Community Association Management *Insider*®

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INSIDE THIS ISSUE

Fannie and Freddie Roll Out New Loan Fees, Appraisal Reform

The two government-sponsored mortgage giants, Fannie Mae and Freddie Mac, are raising their loan fees and implementing a new program to cut down on abusive appraisals.

Fannie Mae now has a mandatory fee of three-quarters of a percentage point on all condominium loans, no matter how high the applicant's credit score. Along with other fees, borrowers are now starting to get hit with cost-raising appraisal rule changes. They have begun requiring appraisers to complete an extra "market condition" report that includes detailed statistical analyses of local sales and pricing trends. In response, appraisers are charging $45 to $50 for the time required to complete the form.

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FEATURE

Latest on Sex Offender Registration and Residency Restrictions

The possible presence of a sex offender within a community gives rise to unique issues. Oftentimes, associations' governing documents impose duties on the board of directors to maintain "safe" conditions for association members. Thus, the board of directors may have a duty to act once board members learn of a sex offender living within the community.

These duties may range from disclosing a sex offender's presence to notifying the proper authorities if the sex offender violates state or locally imposed residency restrictions. We will discuss the minimum information requirements of each state's public sex offender Web sites and the latest cases concerning where sex offenders may live.

Implementation of SORNA Standards

Usually, flags are raised when the community receives notification from local law enforcement that a sexually violent predator intends to move to the neighborhood or a board member hears rumors from neighbors that a sex offender lives within the community. In the latter

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BEST PRACTICES

How to Prepare Your Community, Management Office for a Pandemic Flu

A pandemic flu is a global outbreak of disease originating from a new flu virus. Since most people have little or no natural immunity to these new flu strains, pandemic flus are likely to be more severe than seasonal flus with greater risk of hospitalization and death.

The number of swine flu cases in the United States has been rising, and reports from the Centers for Disease Control and Prevention (CDC) indicate that there are more confirmed cases to come. Dr. Anne Schuchat, the CDC's interim deputy director for science and public health programs, stated during a recent teleconference that the spread of the swine flu is far from over, and could continue through the summer. "H1N1 is not going away, despite what you've heard," she said. In late May, the CDC was reporting 5,710 U.S. cases of swine flu in 48 states, including eight deaths.

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Sex Offender Registration (continued from p. 1)

situation, it is important to confirm the accuracy of the rumors before taking any actions. If the rumor turns out to be inaccurate, the association could be sued for defamation of character.

Verification has been made easier with the passage of the Sex Offender Registration and Notification Act (SORNA), a comprehensive set of minimum standards for sex offender registration and notification throughout the United States. Under SORNA, states must include the following information on their public sex offender Web sites: current offense, employer address, name, current photograph, residential address, school address, and vehicle license plate number and description.

One of the underlying purposes of SORNA is to close any registration and notification gaps among states because each state differs in terms of how it administers sex offender registration and how the information is shared. SORNA also offers greater offender accountability and sanctions for noncompliance by the offender. By law, all states have to implement SORNA standards by July 27, 2009.

Registered Sex Offenders and Residency Restrictions

Across America, states and municipalities are implementing laws to limit the places where convicted sex offenders may live. More than 20 states and numerous local communities have adopted statutes and ordinances that limit the places where a sex offender may legally live. While confirming that a sex offender lives in your community, you might have come across some of these restrictive housing laws with regard to sex offenders. Although you might think these laws apply to the sex offender living in your community, some courts have narrowly interpreted the application of these laws. Here are the most recent cases that may inform whether or not these laws will apply to the confirmed sex offender in your community.

Ownership of home before state residency statute becomes effective. Generally, laws that make an act punishable as a crime when such an act was not an offense when committed are unconstitutional. If your state restricts where sex offenders may live, depending on when the sex offender living in your community bought his home, the state may not be able to apply its residency laws to the sex offender.

In a recent case, a city sought to prohibit a convicted sex offender from living within 1,000 feet of a school under state law. The trial court ordered the offender to vacate his residence. The offender appealed. The appeals court found that the offender had bought his home and committed his offenses before the effective date of the state's residency law. The offender bought his house in 1972, and the law's effective date was in July 2003. As a result, the court ruled that it was an error to apply the statute to the offender because nothing in the statute explicitly provided that it operated retroactively. Although the language of the statute was ambiguous regarding its prospective or retroactive application, ambiguous language was not sufficient to overcome the "presumption of prospective application" [Ohio: City of

Middleburg Heights v. Brownlee, May 2008].

