



IGNORANCE IS BLISS UNTIL THE BOARD DISCOVERS A CRIMINAL IS LIVING IN THE COMMUNITY ASSOCIATION?

Joel W. Meskin, Esq., CCAL, CIRMS, MLIS, ERP, FCAR

It is ten P.M., you finally turn off the T.V., when your iPhone dings, indicating an e-mail has arrived. You check your cell, and the anxiety kicks in as it is another e-mail from Ms. Smith. After living in the association for ten years, you decided to accept the president position. After being in office for less than a month, you have already received 20 plus e-mails from Ms. Jones. The voice in the back of your head immediately reacts with "What is it this time?"

Modern technology is a blessing and a curse for a community association board and its manager. Just when you think everything is perfect, the budget is done, no unit owners are in arrears, the reserve study is reasonably funded and a great manager is keeping everyone happy, Ms. Smith makes another demand on an issue the board had never considered.

The Information

Ms. Smith, owner of condo unit 2A, is an avid Internet surfer. She has the greatest intention to make sure the condominium is safe for her children and neighbors. One evening, Ms. Smith decided to Google the names of everyone in the condominium. Low and behold, Tom Jones in 5G has a criminal record which has allowed him to spend time in the state-run community association where the unit doors are made of iron bars. Apparently, Mr. Jones has a criminal record ranging from sexual assault, to forgery, to credit card fraud and cyber stalking. To make things even more interesting, Mr. Jones is currently charged with car-jacking, for which he is awaiting trial and is out on bond.

The Delivery

Ms. Smith sends the information she has discovered to the board president and the community manager. Ms. Smith, who has two teenage daughters, demands that the board force Mr. Jones to move, or at a minimum, send this information to all of the unit owners.

The Dilemma

The bell has been rung; the board cannot plead ignorance about Mr. Jones' criminal background or his pending criminal matter... One member suggests that the information be forwarded to all the association members, as Ms. Smith requested. Another member suggests that the information be posted on the association website indicating that the truth is a defense to a claim of defamation. Still another board member recommends that they invite Mr. Jones to a board meeting personally to respond to the information provided by Ms. Smith and give him a chance to face his accuser. Finally, the president suggests that they do nothing. What would you do?

The Solution

Go directly to the association's attorney; do not pass "Go." If the association does not have an attorney they regularly use, go to the Community Association Institute local chapter website and get a referral from the service provider list of community association specialized attorneys. You may be tempted to call your daughter-in-law the attorney, or your uncle the big shot attorney, but beware—the board must seek counsel from an experienced community association attorney. A specialized attorney should have a good idea what to do, has probably seen the issue before, knows the applicable law, and will not have to spend the association's money to recreate the wheel.

Why consult an attorney? They just cost money.

Because the nature and extent of the issues involved are beyond the board's experience. (As a side note, the attorney has a professional liability policy that will be on the hook if he or she screws up.) A board's primary duty is to know what issues are within its proper scope of decision making and which are not. In this situation, a board should first realize that a unit owner with a criminal record is probably shameless and will try to take advantage of the situation. Accordingly, the board must be hypersensitive to any decision it makes. This is not like telling little old Mrs. Baker that she cannot have a garden gnome in her yard.

Second, this is a complicated issue that has many twists and turns, with many potential unintended consequences. Many items must be considered: (1) the governing documents, (2) the board's prior conduct in similar situations, (3) whether the individual is an "association member" or a "tenant," (4) the relevant laws or statutes, (5) potential discrimination issues, and (6) case specific issues which always cause things to not quite fit into the seemingly correct spot in the puzzle.

The Issues

Legal Issues

There are numerous issues that could arise as a result of what the board does with the information about unit owner Tom Jones. What the board must keep in mind is that whether the information is accurate or not, there is a very good chance that the board will be brought into a lawsuit. Every time I watched the television show "Shameless" (my guilty pleasure) I would think the character Frank Gallagher, played by William H. Macy, would do something bordering on virtuous or appropriate, he would pull one more shameless stunt out of his bag of tricks. That is what the board must anticipate from a person like Mr. Jones.

Defamation– We always say about defamation that "the truth" is a defense to an allegation of libel or slander. In the real world of litigation and insurance policies, however, do we ever get to "the truth"? Ninety-eight percent of all litigation is resolved prior to a judgment. Here we have a criminal record for which Mr. Jones has apparently paid his debt to society, but there are pending charges for which Mr. Jones has not been convicted. Apparently his debt to society is on a revolving credit line. What if there is a plea bargain or some other resolution? What if Ms. Smith has the wrong Tom Jones? We have seen it before. What if the information is disclosed to Mr. Jones' employer, and as a result he loses his job and it turns out Ms. Smith was wrong? Will they go after Ms. Smith, or the board?

Invasion of Privacy– There is a strong likelihood that even if the information came from Ms. Smith, Mr. Jones will allege that it was at the direction of the board and they are therefore liable for interfering with his privacy.

Discrimination– It is inevitable that the Mr. Jones will fall into a protected class and therefore, there could be discrimination claims added. He may be a minority, he may be gay, he may claim he is actually Muslim and he is being persecuted and harassed by the board.

Wrongful Eviction– There is also potential for a wrongful eviction if the board seeks to get hi out of the apartment pursuant to Ms. Smith's demands.

Malicious Prosecution– What if Ms. Smith did have the wrong guy, or if Mr. Jones is successful (think Case Anthony, O.J. Simpson)? There is also the possibility, if not a probability that if Mr. Jones will sue for malicious prosecution or abuse of power.

What if the Board Ignores the Information– The flip side of these issues is what if the board takes no action, like the president proposed something happens, such as Mr. Jones kidnapping one of Ms. Smith's daughters? Sometimes the crying wolf is correct.

Governing Documents– What if is the governing documents do not authorize the board to do anything in this action, and they do so anyway, or there are statutory issues that you just do not know about?

Insurance Issues

Having insured over 75,000 community associations nationwide, this issue never stops causing the hair on the back of our necks to stand up. We have nicknamed this as the "Zimmerman Syndrome." We know boards for the most part volunteer to serve with the greatest of intentions. However, we also know that many boards who manage budget driven entities thin that they can resolve issues that really require that they obtain help from community association professionals. Unfortunately, there are no shortcuts that don't have unexpected detours.

Directors and Officers Liability– the good news is that when a board takes on issues like this one, there is a possibility that it will be defended, if the policy provides coverage for the Personal Injury/Publisher's Liability coverage such as defamation, invasion of right of privacy, wrongful eviction, and malicious prosecution. There could also be coverage if there is a challenge to the board's authority. The bad news, since this is an issue that places the board's judgment in question, being a matter that is beyond the board's experience, is that the board and the association will probably be looking for new insurance at renewal. Not only will they be looking for a new D&O policy, there is a very strong likelihood that they will be shopping insurance in non-standard market that will provide less coverage at higher costs.

General Liability Coverage– This is an area where there could be overlap in possible coverage as many general liability policies also have personal injury coverage as well. The same concern arises with this policy as well as discussed above.

The cost of consequences will undoubtedly be far more expensive in the long run than consulting the proper community association professionals at the outset. As a side note, I am not being paid by any lawyers to come to this conclusion.

In conclusion, when an issue like this arises, or something in the ordinary course of community association management, there is no shortcut— go to the community association attorney. As my father always told me, people never have time to do it right the first time, but they always have time to fix it.