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PAVESE LAW FIRM | COMMUNITY ASSOCIATION NEWSLETTER

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HUD LIMITS ASSOCIATION'S ABILITY TO DENY HOUSING BASED UPON THE APPLICANT'S CRIMINAL HISTORY

BY: CHRISTOPHER J. SHIELDS, ESQ.

On April 4, 2016, the United States Department of Housing and Urban Development (HUD) issued its guidance memorandum on the use of criminal records to deny sales and leasing applications. HUD's position is built on last year's U.S. Supreme Court decision in Texas Department of Housing and Community Affairs, et al v. Inclusive Communities Project, Inc., et al. In a 5 to 4 decision, the U.S. Supreme Court held that a party no longer had to prove the intent to discriminate. Rather, the court allowed a fair housing claim to proceed simply based upon the allegations that the policy had a "disparate impact" on a protected class of citizens and even though there was no proof or allegation that the defendant intended to discriminate on the basis of race. (Under existing Federal Fair Housing law, there are seven (7) protected classes, race, color, religion, sex, handicap, familiar status, and natural origin.)

In the Texas case above, the plaintiff successfully alleged since proportionately blacks and other minorities tend to be poor, any laws dealing with housing to treat the poor can have a disparate impact on certain racial minorities. And, since race is a protected class, a plaintiff had the right to sue for housing discrimination even without proving any intent to discriminate on housing provider's part. HUD reasons that since a higher percentage of the adult minority community have criminal records when compared to the overall adult population, discriminating against a person with a criminal conviction has a disparate impact on certain racial minorities and since discrimination based on race violates Federal law, using criminal records to deny housing violates Federal law. Some may say this is an example of circular reasoning at its best or worst, for that matter.

In light of the foregoing, what can or should associations do? First, seek legal advice now. Have your lawyer review your existing governing documents to determine whether the association even has the right to approve or disapprove sales or leases, much less deny applications. If your governing documents are silent, the board does not even have the right to require an application much less deny in your community any application so submitted. And if you are requiring persons who are seeking to buy or lease to complete and submit an application, your association has no right to do so. At the very least, the association needs to enact wholesale amendments to even provide for this right.

For those associations which already have the right to approve or disapprove sales or leases, it is always wise to make sure that your application procedures are uniformly followed for all applicants and any denial "for good cause" should only be based solely upon objective factors that are expressly enumerated in your governing documents. Even where your governing documents and your procedures are in order, understand, going forward the association's right to deny sales or lease applications on the basis of the applicant's criminal history will now be severely limited. If the association is going to use criminal records in the sales or leasing approval process, then it must further adopt a policy to consider all relevant factors including the length of time since the conviction and the severity of the

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offense. This policy now needs to be adopted by the board.

In addition, HUD's position is that there is a rebuttable presumption that illegal discrimination has occurred when a person within a protected class (e.g. a racial minority) is denied housing simply due to the person's prior criminal record. So the burden is shifted to the association, as the housing provider, to prove that the association's denial of housing to persons with a "criminal history" actually assists in protecting resident safety and/or property. Interestingly enough, the only exception is where the conviction was for manufacturing or distributing controlled substances. For whatever reason, HUD has determined that persons who are convicted of felonies including violent felonies such as murder, manslaughter, rape or armed robbery, etc. are less dangerous than persons who are convicted of manufacturing and distributing illegal drugs. And, perhaps even more important, denial based upon a history of multiple arrests without a conviction is now always considered by HUD to be an arbitrary and unreasonable denial. In other words, it is unlawful discrimination.

For those of you who are scratching heads and wondering if what you have just read is true; it is. It will negatively impact and otherwise limit your community's ability to deny otherwise unsavory persons who wish to buy or lease in your community. However, there are steps you can and should take to strengthen your position and your defense if and when you deny housing based upon an applicant's criminal history. We can help navigate you through the maze and advise you as to what you should be doing to limit its impact.

USING SOCIAL MEDIA FOR ASSOCIATION PURPOSES

BY: CHRISTOPHER J. SHIELDS, ESQ. and KATHLEEN OPPENHEIMER BERKEY, ESQ.

Use of social media by associations and their authorized board members to disseminate information can be very helpful, but carries with it risks or other concerns. The following are some do's and don'ts and items to consider:

1. Defamation, invasion of privacy, and harassment. Individual Board members should not be allowed to post anything on any association website unless the remainder of the Board approves its content . The Board needs to make sure that any posts that it makes or allows other to post are not considered frivolous, false or fraudulent, attack a member's character in the online forum, or release personal information, or permit users of the online community to do the same. The risk of posting something or allowing something to remain posted that will trigger a law suit exists on web sites and e-mail, but the risk is magnified on social media sites where the information can be reposted and repeated rapidly. Also keep in mind that many association Directors and Officers liability policies expressly exclude claims for defamation, invasion of privacy, discrimination, and emotional distress and any anyone can sue the association, whether he has a legitimate claim or not.