In another case, an Indiana appeals court ruled that a state residency law regarding sex offenders was an impermissible retroactive law. On the date of the sex offender's conviction, he owned and resided in a home that was within 1,000 feet of a school property, a youth program center, or a public park. Nine years after his conviction, Indiana passed a residency statute that established him in violation of the statute.

Here, the court ruled that the residency statute is a criminal statute that criminalizes residency because of the resident's status as a sex offender. In addition, the statute's effect is punitive because it is applied retroactively to sex offenders who established ownership and property rights in a residence prior to the effective date of the statute, and because it forces them to relinquish some or all of their ownership rights or face a felony charge. Perhaps most important, Indiana's residency statute does not exempt ownership established prior to the statute, provide a constitutional taking procedure, or exempt ownership affected by later construction of a protected facility or area [Indiana: State v. Pollard, May 2008].

Child care facility moves near sex offender. Sometimes a daycare facility or school may open up near a sex offender's residence. This is what happened in one Georgia case. Georgia law prohibits registered sex offenders from residing or loitering at a location that is within 1,000 feet of any child care facility, church, school, or area where minors congregate. In this case, a child care facility moved within 1,000 feet of a sex offender's home. The offender's probation officer then demanded that he remove himself from his home upon penalty of arrest and revocation of probation even though, at the time of purchase, the offender's home was not within 1,000 feet of where minors congregate.

The court ruled that the state's action was unconstitutional. The court determined that the offender's property interest in the home he purchased with his wife to be significant. As a registered sex offender, the locations where he may reside are severely restricted by state law. Nevertheless, he was able to find and purchase a house that complied with the state's residency restriction. The home was purchased for the sole purpose of serving as their home, and by prohibiting him from residing at the house, the law would impair his use of his property as the home he shares with his wife [Georgia: Mann v. Dept. of Corrections, November 2007].

Application of city residency ordinances. States are not the only entities placing restriction on where sex offenders may live. There are numerous city ordinances prohibiting convicted sex offenders from living within a designated distance of schools, parks, playgrounds, and daycare centers. In some instances, if the state has passed comprehensive sex offender laws, the courts may decide that city ordinances that regulate where sex offenders may live may not apply.

In these types of cases, the courts are concerned that some restrictions are so severe that they, in effect, mete out additional punishment on convicts who have served their prison sentences. From a state level, additional problems with local ordinances include registered sex offenders:

- Who congregate into a single neighborhood because it is the only place they can live; and
- Who cannot find any place to reside and have become homeless, meaning that state officials no longer have a permanent address for them and no real way to monitor their whereabouts.

In one New Jersey case, a 20-year-old college freshman, who was convicted for a sexual offense committed when he was 15 years old, moved into a dormitory on campus. The township had passed an ordinance prohibiting a person over the age of 18 who has been convicted of a sexual offense against a minor from living within 2,500 feet of any school, park, playground, or daycare center. On notice from the town, the college student was required to move within 60 days or be subjected to a fine, imprisonment up to six months, and community service. The New Jersey Supreme Court ruled that the state legislature had intended the state's legislature to exclusively regulate the handling of convicted sex offenders. Therefore, the town's ordinance conflicted with the policies and operations of the state's sex offender laws and did not apply [G.H. v. Township of Galloway, September 2008].

Unregistered sex offender required to abide by residency statute. If the convicted sex offender in your community is not required to be registered because he committed his crime before any registration requirements were put in place, that individual may still be required to abide by the state's residency requirements. An Iowa law passed in 2005 prohibits sex offenders from residing within 2,000 feet of certain facilities such as schools. In this case, the sex offender was convicted of a sexual offense against a minor in 1977, but was not required to register as

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Sex Offender Registration

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a sex offender. He challenged the trial court's ruling that he was subject to the residency restrictions of the statute. He argued that he is not subject to the statute because he was not a "registered" sex offender.

