

Association Developments

A complimentary newsletter for our
Community Association Clients and their Managers

1st Quarter 2007 - Volume XVII

www.clayton-mcculloh.com

Offices in: Main Office: Maitland Brevard County Branch Office: Indian Harbour Beach Volusia County Branch Office: Daytona Beach

Sexual Predators in the Neighborhood: Suggested Plans of Action for the Community Association

Directors frequently have requested advice about a community association's rights and responsibilities with respect to disseminating information regarding a sexual offender or sexual predator who is found to be living in their community. Understandably, this situation can often evoke very strong negative feelings and impulsive responses from Board members and residents of the community alike. However, Clayton & McCulloh must recommend that a certain amount of prudence be used if the association chooses to address this problem in its official capacity. That is, if the association's Board of Directors is going to take action on behalf of the association or sanction certain actions by members or committees on behalf of the association, it should be remembered that certain plans of action may be more desirable from a risk avoidance standpoint than others.

For example, if the Board of Directors were to publish the personal identity and address of the alleged or convicted sex offender or announce that individual's name and address at an association meeting or function, some risk to the association may develop from legal actions maintained by the sex offender and/or his family. We are not suggesting that the sex offender would prevail in any such action, but the possibility or threat of litigation should be avoided, if possible.

Associations should also keep in mind, however, that there exists a body of case law which appears to suggest that community associations have a duty to protect their members and residents from "reasonably foreseeable harm." Therefore, knowledge of the existence of a sexual offender, without taking reasonable protective action, may put a community association at risk. Consequently, in order to balance the desire to avoid threats of legal action with the desire (and perhaps even duty) to protect the association and its members, the association may consider certain limited types of action.

For instance, the association may want to consider putting some kind of article or notice in a newsletter, mail-out or posting to the residents dealing with sexual offenders and sexual predators in general. This notice may include generic information regarding the fact that sexual offenders and sexual predators exist throughout the state in numerous communities without the knowledge of the current residents therein. Furthermore, this notice could strongly encourage residents to protect themselves and their families by checking with the Florida Department of Law Enforcement (FDLE) and/or their website (www.fdle.state.fl.us) with regard to whether there are any sexual offenders or predators to be aware of in the community. Additionally, the association may want to include information which suggests that there has been some concern recently that a sex offender may have moved into the community, without actually identifying the individual or the individual's whereabouts.

Another point which has been raised on occasion concerns how the dissemination of information
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CALL YOUR ATTORNEY BEFORE TAKING ACTION **Predator, from pg 1**

regarding a sexual predator living in the community could negatively impact property values. While it may be true to a certain degree that property values may be impacted, weighing the financial risk against the potential safety risk of ignoring the situation and failing to alert residents should be a key factor in determining an association's course of action. Also, from a practical stance, with the advent of widespread access to information regarding sexual offenders online, the news is likely to spread within the community at some point that an alleged or convicted offender is living in the community. Therefore, the protection of property values that may result from inaction may be very short-lived, if realized at all.

Please understand that these recommendations are predicated on an association acting in its official capacity. Residents of the community and/or members of the

association may potentially have more leeway if acting in their individual capacities and may want to investigate other options accordingly. Additionally, it is important to keep in mind that each community faced with a situation of this nature may have circumstances which suggest approaches which are somewhat different than what has been set forth herein.

If you suspect or have reason to believe that a sexual predator is living in your neighborhood and would like your community association to take action, it may be beneficial for the association to contact legal counsel prior to doing so. Clayton & McCulloh is more than happy to assist our clients in evaluating the best methods for protecting a particular association and its members from the risks, both practical and legal, of handling this often controversial and upsetting topic.★

VISIT FLORIDA'S SEXUAL PREDATOR WEB-SITE

Florida has created a web-site to locate sexual predators in your neighborhood. The web-site is www3.fdle.state.fl.us. This web-site will provide you with such information as:

- The Names and addresses of sexual predators in your area. You can pinpoint predators within five miles of your residence or business;
- Photographs of Predators including their date of birth, race, sex, hair and eye color, height, and weight;

- Any aliases, scars, tattoos, or identifying marks;
- Crime Information and Qualifying Offenses such as date of offense, description of crime, court case number, jurisdiction and state, and adjudication;
- Victim Information such as gender and if they were minors; and
- Information on their vehicle and vessel.

