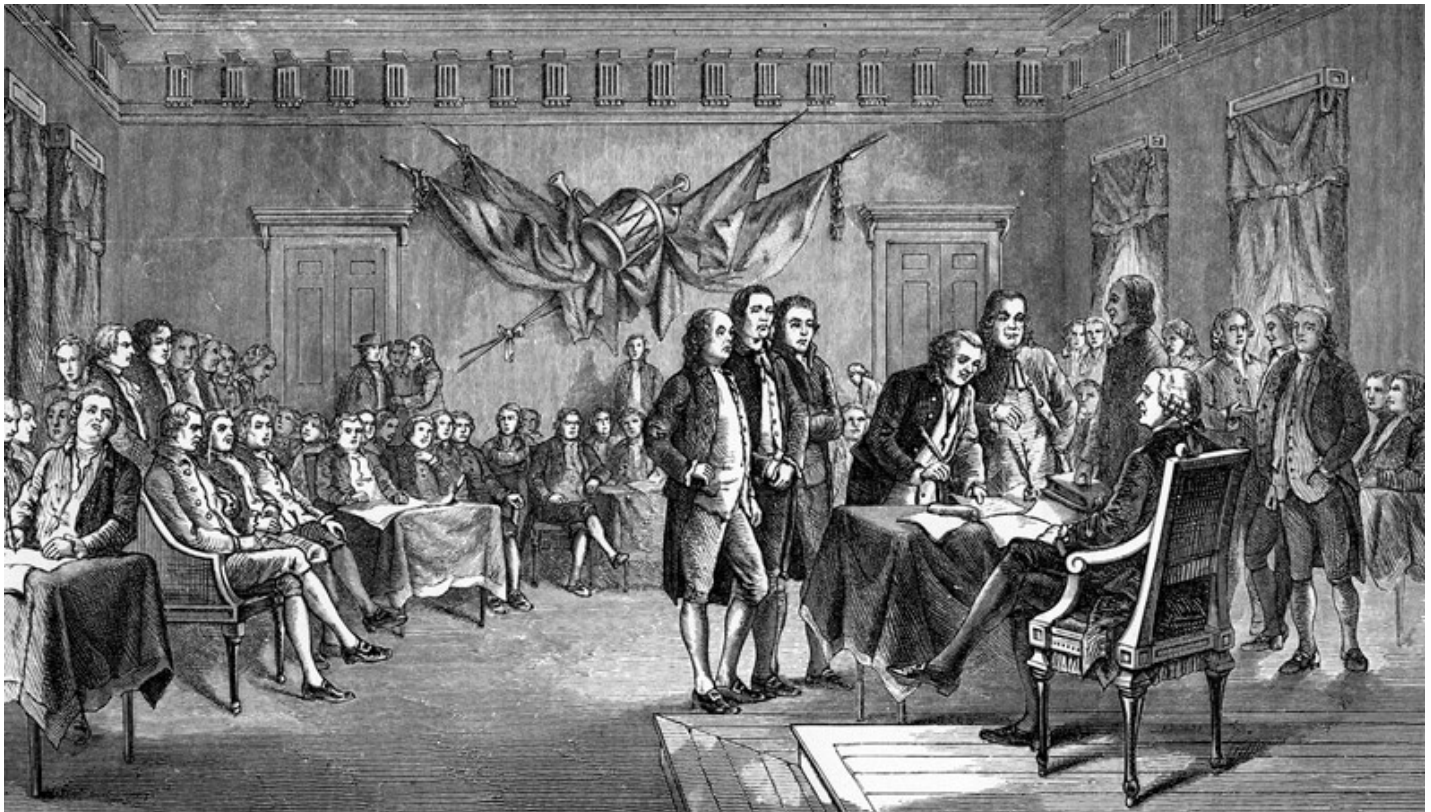
Go to The Cooperator

Legislative Update

Issues to Watch in 2018...and Beyond

BY W.B. KING 2018 JUNE

LAW & LEGISLATION



Whether it's pending Airbnb legislation in various markets; homeowners winning the ability to sue condominium developers for faulty practices; or changes to how boards and managers can transmit meeting minutes to residents, condos and HOAs are often at the mercy of legislators and the legal system. As constituents, they have a voice, but the question remains: are the interests of this niche collective fairly represented? No matter your opinion on that question, if you're in a leadership position in your own community, it's crucial that you stay abreast of changes to the law, so your association can stay on the right side of it.