The Iowa Supreme Court determined that the residency law applied to the sex offender in this case because the definition of "person" included offenders who were not registered. The inclusion of the residency restriction in the chapter entitled "sex offender registry" did not mean that the Iowa Legislature intended to limit the application of such to persons subject to the residency requirements [Iowa: Wright v. Iowa Dept of Corrections, April 2008].

Seek Legal Counsel

Once a sex offender's presence is confirmed, before any action is taken, the association should be clear about what authority it has for disclosing the information about the sex offender to the community and whether housing restrictions might apply to the sex offender living in the community.

Especially with aspects of disclosure, states have different rules regarding if and when information about sex offenders can be disclosed to the public. Some states may allow disclosure while taking into consideration how dangerous the state views the person to be. Others are more restrictive. California, for example, makes it a misdemeanor offense for private citizens to copy and distribute information about convicted sex offenders.

For more information, visit:

www.communityassociationinsider.com

Search Our Web Site by Key Words: SORNA; sex offender; residency restrictions; residency ordinance; residency statute

Pandemic Flu (continued from p. 1)

A pandemic flu such as the swine—or H1N1—flu may present unique challenges for an association or management office because continued business operations entail operating at a high level to continue to provide support services for the community. The following are some flu-specific preparedness points provided by the National Multi-Housing Council report on pandemic flu preparations. Management offices should expect to execute or consider implementing some of these steps in the near future.

Prepare for Staff Absences

The CDC has recommended that management emergency plans include expecting and allowing staff absences during a pandemic due to illness or family member illness, quarantines, and school or public transportation closures. As a starting point for developing a plan, managers should consider the following points when formulating a response plan to pandemic flu.

- Consider leave policies that require sick individuals to stay home and accommodate situations where healthy employees are absent due to circumstances such as mandatory isolation. Policies should also provide clear guidance for indentifying and dealing with abuse of the absence policy.
- Cross-train employees to perform multiple job functions in anticipation of increased employee absenteeism.
- Establish policies for telecommuting, flexible work hours, and staggered shifts to the greatest extent possible.
- Establish protocols for staff to stay in touch with their supervisors.
- Familiarize yourself with state and local public health and disaster management authorities, learn how to access and use their resources, and designate individuals to maintain these relationships. These individuals will be responsible for providing your community with up-to-date information about a pandemic, recommended procedures, and mandatory activities.

Minimize Chances of Transmission

Some condo members and staff persons may worry that the confined characteristics of condominium buildings may contribute to the spread of a pandemic flu. Fortunately, these characteristics are not likely to exacerbate flu transmission rates. Most flu is spread when infected individuals cough and/or sneeze. The vapor droplets released in these actions contain infectious viruses. However, these particles do not remain suspended in the air, so close contact with an infected individual is required for transmission. Experts consider three to six feet a protective distance from sick individuals. Therefore, the mere presence of sick members within a community should not pose a threat to other members or staff.

HVAC systems. Shared heating, ventilating, and air conditioning (HVAC) systems also do not generally help transmit flu viruses. Therefore, staff and condo members should not disable or otherwise alter HVAC systems unless expressly instructed to do so by local authorities or experts such as building engineers. Doing so could compromise the indoor air quality of the building and the overall health of members.

Transmission by fomites. Flu can also be transmitted through "fomites." Fomites are inanimate objects such as tissues, money, and office supplies that can transmit infectious disease from one person to another. For example, when a sick individual touches a door handle, the virus can attach to that handle. Then, a second person coming in contact with that door handle can become infected. This kind of transmission can be minimized by frequent hand washing, cough etiquette, and other personal hygiene efforts.

In the community context, staff should increase the frequency and thoroughness of cleaning in common areas and of frequently touched items like elevator buttons, door handles, and intercom panels. Accordingly, extra supplies should be purchased ahead to ensure that proper cleaning and maintenance can continue despite shortages or disruptions in the supply chain due to a pandemic.

Follow Local Authorities' Directions

Communities should avoid any activities that are counter-productive to greater mitigation efforts. For instance, if local authorities close schools, it would not make sense to create onsite childcare arrangements that mimic the classroom setting.