You can also access other State's Sexual Predator web-sites.★

Tips for Directors: Team Work

The way a team plays as a whole determines its success. You may have the greatest bunch of individual stars in the world, but if they don't play together, the club won't be worth a dime.

- Babe Ruth

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REINCARNATION IS REAL . . . AT LEAST FOR HOMEOWNERS ASSOCIATIONS

Seldom, in the area of Real Estate law, is there any need to discuss “reincarnation.” Although the idea of recycling life still is considered to be far-fetched, at least with homeowners’ associations, “reincarnation” is in fact now statutorily permitted.

In conjunction with numerous changes implemented by the Florida legislature to the Homeowners Association Statute, the legislature also enacted comprehensive and innovative new provisions which, under certain circumstances, allow communities, which have had their declarations of covenants and restrictions terminated by pre-determined expiration dates or by the effects of the Marketable Record Title Act (MRTA), to now reestablish their pre-existing covenants.

Florida Statutes, Sections 720.403 through 720.407, set forth the procedure for reestablishing covenants and restrictions. Generally, communities may revitalize pre-existing covenants, so long as the reestablished covenants are not more restrictive than the covenants that previously existed. However, the newly revitalized covenants may provide for amendments (if no procedure existed) and for a longer term of duration than the previous covenants. The Statute is limited to “mandatory” homeowners associations as that term is defined in the Homeowners Association Statute.

The process starts with at least three parcel owners in the community forming a committee to prepare or cause to be prepared the complete text of the proposed reestablished covenants, as well as the articles of incorporation of the homeowners association and the bylaws. The documents are then submitted to the other parcel owners in the community for approval. The parcels proposed to be subjected to the documents must be identified in the covenants by legal description and also must include the name of the parcel owner. The proposed reestablished covenants must contain the same voting interests and proportional assessment obligations as the earlier covenants, the same amendment procedures (if any

existed under the earlier covenants), and no provisions that are “more restrictive” than contained in the earlier covenants.

Parcel owners, to be subjected to the newly reestablished covenants, must approve of them as follows: Copies of the documents, as well as a graphical depiction of the community to be subjected to the new documents, must be submitted to the parcel owners no later than 14 days before the time that approval of the proposed documents is sought by the committee. A majority vote or written approval of all the owners proposed to be subjected to the documents is then required for the documents revitalizing the covenants and restrictions to go to the next step.

The next step is submission of the proposed governing documents to the Florida Department of Community Affairs (“Department”). Not later than sixty days after the submission of the documents to the Department, the Department is required to determine whether the owners have acted in accordance with the law and submit the approval or reasons for disapproval in writing to the Homeowner’s Committee. Then, if the documents have been approved by the Department of Community Affairs, the Homeowner’s Committee must file the articles of incorporation with the Secretary of State and execute and record the declaration of covenants and restrictions in the county in which the community is located within thirty days of receiving approval from the Department. The committee must also see that once the documents have been recorded, copies are to be given to each parcel owner subject to the reestablished covenants.

With that, the community is then subject to the reestablished governing documents. It must be noted, however, that the statutes state the revived declaration of covenants and restrictions may not have a retroactive effect upon a parcel. Clayton & McCulloh cautions any community desiring to reestablish its covenants to contact us regarding this process. Although such a process affords a community a very welcome opportunity to reestablish

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C & M REVAMPS NEWSLETTERS **Association Developments & C&M Community Update** **Have New Look and New Features**

Notice anything different? Yes, you guessed it! Drum roll, please. . .Introducing our newly redesigned and expanded Association Developments . Here's what you can expect starting with this issue:

- A great new look! We have incorporated our firm's theme of green marble and Greek columns into the newsletter and are utilizing new fonts.
- More legal articles! Depending upon the issue, we will be featuring two or more legal articles written by our experienced attorneys who have a combined legal experience of 96 years!
- Practical articles! From time to time, we will also be featuring practical articles to assist community associations with their responsibilities such as how to boost attendance at their Annual Meeting or tips for a successful newsletter. Psst! If you have any suggestions for future articles, call our Client Services Department.
- Information on fixed rate services for your Association! Each issue, we will discuss a particular fixed fee service which we offer that can save your Association money.
- Guest Columnists! Starting with this issue, we will be featuring guest columnists who participated in our 2006 Annual Directors Workshop and Trade Show. Depending on the newsletter, each issue is scheduled to feature one or more informative, educational articles from various companies. While we do not necessarily endorse, nor recommend, the use or employment of any independent vendors' articles featured in our newsletters, C&M is proud to be the first firm to create and implement this feature in our newsletter.