Massachusetts Condo Owners Win in Court

According to Dawn Bauman, Community Associations Institute (CAI)'s Senior Vice President of Government & Public Affairs, a new ruling came down in early 2018 from the Massachusetts Supreme Judicial Court (Trustees of the Cambridge Point Condominium Trust vs. Cambridge Point, LLC, the community's developer) stating that condominium developers cannot restrict owners from filing construction defect lawsuits.

"Condominium developers cannot unreasonably restrict the ability of homeowners to file suits against them," notes Bauman. At the crux of the argument was developers' use of the "poison pill" defense, which protects them from liability for construction defects, design flaws, and other claims condominium owners might pursue against the developers of their communities.

"The court's ruling protects the more than two million Massachusetts residents living in community associations that are private entities," says Bauman.

Bauman further explains that the CAI released a survey report in 2017 indicating that nearly 50 percent of construction deficiencies became evident after the statute of limitations had expired, and more than 44 percent of construction defect cases were settled out of court.

"CAI and its international members applaud Edmund A. Allcock, a partner in Marcus, Errico, Emmer, & Brooks, P.C., [a Braintree, Massachusetts-based law firm] who represented the trustees of Cambridge Point Condominium, the plaintiffs in this suit," says Bauman. "Homes in Massachusetts community associations are generally valued at least five to six percent more than other homes. It is consequential that the court acknowledged homeowners' rights to protect their property and seek retribution from developers involving a construction deficiency."

The Airbnb Quandary

According to data from InsideAirbnb.com, with 660,000 listings in the U.S., and nearly 5,000 in Boston alone, Airbnb hosts and users show no signs of slowing down, despite the legal battles that have erupted over the burgeoning homesharing trend. For many HOAs, unit owners are growing frustrated with residential neighborhoods that are turning into a hotel culture.

Earlier this year, Boston's Mayor Marty Walsh called on the City Council to redefine short-term rental guidelines as way to better define how sites like Airbnb and HomeAway hosts conduct business. The legislation is pending.

Bauman explains that related Airbnb issues are impacting condos, co-ops, and HOAs nationwide. CAI, she says, tracks more than 1,000 wide-ranging HOA-related bills each year. There has been an uptick in short-term rental issues in countless towns and cities. "We are seeing a lot of short-term rental [legislation] on the local and city level," she says. "These municipalities are losing tax revenue from the hotels, and the hotels owners are annoyed."

On the state level, Bauman says there are more and more legislative items directly aimed at Airbnb and its competitors that seek to prohibit short-term rentals. "There are dozens of cities – including New York City – that prohibit short-term rentals, so to bypass that, companies like Airbnb are going to the state legislators to try and persuade them to pass laws that would prohibit local municipalities from enforcing those laws."

In 2017, New York State passed legislation to fine condo and co-op owners who list their units on websites like Airbnb. Enforcing the law, however, is proving difficult, notes Bauman. "There is compliance in place, but if you go on Airbnb right now, you will see that there are tons of condos in New York City listed," she says. "So, enforcement is not yet working."

Boston is navigating its own homesharing landscape as well. According to an April 24, 2018 article in the Boston Globe: "For two months in public, and in two years of quiet meetings before that, a vast array of interests has been wrestling over an industry that's changing the way people visit Boston and — some say — turning too much of the city's scarce housing stock into hotels for out-of-towners." The article goes on to say that the City Council is "weighing a tight housing market and anxious neighbors against the desire to keep Boston open to an increasingly popular form of lodging, which helps bring tourists – and their wallets – to some of the city's less-traveled neighborhoods."