   Copyright and trademark infringement. Postings that contain text, photos, graphics, or other media content without the author's permission may constitute a copyright or trademark infringement.

   Unauthorized use of pictures of association members, especially their children, can expose a community association to liability. For example, taking pictures at an association-sponsored social gathering, and later posting those pictures of the members in attendance on its website or social media page without written permission can expose the association to potential liability. I recommend obtaining a signed photo release form from each person so photographed.

2. Check insurance policies, like its Directors and Officers and Errors and Omissions policies, to determine whether the association has coverage for claims related to social media use. If the association's current

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coverage does not extend to claims resulting from social media, the association should contact its insurance agent to obtain additional coverage, typically in the form of a rider to your existing general liability insurance policy.

3. There should be one unified account for the association, the authorized Board members, or your manager to use. We do not recommend that individual members or Board members use their personal accounts to post on behalf of the association. Further, such Board members should utilize a disclosure like this on their bio or profile pages when posting from their personal accounts: "Posts are my own and do not represent the views of the association or its Board of Directors."

4. Rules of Conduct. If social media is used for purposes other than disseminating association information and the platform allows third-parties to post, it is important to require civility in any online posting.

5. Voting Outside of a Meeting. The Board needs to be careful to ensure that when a quorum of the Board is communicating outside of a properly noticed meeting, whether it be through private messaging on Facebook or Twitter or in person, that no decisions (no matter how large or small) are made. This avoids arguments in litigation that the action taken by the Board was improper and, therefore, invalid.

6. Posts Being Considered as Official Records. While the law is currently unsettled, social media posts and communications from private accounts held by individual Board members posted from their private computers to other Board members or general members would not be considered official records of the association subject to inspection. See Humphrey v. Carriage Park Condominium Ass'n, Inc., Case No. 08-04-0230 (Mar. 30, 2009/Final Order) (finding that e-mails sent from an individual director's private computer do not become property of the association because of his office on the Board, because there is no obligation for a director to turn on his personal computer with any regularity, or to open and read e-mails before deleting them). However, in the Humphrey case, a footnote from the arbitrator also supports that if the electronic communication was initiated from a computer the Association owns on which management conducts business such communication would likely be considered official records subject to an official records request. While arbitration decisions such as these are not binding as law, they may be considered persuasive when dealing with similar issues in the community association context.

7. Create and use an association website to provide information only. We generally recommend using social media for informational purposes only e.g. to provide date/time/location of meetings, governing documents, architectural guidelines, management contact information, date/time/location of community events, and the like, and assume that such posts are official records of the association subject to inspection in order to limit liability and make management of the site practicable.

   In addition, we recommend creating a "one-way" website that only permits the Board or the managing agent to post such content and information and would not allow third parties to make any postings. Further, we advise that documents with specific details on lots and members, like agendas and meeting minutes that may detail violations of the covenants and their location, only be posted on a social media platform or website to the extent a member must first log in to view these materials. This will limit the audience and the association's potential liability, should there be a subsequent defamation, invasion of privacy, discrimination, or emotional distress claim.

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COMMUNITY ASSOCIATIONS NEED TO PAY PROMPT ATTENTION TO CHAPTER 13 BANKRUPTCY CASES

BY: SUSAN M. MCLAUGHLIN, ESQ.

Chapter 13 Bankruptcy cases are only filed if there is money to pay creditors. Yet we often see that our client is time barred from pursuing valuable claims by the time we have been retained or takeover from prior counsel. Below are common and easily avoidable mistakes.

Failure to File a Claim

This is a low cost and potentially high reward proposition but there is a deadline and claim is lost if not timely made.

Misunderstanding the Automatic Stay

In a Chapter 13 case, the debtor must agree to pay the ongoing obligations to a secured creditor, as part of the plan, or the automatic stay is automatically lifted on actions against the property upon filing the Plan. Under, current rules, the debtor must also move to re-impose the automatic stay if the plan is amended.

We see many mortgage foreclosures and even lien foreclosures on a Bankruptcy hold, for years, even when the stay on the *in rem* foreclosure portion of the case had been lifted shortly after the Bankruptcy was filed.

When the proper documentation, showing the stay is not in place is presented to the State Court Judge, the Judge will very likely enter an order compelling the Plaintiff to complete the foreclosure.

Failure to Object to the Plan

If the debtor is keeping the property, the Association is normally entitled to collect all of the post-bankruptcy assessments. If the plan does not provide for payment of the regular assessments, increases in regular assessments and any special assessment then the Association needs to object. Otherwise, the loss to the Association over a five year plan could be substantial. The Association needs to file an objection and get the correct provision in the plan or have the Bankruptcy Court enter an order providing that the ongoing obligations to the Association should be paid directly to the Association, outside of the plan, as they come due.