With the swine flu, according to the CDC, what Mexico and the U.S. is experiencing is a large outbreak or an epidemic, made up of a series of smaller outbreaks and epidemics. Therefore, in Mexico, they are seeing increases in disease in parts of the country and decreases in other sections of the country. The CDC expects to see similar patterns among the states. As a result, localized responses may differ across regions of the United States, and that is why it's important to also get pandemic flu information from local authorities. For more information on state contacts and resources for pandemic flu, visit *www.pandemicflu.gov/plan/states/statecontacts.html.*

For more information, visit:

www.communityassociationinsider.com

Search Our Web Site by Key Words: health; safety; medical emergencies; staffing; maintenance

Q & A

The INSIDER *welcomes questions and comments from subscribers. You can submit your questions through the "Ask the Insider" feature of our Web site,* www.communityassociationinsider.com.

Authority to Add Community-wide Wireless Internet System

Q My condominium association would like to contract for wireless Internet service in the community, but it is an all-or-nothing proposition. Either all units will get it and be charged through the monthly assessment, or no one will be able to get it. Most of the members would like wireless Internet access and agree that they are happy to pay their fair share of the cost, but there are a few holdouts. Does the board have the authority to add a service that was not originally part of the association's common expenses?

A It is no surprise that wireless Internet access is becoming an increasingly desirable amenity among members. According to J. Turner Research, wireless Internet is a top amenity request according to executives and operating staff of multifamily buildings, and 45 percent plan to increase spending on Wi-Fi in 2009, as communities seek cost-effective ways to gain an edge in the down market.

If the declaration gives the board sufficient power, then a bulk buy of technology arguably enhances the value of the real estate and is appropriate and enforceable, even against those owners who will not use it—just like the swimming pool, says Virginia attorney Robert Diamond of Reed Smith LLP.

Be sure to consult with your attorney to check if your community's governing documents have very limiting language about what assessments can be used for. If this is the case, an amendment may be necessary.

Insider Source

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RECENT COURT RULINGS

➤ Association Not Liable for Defamation

Facts: In a rural California homeowners association with 16 members, one member witnessed two dogs attack his pet goat. He chased them off and followed them to their owner's house. The member told other members in the area, including the association president, about the attack.

At the next meeting of the association, one of the topics discussed and recorded in the minutes was "the dog attack." The next day, the association published and distributed to its members the minutes of the meeting in the form of a newsletter and advised its members to be cautious. The dog's owner filed a defamation lawsuit, and the association asked the trial court to dismiss the case. The trial court granted the association's request, and the suing member appealed.

Ruling: A California appeals court upheld the trial court's judgment.

Reasoning: The suing member tried to argue that the statements in a small neighborhood newsletter of a private association are not a "public forum" deserving free speech protections. The appeals court disagreed. By definition, a public forum is a place open to the use of the general public for purposes of assembly, communicating thoughts between citizens, and discussing public questions. The court ruled that a public forum is not limited to a physical setting. It also includes other forms of public communication.

The court stated that a single publication does not lose its public forum character merely because it does not provide a balanced point of view. The association newsletter was specifically designed to foster awareness and promote discussion of issues crucial to the community, and since the statement involved an issue of public interest, it is therefore protected speech.

■ Toler v. Dostal, April 2009

➤ Association Allowed to Hold Special Meeting

Facts: A dispute arose between a member and her neighbors regarding access to the member's air conditioning unit for servicing through a trapdoor in a fence separating their two properties. As the dispute intensified, the neighbors circulated two letters to other members of the association to have the member removed from the association's board of directors. The letters accused the director of abusing her position as chair of the architecture and landscape committee and lying to other members of the board.

The governing documents provide a special meeting of the membership to be called upon request of 20 percent of the voting members. In response to the letters, a special meeting for voting on the director's recall was requested with 22 percent of the members. A total of 99 members were represented at the special membership meeting. Because a quorum was not present, no action was taken, and those members present voted not to reconvene the special meeting at a future date.

The director sued the association for defamation and sought a court order to prevent any future meeting to remove the member from the association board. The trial court dismissed the member's lawsuit. The association had free speech protections in this case because the member's complaints against the association arose out of written and oral statements made in a public place or in a public forum in connection with an issue of public interest. The member appealed.

Ruling: A California appeals court agreed with the lower's court decision.