- Not only will you be receiving great legal and practical information, you also start having access to information from some of the most prominent leaders in the community association industry.
- Upcoming Seminars! We will let you know when one of our outstanding seminars is coming to a location near you. We'll also tell you when one of our staff members will be a featured speaker at another organization's event. Receive all the information on attending these special events and gain valuable knowledge for your Association!

As one of our Association clients, each member of your board will receive the following complimentary newsletters approximately four times a year:

- Association Developments - This newsletter is available to all board members and your Association manager and is sent to you through the mail; and
- C&M Community Update - This newsletter is a completely different newsletter from Association Developments which features articles not published in Association Developments and is sent exclusively electronically (through e-mail). Do we have your current e-mail address? If so, you will receive this informative and interesting newsletter that is available to all board members and your Association manager. Your e-mail address is held in the strictest confidence and is not disclosed to any outside source. Every C & M Community Update is sent to one of our e-mail addresses with your e-mail address receiving a blind copy. What does that mean? It guarantees your privacy. Your e-mail address will not appear anywhere so no one will know who you are. No one will be able to access your e-mail address and start sending you spam. I know your next question - will Clayton &

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NOW FEATURING VENDOR ARTICLES

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McCulloh start spamming me? Sorry, our Client Services Department just doesn't have the time to start spamming our clientele nor do we have any desire to do so. There are only four things that you will receive from Clayton & McCulloh through e-mail:

1. Correspondence on any legal issue one of our attorneys or paralegals is handling for your Association;
2. The C & M Community Update newsletter;
3. An invitation to one of our seminars; and
4. Late breaking news about important legislation or case law that affects your Association.

Yes, that's it! You won't receive anything else from us. If you want to ensure you receive the C & M Community Update, either call or e-mail us to make sure that we have your e-mail address. Please provide us with your name, position on the Board, and the name of your Association with your e-mail address and we will provide you with this educational tool each time it is published. E-mail us at clientservices@clayton-mcculloh.com.

All of our newsletters are published for every board member of our Association clients. Occasionally, we provide a complimentary one year (or four issues) to any Association's Board of Directors, owners, or managers by special request. This subscription is offered only one time and cannot be renewed. However, in celebration of our new newsletters, we will be happy to provide a complimentary subscription to the newsletters to any Association that was formerly on our mailing list. After the four complimentary issues, the subscription will not be renewable. If you know of an association or manager who would be interested in receiving a complimentary subscription, encourage them to call or e-mail us and request their complimentary subscription.

We hope that you like our new look and the expanded newsletter. If you have any suggestions for articles or other features, please call or e-mail our Director of Client Services, Arlene Ring. You can reach her at any of our offices at extension 129 or e-mail her at aring@clayton-mcculloh.com. As always, we are honored that you have selected Clayton & McCulloh as your Association's law firm and hope that you enjoy our newsletters. ★

ARE YOUR ASSOCIATION'S GOVERNING DOCUMENTS A MESS?

**Sign up for
Document Organization Service!**

Are your Association's Governing Documents a nightmare? Would you like to amend your Documents? If you answered yes and did not purchase our Document Organization Service when you first became a client, consider signing up for our Document Organization Service!

This service was previously available to new clients when the Association first hired C&M. We are now offering this fabulous service to existing clients on an hourly basis. A paralegal will organize your Documents and create an extensive Index. The paralegal will then forward the Association's Documents to an attorney who will perform a limited (up to 1½ hour review) to analyze for any major problems. Upon completion, the attorney will forward to the Association a "Comment Letter" outlining our concerns. You can then determine if you can live with your documents or perhaps you may want to amend them. You can also select a copy of this Service for your Association's records.

If you are interested in this service, please call Arlene Ring at any of our offices.