Attorney Stella Goldstein with the White Plains, New York-based firm Steinvurzel & Levy Law Group adds that Airbnb has been "the target of much criticism" in recent years, insofar as many hosts do not abide by city and state laws concerning zoning, advertising, and upgrades.

"When it comes to cooperatives, there are often bylaws pertaining to subletting that Airbnb hosts ignore – to the fury of their fellow owners in neighboring units," says Goldstein. "Co-ops are, by nature, more selective about who they want in and around their communal property, and while abuses of local and state laws might go undetected, cooperative boards may be more likely to enforce their own bylaws and to penalize violators by fines, and even evictions."

According to Kenneth Finger, Chief Counsel of the Westchester Cooperative and Condominium Advisory Council, which represents 300 to 400 co-ops and condos in Westchester County, New York, the majority of his condo clients would support restricted Airbnb-related legislation. In many states, including New York, there is a push to have "short-term" rental defined as 30 days or less.

"Most of the co-ops and clients we represent are not investments, but homes," says Finger. "There's a big security issue. There are no interviews or review of who these renters are, and we believe it endangers the residents and their families."

Some townships have made decisive moves to get a handle on the homesharing industry. For example, the city of Beacon, New York has placed Airbnb and other short-term rental companies in its sights with a proposed bill introduced in April 2018 to curtail so-called "transient neighborhoods." The proposed bill would apply to a rental of 30 consecutive days or less, but wouldn't apply to hotels, motels, and bed and breakfasts. Airbnb hosts, of which there are 110 in Beacon, would also be capped at a 100-day rental cycle per year. The proposed legislation states in part that "in order to protect the health, safety and welfare of the City and its residents, it is necessary to restrict the rental of homes for terms shorter than 30 consecutive days, a practice which is growing in popularity with the advent of internet and social media-based programs that connect property owners and persons seeking short-term rentals."

Give Me a Minute

A minor amendment to the Massachusetts Condominium Act was tucked into a budget bill toward the end of 2017, according to Matt Gaines, an attorney also with Marcus, Errico, Emmer & Brooks, P.C. The change was to Section 10(c) of the Act, and requires condo boards to make their meeting minutes (if they're taken) available to unit owners via email, if requested.

According to Gaines: "The Condo Act already stated in Section 10(c) that if meeting minutes are kept, then unit owners have a right to inspect such minutes. Now, with this minor change to the law, if meeting minutes are kept, property managers and boards will have to provide them via email to unit owners if requested.

"Neither the statute nor the recent change requires associations to keep meeting minutes," Gaines notes. "The only requirement is that the minutes be provided by email, if minutes are kept. Given that the statute does not distinguish between minutes for unit owner meetings and minutes for

board meetings, the requirement to provide the minutes via email would pertain to both unit owner and board meetings.

However, Gaines continues, "with respect to board meeting minutes, it's extremely important that the minutes are reviewed carefully before providing them to unit owners. Board meeting minutes may contain personal or confidential information (for example, information regarding delinquent accounts); such information must be redacted before it is provided to unit owners. In addition, minutes of board executive sessions should not be provided to unit owners."

Given that most meeting minutes are likely typed and saved electronically, Gaines says that he does not foresee the email amendment posing an undue burden for boards or managers; if a unit owner requests minutes via email, the property manager or board simply needs to attach the typed minutes.

'Recuse!

Another somewhat recent piece of legislation impacting co-ops and condos in New York State requires annual disclosures of conflicts of interest. Finger says he doesn't have an issue with this legislation, though he feels it is also somewhat redundant.

"Similar legislation has long been on the books, so this legislation wasn't necessary," says Finger. "But I don't have an objection to it, because if there is a conflict with a certain board members, it should be disclosed – and that board member should recuse themselves from discussion or voting on the particular contract [or issue], and physically remove themselves from the boardroom at that time."

Part of serving on one's board, or working for boards as a management professional, includes staying abreast of both legislation and litigation that could impact one's community, either in the short term or the long term. Doing so can help make you a more informed critical leader, and insure that you and your constituents aren't blindsided by any nasty legal surprises.

W. B. King is a freelance writer and frequent contributor to New England Condominium.