Failure to Defend a Motion to Strip its Lien.

If the debtor is keeping the property, the Association, assuming it filed a timely claim, is also usually entitled to be paid all that it is owed for the pre-bankruptcy debt through the plan. However, in a Chapter 13 bankruptcy case, the debtor can move to "strip" a junior lien if the Court determines that there was no equity in property after consideration of the amount of the superior liens as of the date the bankruptcy is filed.

For example, if the property was worth $200,000 at the time the bankruptcy was filed and the amount due to a superior mortgage holder is $210,000 then the Association's a lien could be stripped. It doesn't matter that the property may be valued at $300,000 by the completion of the 5 Year Plan.

The first mortgage is usually the only issue but it is not always superior to the Community Association's lien. Most Condominium and some Homeowners' Association Declarations provide the Association with the right to collect the lesser of one year of assessments or 1% on the amount of the original mortgage from a foreclosing first mortgage holder. The United States District Court Appeals for New Jersey has recently ruled this "partial superiority" precludes any portion of the lien from being stripped and the decision is likely to be followed in our jurisdiction. See *Whispering Woods Condominium Association, Inc. v. Rones*, U.S. District Court for N.J. Case No. 2016- 4271, LEXUS 18742.

For a Homeowners' Associations, if the Declaration for the community provides that the assessment lien relates back to the filing of the Declaration and is superior to a first mortgage, the Association should also prevail against an attempt to strip the assessment lien. However, these situations are rare for because Developers usually include a provision subordinating the HOA's assessment lien to a first mortgage to make it easier to finance their sales. As a result, most Homeowner's Associations have this provision. Some Condominium Declarations also give the mortgage lien total superiority. If the Declaration subordinates the Association's lien to the first mortgage it can be stripped.

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Even so, the Association should take a careful look at whether the amount allegedly owed to the first mortgage holder is correct. The Association should also check on recent sales of comparable property before accepting the owner's allegation that the amount of the superior lien exceeds the value of the property.

Conclusion

When a Chapter 13 case is filed, there is definitely money available to pay creditors and an Association should immediately direct its attorney to review the plan and provide advice on how make sure it collects as much as possible.

SERVICE ANIMALS IN PLACES OF PUBLIC ACCOMMODATION

BY: SUSAN M. MCLAUGHLIN, ESQ.

Section 413.08, Florida Statutes was recently updated effective July 1, 2015 to bring it in line with the guidance of the Justice Department on the obligations of the operators of places of public accommodation to allow access to service animals. Associations operating communities that allow short term leasing or open their golf courses and other facilities to persons who are not members or their guests are generally required to comply with the law.

Section 413.08(4), Florida Statutes, provides for a specific mandatory penalty for violation as follows:

> Any person, firm, or corporation, or the agent of any person, firm, or corporation, who denies or interferes with admittance to, or enjoyment of, a public accommodation or, with regard to a public accommodation, otherwise interferes with the rights of an individual with a disability or the trainer of a service animal while engaged in the training of such an animal pursuant to subsection (8), commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083 and must perform 30 hours of community service for an organization that serves individuals with disabilities, or for another entity or organization at the discretion of the court, to be completed in not more than 6 months.

Section 775.082 provides for up to 6 months of imprisonment and Section 775.082 provides for a fine of up to $500 and other potential fines can be assessed under the Americans with Disability Act. So the risks of not knowing the rules are significant.

Section 413.081, Florida Statutes also provides additional criminal penalties for endangering or injuring a service animal.

To qualify for access to places of public accommodation, such as a restaurant or swimming pool, a service animal must be a dog or in some circumstances, a miniature horse, but the miniature horse scenario is beyond the scope of this article. The service animal must also perform some specific work or task beyond the crime-deterrent effect of an animal's presence and the provision of emotional support, well-being, comfort, or companionship. Obvious examples are seeing eye dogs but other qualifying tasks include alerting an individual who is deaf or hard of hearing, pulling a wheelchair, assisting with mobility or balance, alerting and protecting an individual who is having a seizure, retrieving objects, alerting an individual to the presence of allergens, helping an individual with a psychiatric or neurological disability by preventing or interrupting impulsive or destructive behaviors, reminding an individual with mental illness to take prescribed medications and calming an individual with posttraumatic stress disorder during an anxiety attack.

The most important thing to know about this law is that operators of places of public accommodation may only ask a guest or customer whether the dog is a required because of a disability and what it does for the sole purpose of determining whether it is a service animal. The second most important thing to know is that you may not ask for medical documentation of the disability. This is different from the rules that apply to persons seeking exceptions to restrictions that apply to occupancy of residential accommodations by owners and their family members and tenants who lease the property for a term of at least thirty days. Medical documentation can be required in those situations if the disability is not self-evident.

