



Association Can Be Liable For Crime On Property

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Q: I live in a gated homeowners' association. Our entire community is surrounded by fencing, most of which is chain link fence. Over the past couple years, we have had problems with people cutting the fence and pulling it back so that they can enter the community. In that time, there have been two home burglaries and one attempted burglary. Whenever people in the neighborhood notice the fence has been cut, they have been notifying the association, which repairs the fence, but sometimes it has taken several weeks to get the fence repaired. Moreover, the association isn't doing anything to prevent this from happening in the future, although the police have been called on several occasions and I understand a report was made about the damage to the fence. I would like to know whether the association is liable if someone comes into the community through a hole in the fence and either steals property, or worse yet, commits a crime against one of the residents.

N.N. via email

A.: This is a recurring issue in gated communities such as yours. As an initial matter, I always advise associations to remember that they are not a police force. Just because a community is gated and access is limited, that does not mean that the local police authority is not equally responsible for enforcing criminal laws as in an ungated community. If a resident in a gated community witnesses a crime or is concerned about criminal activity, their first call should be to the local police or sheriff's department, and not to the association.

Admittedly, their second call should be to the association, especially under the facts you described above.

Without regard to the security issue, an association board of directors most certainly has the obligation to maintain association property and improvements. I am certain that the declaration of covenants governing your community requires the association to repair the fence, and likely requires the association to take reasonable steps, if any are available, to preclude the fence from being damaged in the future. The ultimate question of whether the association is liable for the criminal conduct of trespassers who enter through the hole in the fence is not settled law in the State of Florida, but is a reasonable cause for concern.

One issue is whether the association has created a reasonable expectation in its residents that it will provide security from criminal activity. There have been cases in Florida where a community was specifically marketed as safe and secure and the association provided security guards, sometimes armed, so that members reasonably expected the association had assumed some duty to protect them. In those cases, when criminal activity occurred, the court found that the association was liable because it had assumed the duty to protect its residents. Therefore, one preventative step that we advise associations to take to reduce the likelihood of being held liable for some criminal act is that the association not provide "security", but provide

only “access control”. Moreover, well-written governing documents of an association have a disclaimer provision in all capital letters and bold type advising all residents that the association is not responsible for their personal security. While these steps may help the association to deflect liability, there is no guarantee that these disclaimers will completely insulate the association.

In fact, case law has been established in the landlord-tenant situation, as well as in other, similar situations where the courts have determined that a special relationship exists between tenants and the landlord. The courts have determined that there is a duty for the landlord to protect persons, or at least to warn persons of potential dangers, whether or not the landlord has done anything to create a reasonable expectation that it would protect the persons in question. While this “special relationship” concept has not, to my knowledge, been extended to community associations, it is possible that a court may declare that a special relationship exists between associations and its residents at some time in the future. In any event, where there is known, past criminal activity, it is very likely that the association has at least a duty to warn residents, and possibly a duty to take extra steps to protect residents and their property. In the situation that you describe, perhaps extra access control personnel who patrol the perimeter would be in order. Ideally, the local police agency will assist with these extra security measures.

Q: I have been searching to buy a condominium unit and am interested in the pet regulations, because I have a cat. I recently looked at a property where the recorded documents do not address pets, but there are some rules made by the Board. These rules are given out to the unit owners, tenants, and rental agencies, but they are not recorded. Are rules made up by the Board of any legal standing? **G.M. via email**

A: Yes.

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

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Florida Law specifically recognizes a board's authority to make rules and regulations. In order for a board-made rule to be legally upheld, several criteria must be met.

First, the recorded condominium documents must grant rule-making authority to the board. It is important to ensure that the board is granted both rule-making authority as to the “common elements” (common property) and the “units” (apartments). Some documents only grant rule-making authority for common elements.

Secondly, any board-made rule cannot be inconsistent with the superior documents (typically the recorded declaration of condominium, articles of incorporation, or bylaws), nor any right which is “inferable” from those superior documents.

Third, board-made rules must be “reasonable”, which is often at the heart of legal challenges regarding board-made rules.

Fourth, a board-made rule must be adopted and promulgated in a procedurally correct fashion. Rules regarding common elements are subject to 48 hour pre-meeting posting requirements. Rules regarding unit use are subject to heightened notice requirements, 14 day advance mailed and posted notice. Additionally, the condominium documents need to be consulted as to additional procedures. For example, some documents require that new rules be mailed out to unit owners 30 day before they become effective. If that requirement is in the documents, it should be followed.

Rules do not need to be recorded in the public records in order to be valid, there are pros and cons to recording rules.

If you are contemplating a purchase in a community where your ownership of a pet is in direct contravention of a rule, I would suggest you consider other alternatives.

consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.