



## Coping with Sex Offender in Your Area

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It sometimes seems that bad things happen in waves. Perhaps, the same things are happening all of the time, but the media decides it is time to focus on the issue.

The recent rash of child abductions, most with a sex-crime component, is a case in point. Do these despicable events trigger each other, or is it just the way that history happens?

The recent news coverage of these heinous crimes has once again caused community associations to focus on what they can do, what they should do, or even what they must do if a sex offender is living in their community.

Some will say that once a person has served their time, they have paid their debt to society, and deserve the right to live in freedom like the rest of us. Others will tell you that pedophilia is virtually incurable, and that it is not a matter of if, but when the offender will strike again.

The Florida Department of Law Enforcement maintains a web-site that keeps track of registered sex offenders, including their place of residence. The address for the site is [www.fdle.state.fl.us](http://www.fdle.state.fl.us)

Florida categorizes registered sex offenders in one of two ways. Those with a history of more serious or recent crimes are known as "sexual predators", while those who have been convicted of less serious sex crimes, or were convicted longer ago, are known as "sexual offenders". The various types of offenses that qualify a person for the more serious or less serious categorization are found

in Section 775.21 of the Florida Statutes, known as "The Florida Sexual Predators Act."

Similar laws exist throughout the country, and are often referred to as a version of "Megan's Law", which was enacted after the brutal death of 7 year old Megan Kanka in New Jersey. In Florida alone, well over thirty thousand predators and offenders are registered with FDLE.

A question faced by many associations is what, if anything, the association can or should do if it becomes aware that a registered sexual offender is residing in their community. There are certainly no easy answers, and no unanimity of opinion among community association attorneys.

According to a recent article published by Alexandria, Virginia based Community Associations Institute, CAI recommends a 4 prong approach when an association learns of the presence of a sexual predator residing within the community operated by the association:

- 1. Verify the Accuracy of the Report:** Obviously, accusing a person of being a sex offender could create tremendous liability for defamation if the information is untrue. Do not rely on hearsay reports from community residents. The association can easily verify reported information through the FDLE's website. In cases I have handled, I have found that the offender's parole or probation officer is often willing to share information about the nature and history of the offense that might not be ascertainable from the website. For example, in a recent

case reviewed in my office, we learned that an offender had been ordered to stay at least one thousand yards from any child, unless supervised.

**2. Consult With Association Legal Counsel:** According to CAI's expert, every state has slightly different versions of Megan's Law, including immunities involving disclosure. Further, some state laws specifically prohibit the harassment of registered sex offenders. The Florida Sexual Predator's Act confers immunity on public officials, but not on private citizens in general. The Act does, however, offer immunity for any "individual acting at the request of or on the direction of any law enforcement agency."

**3. Measure the Level of Potential Threat:** As noted earlier, there are degrees of offense, which are sometimes measured by the severity of the conduct, and sometimes measured by how long ago the conduct occurred. I have seen cases where the registered offender may have been involved in a consensual relationship with a person who had not reached the age of consent, but was still fairly close in age to the perpetrator. Obviously there is some room for judgment between a situation like that and a repeat offender who preys on young children.

**4. Send a General Notice Letter to Owners in the Community:** This is where things get tricky. CAI rec-

ommends that if the threat level is sufficient, and notice is not prohibited by state law (which in Florida, it is not), a "general informational letter" should go out. The letter would basically say (in more formal language) : "We have learned there is a sexual predator in our community. We are not going to tell you his name. You can look it up on the FDLE website. You can call the FDLE or sheriff's office for further information. The association has no authority to evict this person, and is not in the business of protecting residents, so you need to take steps to keep you or your children safe."

I think that is prudent advice in many cases, but there are certainly dangers. For example, should an association make a subjective judgment of whether someone's previous sex crime was "not so bad" or too long ago to present a threat? Further, since many associations purport to "screen" potential renters or buyers, what type of liability exposures exists if a predator slips through the cracks in the background investigation? Or what if the governing documents require screening and the association simply pockets the application fee and does not go to the effort of a background check?