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The Amendments to Section 413.08 do not restrict the right to an accommodation of residential housing restriction that includes the right to an "assistance animal". Under section 413.08, the more limited definition of service animal does not apply to accommodation of residential housing restrictions. In the residential housing context, the animal could be a kangaroo with no training whose presence merely comforts an owner with a medical or emotional disability.

The other "don'ts" are the same in both residential and public accommodations cases. You may not ask about the nature of the disability or for proof the animal can perform the task. You may not assume that the animal is a danger to others based on the breed. Allergies and fear of animals are not valid reasons for refusing to accommodate a service animal. The fact that public health laws prohibit dogs in pool area or restaurant is not a basis to deny entry.

A service animal can only be excluded or removed for being a direct threat to others. In a public accommodation case, the operator must provide the individual with a disability the option of continuing access to the public accommodation without having the service animal on the premises.
Also, effective on July 1, 2015 Section (9) was added to Section 413.08 and provides:

> A person who knowingly and willfully misrepresents herself or himself, through conduct or verbal or written notice, as using a service animal and being qualified to use a service animal or as a trainer of a service animal commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083 and must perform 30 hours of community service for an organization that serves individuals with disabilities, or for another entity or organization at the discretion of the court, to be completed in not more than 6 months.

The punishments for a second degree misdemeanor include, at the Court's discretion, up to 60 days imprisonment under Section 775.082 and a fine up to $500 under Section 775.03.

Questions abound as to whether this will have any practical implication. In my opinion, it technically applies to a residential housing case but since a disabled person in that context is entitled to an "assistance animal" it should not be an issue. There may also be a preemption issue that would preclude the application of penalty not sanctioned by Federal law

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CASUALTY LOSS REPAIR RESPONSIBILITIES OFTEN SURPRISE CONDOMINIUM BOARDS

BY: SUSAN M. MCLAUGHLIN, ESQ.

Section 718.111(11)(d), Florida Statutes requires a residential Condominium Association to use its best efforts to obtain adequate property insurance to protect the condominium. The Associations must insure all the elements of the condominium except for the floor, wall, and ceiling coverings, electrical fixtures, appliances, water heaters, water filters, built-in cabinets, countertops and window treatments within the boundaries of the units. The unit owners are responsible to insure these elements of the unit along with their personal property.

The Statute also requires the Association to repair all of the elements that it is required to insure. So repairs that are not funded by insurance because of deductibles and exclusions become a common expense to all owners even if only one unit is affected.

In a residential condominium, the provisions of Section 718.111(11), Florida Statutes apply regardless of anything to the contrary in the governing documents. So the impact may be to change the responsibility for repairs of things like air conditioners, windows, doors and drywall to the Association in casualty loss scenarios.

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The Association may not opt-out of the duty to use best efforts to obtain property insurance with deductibles consistent with industry standards and prevailing practice for similar communities. However, there is an opportunity to opt-out of the statutory treatment of uninsured losses and to allocate the responsibility for those losses according to provisions of the condominium declaration.

If the Association wishes to opt-out, the proposal to do so must be approved by a majority of the voting interests of the condominium. The decision to opt-out is not effective until notice of the opt-out vote is recorded in the official records of the County in which the Association is located.

MORE NEW LAWS ON DRONES

BY: SUSAN M. MCLAUGHLIN, ESQ.

I recently commented on Florida's new law intended to protect us all from invasion of privacy but the potential for a hole in your roof or a hole in your head is really a more immediate problem. Yet, there is no licensing requirement for the recreational operation of drones of up to 55 pounds at low altitudes. The Federal Aviation Administration has just recently taken the first step toward regulating in this milieu.

As of December 21, 2015 all unmanned aircraft weighing between .55 pounds (or 250 grams) and 55 pounds are required to be registered. Registered owners must also be United States citizens of at least thirteen years of age. The registrant will be issued registration number and the drone must be marked with the registration number. Flying an unregistered drone can result in criminal sanctions and the FAA may assess civil penalties of up to $27,500.

Yet, there could be a thirteen year old with no prior instruction or liability insurance at the controls. Many Community Associations are considering rules barring or restricting the operation of drones and model airplanes from or over the "property". Communities that chose to allow such activities should remember to include tethered devices and confine the operations to open space and require proof of registration and liability insurance. According to "Insure.Com", membership in the Academy of Model Aeronautics costs $58.00 per year and includes $2.5 million in general liability insurance.

References:

federaldroneregistration.com/faq
AMA sUAS FlightSafety Guide © 2014
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