

Voyeurs, Exhibitionists, and Sex Offenders in Community Associations

I. Does an Association Have the Right to Restrict Registered Sex Offenders?

The answer to whether an association can restrict sex offenders from residing within its community remains unsettled and disputable. There will inevitably be a civil rights challenge in the courts placing an association in the self-imposed position of defending such a restriction. However, restrictions or complete bans are worth considering if the community is willing to assume the risk of challenge as well as the duty that comes with it.

On the one hand, several communities throughout the country have amended their governing documents to prohibit violent sex offenders from residing within their planned community. The benefits appear obvious. The health, safety, and welfare of the residents are protected. Buyers may be attracted to “sex offender free communities” and, consequently, property values may be protected or even enhanced.

Furthermore, in a community association with common facilities, allowing a sex offender into the clubhouse, pool area, or sauna, can feel akin to inviting them into your own home.

But on the other hand, constitutional challenges will inevitably be made on the grounds that the community association has interfered with a person’s right to own property. Also, if the community association gets

involved and notifies its members of the identity and residence of a registered sex offender, then this “lifelong scrutiny” amounts to double

jeopardy because the offender is being punished, once again, for a sentence already served (I am not sympathetic with this argument). Or, based on the Federal Fair Housing Act Amendments of 1988, a sex offender might allege that they have a disability protected under the law which would entitle them to residency without scrutiny. For the most part, these arguments will need to be played out in the courts to be resolved conclusively.

There are several factors that must be considered, and certain risks assumed, before a community association adopts a ban on sex offenders within their community. Once these “risks” have been discussed, and a cost-benefit analysis conducted, among the board, property manager, and attorney, then you are ready to implement a plan.

While it may be premature to state with certainty that a community association has an unequivocal right to restrict sex offenders, I do advise communities to consider the issue closely and act as they deem appropriate.

For instance, consider the following questions: By adopting a restriction on sex offenders, does that association now assume a duty to make sure that sex offenders do not reside within the community? If so, which volunteer gets that task?

This author believes that an outright ban on sex offenders by your governing documents, does create a duty upon the Association to diligently monitor those residing (and visiting) within the community. Imagine the potential liability if you have assumed this duty and then a violent sex crime occurs in your community – is the association, the board, the

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property manager now liable? Jointly and severally? Individually?

A related question is, can you adopt a policy whereby any renters who are on the sex offender registry are not allowed to reside within a community? Can this be done by board resolution or must it be done by amendment to the governing documents?

I always advise that such issues be done by document amendment. At a minimum, those communities that have adopted restrictions on sex offenders have implemented the following strategies: (1) the restriction or ban is limited to violent/dangerous sex offenders (local law enforcement can help you identify the varying degrees of offenders). (2) The ban does not prohibit a sex offender from owning property, but it does prohibit a sex offender from residing within the property (e.g., as owner or renter). This is an attempt to defeat the argument that a ban is an unreasonable restraint on alienation. (3) Finally, those associations that have adopted such restrictions include a clause that states: “The Association undertakes no liability whatsoever as a result of failing to enforce this covenant . . .” Many attorneys will tell you, however, that such exculpatory clauses are about as valuable as the paper they are written on.

Again, time will tell how this plays out, and it will inevitably be in the courtroom. It may be the unique nature itself of common interest communities that provides the best de-

fense to any such challenges (i.e., the shared ownership of common elements of the community). To date, I am aware of only one case (*Mulligan v. Pan-*

ther Valley Property Owners Association) where an amendment completely banning predatory sex offenders was held valid and enforceable.

II. Does an Association Have a Duty to Restrict, or Warn of, Sex Offenders?

Utah law states that “members of the public are not allowed to publicize the information [contained in the sex offender registry list] or use it to harass or threaten sex offenders or

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members of their families; and harassment, stalking, or threats against sex offenders or their families is prohibited and doing so may violate Utah criminal laws.” ([Utah Code Ann. §77-27-21.5 \(21\)\(b\),\(c\)](#))

This provision of the law should cause community associations to seriously consider the ramifications of publicizing any such information it may become privy to. I have often been asked if an association should publish a list of registered sex offenders in their newsletter or post the list in the clubhouse. My answer is always unequivocally “no.”

In my experience, there are three methods of dealing with the presence of sex offenders in a community. Two are preferred, and one of them, for obvious reasons, is not.

These three possible approaches are:

1. Do Nothing. The board, property manager and attorney stick their heads in the sand and stick to a “caveat emptor” mentality. In other words, you do nothing. I do not advise this approach once a sex offender becomes known to the association (for example, a homeowner calls in and informs the manager). I do not, however, believe that it is the responsibility of the board or manager to search the sex offender database on a regular basis.

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2. Wait and See. The board may adopt a “wait and see” approach. By this, I do not mean wait and see if the offender causes an additional offense. I simply mean that once the board is notified of the problem, they monitor the situation (e.g., take note of complaints from neighbors) to see if any suspicious activity is occurring. If so, the police should be contacted immediately. The board should not shy away from direct communication with the “complaining” neighbor but it does not need to make the entire community aware.

3. Be Proactive. The third approach is much more proactive. Once a sex offender is brought to the board’s attention, the board

could decide to take formal steps to help protect its members and let the presence of a sex offender be known. However, as noted above, the law expressly states that the sex offender registry list may not be used to harass sex offenders or their family members. Arguably,

publishing the names of sex offenders in your newsletter, for example, would be deemed to be harassment. Another problem is that the registry may not be entirely correct. There is always the possibility that disseminating any names could result in the board facing claims of libel and/or slander. In my opinion, a better approach might be to inform your members that a sex offender registrant may reside in your community and point them to the relevant website: <http://corrections.utah.gov/asp-bin/sexoffendersearchform.asp>.

Under this third approach, it is important that you do not identify the person specifically and do not identify their address. Simply let it

be known where the members can get the source of this information. Be very careful however, because not only can you not publicize the information contained in the registry, you cannot “use it to harass” sex offenders or their family. The term “harass” is often interpreted broadly by courts. Merriam-Webster says that to “harass” is “to create an unpleasant or hostile situation.” I don’t think it will take much to constitute harassment, so a board or manager must be careful.

Please be cautious of creating mass hysteria in your community. In reality, it is not likely that any degree of excitement will be constructive. Cool minds must prevail.

To help calm nerves and shield the board from an allegation of harassment, I advise calling a town hall meeting of members to discuss these concerns – if the concerns have risen to that level. The board should not make the presentation. Contact your local police department and have them discuss the registry, how it can be used, and have them explain how the registry is enforced. Also note that police officers enjoy some “immunity” from certain lawsuits that board members do not.

In summary, I do believe a board has a duty to do “something” once it is informed of a sex offender residing in the community. By “something” I mean following one of the two preferred strategies numbered 2 and 3 above.

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