Unfortunately, this is an area where the stakes can be tremendous, perhaps incalculable, and where you can be darned if you do, or darned if you don't. ■

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**Question:** My condominium unit was damaged after Hurricane Charley from roof leaks caused by the hurricane. The association's management company ordered a restoration company to tear out most of the ceilings, walls, and kitchen cabinets. Now the association is saying that we and our insurance company are responsible for the tear down and the rebuilding of the ceilings and walls. Our insurance adjuster is saying that because of the new law, the association is responsible for all repairs. What is the new law and what is the association responsible for? D.G. (via e-mail)

**Answer:** The "new law" that your adjuster is probably referring to is amendments to the Condominium Act which became effective on January 1, 2004. These amendments changed Section 718.111(11), Florida Statutes, to specify the portions of the condominium property that the association is responsible for insuring, and also describing the portions of the condominium property that the unit owners are responsible for insuring. The amendment applied to all association policies issued or renewed on or after January 1, 2004.

The main difference in the old and new law is that the new law applies to all condominiums, regardless of when the declaration of condominium was recorded. The prior versions of the law contained certain exceptions for condominiums created prior to 1986 and 1992. The old law and the new law did not change the insurance responsibility for ceilings and walls. The association has always been responsible for insuring that portion of the condominium property.

The confusion over the new law appears to arise primarily with regard to who repairs and who pays for the cost of the repairs. The new law controls who insures the various portions of the condominium property. The new law does not address who is responsible for making repairs to items damaged by a casualty. Just because an association insures an item (such as interior drywall) does not necessarily mean that it is responsible for making repairs or paying for the cost of the repairs if there is a shortfall in the insurance proceeds.

Those issues will be governed by the wording of your particular declaration of condominium and will likely be controlled by those portions of your declaration dealing with repair after casualty. It is not uncommon for declarations to say that if a damaged item is part of the unit, that the unit owners are responsible for making the repairs and for the cost of any shortfalls, notwithstanding the fact that the Association may insure that item. Other declarations may say the opposite.

**Question:** Is an association board member required to be physically present at a board meeting in order to be counted for purposes of having a quorum, or can the board member be present by telephone, email, or other electronic device? D.D. (via e-mail)

**Answer:** A condominium or homeowners association in Florida must be a Florida corporation, unless it is a condominium association that was formed prior to 1977. The Florida Not For Profit Corporations Act allows directors to participate in meetings by using any means of communication that allows all participating directors to simultaneously hear each other during the meeting, as long as the articles or bylaws do not prohibit this. The Florida Condominium Act addresses the issue of telephone conference calls specifically, and adds the requirement that any unit owners in attendance must also be able to hear all directors. Therefore, conference calling or video conferencing is allowed, but email would not meet these requirements.

**Question:** Prior to the turnover of our homeowner's association, the Developer signed a contract giving himself control of maintenance of the common areas. The contract is for one year. The developer has performed these functions to date, and has been paid on a month to month basis. It seems to me that it would be illegal for the developer to initiate a long term contract by himself, binding the future Board. G.O. (via email)

**Answer:** In a homeowners association setting, the relevant statute found at Section 720.309, Florida Statutes, indicates that any contract with a term that is longer than

ten years, and which is made by an association before control of the Association is turned over to the members (other than the developer), which provides for the operation, maintenance, or management of the association or common areas must be "fair and reasonable." In your case, the contract is only for one year, thus this statute does not come into effect.

As you can see, this statute does not afford the association much protection. In contrast, the condominium law provides that any contract made by an association prior to the unit owners (other than the developer) assuming control of the association that provides for the operation, maintenance, or management of the condominium association or the property serving the unit owners is to be "fair and reasonable." As you can see, there is no requirement in the condominium setting that such contracts exceed ten years before the "fair and reasonable" requirement comes into play. Additionally, the Condominium

Act details multiple scenarios whereby the owners can vote to cancel such contracts. A similar right does not exist for homeowners associations.

Another potential issue is whether this contract was subject to the competitive bidding process. Section 720.305(5), Florida Statutes, indicates that if a contract for the purchase, lease, or renting of materials or equipment, or for the provision of services requires payment by the association that exceeds 10% of the total annual budget of the association, including reserves, the association must obtain competitive bids for the materials, equipment, or services.

Finally, if the contract amounts to self dealing to the detriment of the association (for example if the conflict of interest was not disclosed, if the price is exorbitant, or if the party is not qualified to do the work), a claim for a common law breach of fiduciary duty may exist. ■