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TO BORROW OR NOT TO BORROW – THE SEQUEL

I wrote the original article during what I consider the infancy of Community Association Lending. My cohorts and I embarked on a sea of uncharted waters, driven by an engine revved up by Community Associations starved for cash. The funny part is, we didn't know it! During those first few years in the mid 90's, a time I classify as our "stupid" years, we chomped on the bit, ready to entertain any request that drifted through our offices. Delinquency? Rental units? Number of units? Bring them all on; we made them; 9 unit associations, whatever ... we found a way. What were the results of these early years? Now that we are "smart," are we too smart? What about competition? How is our industry progressing in servicing Community Associations? I am going to attempt to bring you up to date. Hey, it's a sequel, what were you expecting, *The Empire Strikes Back*?

Since 1996 we have made over one thousand community association loans. These loans total over \$300,000,000.00. That's right, three hundred million dollars. That makes our averages \$300,000.00. We continue to entertain all size loan requests, but prefer to process requests over \$100,000.00. Over the years our default rate is zero and our portfolio delinquency is virtually nil.

Due to the volume of production, we have adopted guidelines to which all new loan requests are subject. Loan requests which exhibit high delinquency or high rental unit numbers may not make it to approval.

In recent years we have moved to provide our services throughout the country. Each market area presents different challenges and we must adapt to customer attitudes and market conditions. Our rate structure provides prospective borrowers with a tantalizing list of term options and aggressive pricing. We recognize our competitors and respect them as fellow professionals. We, of course, feel that our product packages are the best offered in the industry.

In many areas of the country, association boards have "caught on" to the competitive nature of our business. They seek out several "bids" when seeking financing for

projects. In many instances the old "put the cart in front of the horse" syndrome sets in. Rate offers are sought from numerous institutions before any loan is approved. The Association should be cautious during this process. It is likely that many offers provided might not hold up, once actual financial packages are presented and underwritten.

Many of these financing transactions take an inordinate amount of time to "get to the closing table." Why? The inability of the multifaceted boards to make decisions and attempts to "satisfy" every unit owner in the community. Boards must strive to protect the integrity of their properties and provide prudent leadership. Delays in the decision making process can bring the association into an adverse rate environment, or allow advantageous contractual time frames to lapse. Common sense dictates that you can't please all the people all the time. Directors should rely on professional support to make reasonable decisions; accountants, attorneys, bankers, engineers, architects, reserve study professionals and property managers should be relied on to provide advice and guidance during the decision making process.

Recently, I have stumbled on a new problem we did not face in the "early years." When we first acquainted ourselves with the underwriting process, we would meticulously read the association's condominium or homeowners' association document to make sure the documents allowed the association to enter into the financing transaction. With loan volume at its present level, the bank does not perform this review. Condominium, HOA or cooperative documents are now reviewed by community association counsel. On several recent occasions we have moved through the approval process only to find prior to closing from association counsel that language within the documents requires a unit owner's vote to enter into the financing transaction. Based on these events, I caution association documents be reviewed for borrowing powers before moving ahead with any application process.

Additionally, many associations provide their unit owners a

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THERE ARE NOW BANKERS WHO SPECIALIZE IN SERVICING COMMUNITY ASSOCIATIONS

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period of time to pay their share "up front," thereby avoiding the interest expense on the loan. There are differing views from various attorneys on this issue. Association boards should work closely with their attorneys in formulating this plan. In addition unit owners who "pay up front," while enjoying the benefits of not paying their proportionate share of interest, are liable if the association should default on the loan or if additional assessments are needed, due to delinquency levels within the association. We have to state, however, that we have never encountered these types of default situations.

Article published with approval by author, Harold Blinder, Senior Vice President of Banco Popular, a financial institution providing financial services to community associations.

A few years ago we added lock box processing to our menu of community association financial services. We struggled to work the "bugs" out of the system and unfortunately disappointed some of our earliest clients. We now can say that we have a state of the art, image based, processing system which is performing extremely well. We have even begun attracting out of state clients. The "hang-up" here has always been the reluctance of unit owners to mail their maintenance payments out of state. I guess people are starting to realize that in reality they are mailing various payments to all sections of the country. Check your mortgage bills, credit cards, car payments, etc. Chances are they are not going to a local entity down the street. In any event, we continue to pursue a nationwide client base in the cash management, lock box business.