Reasoning: The court stated that convening a special board meeting to consider the petitions to recall the member signed by more than 20 percent of its members and setting a special membership meeting to vote on the recall were taken in furtherance of the association's exercise of its members' rights of petition and free speech.

Also, the actions undertaken by the association did not amount to defamation. The notices sent to members by the association advising its members of the special membership meeting did not attach the letters or quote from the charges made against the member, and they expressly stated that the recall petition and related letters had been circulated independently by the neighbors with no involvement from the board.

■ Aziz v. Beverly Glen Park Homeowner's Assn., April 2009

➤ Association Not Liable for Discrimination

Facts: An association member enlarged his front stoop and the back patio of his townhouse in violation of the governing documents. The association fined him $500, ordered him to restore his property to

its original condition, and suspended his voting rights as a member of its board of directors for 60 days.

The member then sued the association and its management company under the federal Fair Housing Act, alleging that they took these actions against him because he is Muslim, Asian, and was born in Afghanistan. The U.S. district court granted a judgment without a trial in the association's favor. The member appealed.

Ruling: The 7th circuit appeals court denied the member's request for reconsideration.

Reasoning: The appeals court affirmed the lower court's judgment that the association provided legitimate justification for its actions. It had a duty to enforce the governing documents, and the member's appeal was not only filed late, but did not give any reasons to review the lower court's decision. The appeal simply rehashed the case based on the existing record.

- Tokh v. Water Tower Court Home Owners Assn., May 2009

➤ Arbitration Required for Rental Restriction Dispute

Facts: An Ohio condominium association adopted an amendment to its governing documents that reduced the number of rental units allowed in the community. A group of owners filed for a court declaration, alleging that the amendment was invalid because it affected the fundamental purpose of the owner's unit. They argued that according to the governing documents, 100 percent of the members had to approve it rather than the 75 percent who did, because the amendment affected a fundamental purpose of a condominium unit.

The association sought arbitration of the matter in accordance with the arbitration provision in the governing documents. The members argued that the mandatory arbitration clause was in conflict with state law and, therefore, unenforceable. The trial court granted the association's request to postpone the hearing pending arbitration. The members appealed this decision to postpone the decision pending arbitration.

Ruling: An Ohio appeals court agreed with the trial court's decision.

Reasoning: The court ruled that the state law cited by the members does not apply. Under Ohio state law, a board of directors may amend a declaration without a vote for a few limited reasons. Outside of those reasons, if an amendment gets passed without a vote, the laws allow an aggrieved member to seek a court declaration invalidating the amendment.

Here, the court stated that the ultimate issue in this case was whether the vote of 75 percent of the members was sufficient to pass the resolution. If the members prove that the vote is found invalid, then the amendment fails and the declaration is not amended. The amendment does not automatically transform into an amendment made by the board without a vote of the members simply because a vote was invalid. In this case, the board took a vote and did not attempt to amend the declaration without a vote of the members.

- Boyd v. Spring Creek Condo. Assn., May 2009

➤ Association Must Sue Individuals of Dissolved Company for Construction Defects

Facts: A Washington condominium association sued the limited liability company that developed the condominium for construction defects. However, after the building was completed, the company ceased active operations and did not pay license fees or file reports as required by law. Eventually, the secretary of state administratively dissolved the company.

The company then asked the court for a judgment without a trial on the basis that the company ceased to exist upon cancellation of its certificate of formation. The trial court granted the company's request. The association appealed. A Washington appeals court ruled that the trial court should grant the association's request to amend its complaint to add to the lawsuit the individuals who allegedly failed to properly wind up the company. Both sides asked the Supreme Court of Washington to review the case.

Ruling: The Washington Supreme Court ruled that the company could not be sued, but claims against individual members of the company would be allowed.

Reasoning: The court ruled that the association could not properly sue the company because it was a canceled limited liability company at the time the association initiated the lawsuit. The court also said that the company failed to comply with the winding up requirements under state law. A dissolved limited liability company must pay or make arrangements to pay known obligations and claims, even if the claims have not occurred or are contingent upon some other occurrence. Here, the company did not pay or make provision for paying the claims asserted by the association. Individuals of a limited liability company who wind up the company improperly expose themselves to individual liability.

- Chadwick Farms Owners Assn. v. FHC LLC, May 2009

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