So, on an overall basis, how is the banking industry servicing community associations? I serve on the Community Association Institute National Banking Committee which meets semi-annually at "CAI" national conferences. I have to say that I am amazed at the skill level and professionalism of these folks, representing

various institutions from all corners of the fifty states, including Hawaii. Community Associations now have an opportunity to avail themselves of Professional Bankers who are specializing in this industry. This is a win/win situation for the communities and the banking industry.★

2006 DIRECTORS WORKSHOP AND TRADE SHOW ROCKS THE INDUSTRY!

Record Numbers Flock to Seminars!

Our 2006 Annual Directors Workshop and Trade Shows were a huge success breaking all previous records for attendance and received rave reviews!

This year, we added a Trade Show featuring vendors who specialize in servicing community associations. Our vendors were ecstatic over the turnout and the request for their services. Many vendors have already signed up for the 2007 Seminars! This year's seminars were held in St. Augustine, Cape Canaveral, Orlando, and Kissimmee. Featured as speakers at this year's seminars were Senior Partners Ken Clayton and Neal McCulloh, Attorneys Joy Carney, Joe Stayanoff, and Brian Hess, and Director of Client Services, Arlene Ring, speaking on such topics as collections, covenant enforcement, and what it means to be a Board member. Attorneys Russ Klemm, Chris Eri, and Carlos Arias were on hand to assist with questions and answers.

Our Trade Shows featured such vendors as:

Advanced Property Management of Central Florida, Inc.
Apartment-Condominium Vendor Guide
Asphalt Restoration Technology of Florida, Inc.
Baldwin, Cole, & Co., L. L. C.
Banco Popular
Bray, Beck, & Koetter, C. P. A., P. A.
Brenda Bray, C. P. A., L. L. C.
Business Insurance Corporation
Central Association Management, Inc.
Chaise Services, L. L. C.

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BOARD MEMBERS TURN OUT IN MASS!

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Charles Aquatics, Inc.
Colonial Bank
Commercial Mowers, Inc.
Community Association Banc
Condo Certs
Cort Business Service
Creative Mailboxes
Decon Environmental & Engineering, Inc.
Dependable Property Management, L. L. C.
Florida Association Management, Inc.
Florida Bulb & Ballast, Inc.
J. Carey Properties, Inc.
Invisible Waste Services
Karin's Engineering Group, Inc.
Keystone Engineering & Consulting, Inc.
Lars Holfve Construction, Inc.
Leland Management, Inc.
M. J. Lawns, Inc.
Mark Lammert, C. P. A.
McNeill, Garrison, & Fletcher
Michael's Plumbing
Nanak's Landscaping, Inc.
Pool Sure/Aquasol Controllers
PROscape, Inc.
PSeeTv
R. L. Haines Construction, Inc.
Rick Arsenault, Certified Pool Consultant
Sentry Management, Inc.
Spies Pool, L. L. C.
Richard White, Newspaper Columnist
Sihle Insurance Group, Inc.
Southeast Restoration Group, Inc.
Southern Mosquito Control Service, Inc.
Space Coast Condominium Association
Space Coast Property Management of Brevard, Inc.
Sprinkler Repairs, Inc.
T & S Restoration & Painting, Inc.
The Lake Doctors, Inc.
The Lawn Doctor of Melbourne, Inc.
The Ranew Insurance Agency, Inc.
The Sherwin Williams Company
Trugreen Landcare

Truly Nolen
Untouchable Maintenance, Inc.
Urban Electrical, Inc.
Vista Properties, Inc.
Westbrook Air Conditioning, Inc.
William A. Jackson & Company, C. P. A.
World of Homes

We are in the process of completing our plans for our 2007 Community Association Law Seminars & Trade Show which will be open to Board members, owners, and managers. The 2007 Seminars are scheduled to take place in St. Augustine, Cape Canaveral, Orlando, and Lakeland. Invitational flyers to our 2007 Seminars are in the mail. For up to the minute details on the upcoming seminars, watch your e-mail for your advanced invitation and our web-site! Don't be left out in 2007!

RE-ESTABLISH YOUR GOVERNING DOCUMENTS

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pre-existing covenants without the approval of all owners, it must be noted that any violations of those covenants which may have occurred while the covenants and restrictions had expired may not be able to be corrected by way of a covenant enforcement action.★

Tips for Directors & Managers

Nothing gives one person so much advantage over another as to remain always cool and unruffled under all circumstances.

– Thomas Jefferson

You have to accept whatever comes and the only important thing is that you meet it with the best you have to give.

– Eleanor Roosevelt