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Addressing Crime in Community Associations: We Volunteered for This?

By Ken Strauss

Community associations are well-suited to maintaining properties, budgeting for repairs, setting reserves and collecting assessments. However, in some matters that they are called to address, associations are particularly ill-equipped to deal with their communities' issues. Crime is one of the most difficult issues for associations to address, simply because there is not any clear guidance as to what a board member or manager should do. You can look through stacks of governing documents and you just aren't going to find a provision that describes a board's obligations when a methamphetamine-addicted tenant assaults an owner in a common element hallway. When faced with criminal activity in their communities, boards and managers are put in the difficult position of hearing demands from the members to take action, but lacking guidance or experience as to what to do.

It gets worse. Not only is there little guidance, but in one of the most notable cases relating to the obligations of associations and their boards of directors relating to criminal activity, the Supreme Court of California stated that, "...when the only persons in a position to remedy a hazardous condition are made specifically aware of the danger to third parties, then their unreasonable failure to avoid the harm may result in personal liability." *Frances T. v. Village Green Owners Ass'n.*, 42 Cal.3d 490, 723 P.2d 573 (1986). Not only can an association be liable for not acting appropriately to address criminal activity, but this is one of the few instances where a volunteer member of an association's board of directors may face individual liability for failure to act.

In *Frances T.* and other reported cases involving association liability for failure to prevent harm from criminal activity, the key concept is that associations have a duty to protect the members of the community from foreseeable harm. Knowledge of a pattern of crime in the community or repeated complaints from residents likely triggers a duty to at least perform an investigation to determine if association action is necessary. The more difficult question for a board or manager is just what action should be taken.

Isn't crime a police matter?

Of course it is. The first step upon learning of criminal activity affecting a community association, its members, guests and agents is the most obvious one: call local law enforcement. Law enforcement personnel are trained to deal with these situations. Further, making a record

of the association's response to criminal activity helps to show that the association is acting in a reasonably prudent manner.

The association can assist law enforcement through exercising its authority under the governing documents. Most associations' documents specifically include a right of entry for emergencies. Associations can work with both police and fire officials to determine that units are being kept in a safe condition where there is reason to believe that residents' health or safety is at risk.

Cooperation and coordination with law enforcement is often all that is necessary to address some criminal activity; however, that is not always the case. In some situations, an association may have to take additional steps.

We called the police. Now what?

Recently, a Board and its property manager requested my help dealing with a resident who had been repeatedly cited and/or arrested for various offenses, including using illegal drugs, violently abusing alcohol, causing property damage to common elements, creating excessive noise and threatening other residents. In each instance, the individual was released to return to his condominium unit. Residents feared for their safety and the problems were becoming more frequent and the conduct more volatile. The association had already sent several violation letters and imposed fines on the unit owner, who simply paid each fine without comment. The offender was the unit owner's son, so he was not considered a tenant and could not be evicted under this association's documents (in many governing documents, an association has authority to can evict a tenant for violations; this is often a good option for dealing with criminal activity of tenants). The board felt like they were out of options. The community's residents demanded more be done to protect them.

In this case, the foreseeable risk of harm was clear; the association had to take additional action. The problem for this association, like most associations in these types of situation, was that the governing documents are very thin on regulating conduct. In most cases, the best associations can look to are a combination of two common provisions. First, the "noxious and offensive activities" provision is often the only provision in an association Declaration that addresses individual conduct. A typical provision says something like:

No noxious or offensive activity shall be carried on in any Unit or Common Elements (including the Limited Common Elements), nor shall anything be done therein which may be or becomes an annoyance or nuisance to other Unit Owners, would be in violation of any laws, or would interfere with the quiet enjoyment of the other residents.

In most sets of governing documents, that sentence or something like it is the only thing addressing resident conduct that negatively impacts a community.

The association had relied on this provision to send out multiple violation letters with little success, so it turned to the enforcement provision, which is common to most association documents and the second part of the combination necessary for meaningful action. A sample provision looks like this:

Each owner shall comply strictly with the provisions of this Declaration, the Bylaws, and the administrative rules and regulations made pursuant thereto as they may be lawfully amended from time to time. Failure to comply shall be grounds for an action to recover sums due for damages or injunctive relief or both, maintainable by the Board of Directors on behalf of the owners, or in a proper case, by any aggrieved owner. Failure to comply shall also entitle the Board of Directors to recover any costs and reasonable attorneys' fees incurred by reason of such failure whether or not such activities result in suit being commenced or prosecuted to judgment. In addition, the Board of Directors shall be entitled to recover costs and reasonable attorneys' fees if it prevails on appeal and in the enforcement of a judgment.

Put them together, and the violation of the noxious and offensive activities clause can be enforced through a court action for damages, injunctive relief or both. In most cases, there is also an attorney's fees provision that adds further consequences.

In this case, one final letter to the owner from the association's attorney, explaining that the association would seek damages, an injunction and attorney's fees caused the owner to remove the problem child and the residents lived happily ever after. Associations should review their governing documents to ensure that they have appropriate provisions to address conduct-based issues.

An Ounce of Prevention

Associations do not need to wait until crime occurs to address the issue. There are several ways in which a community can act to prevent crime:

- Criminal background checks for tenants can be a useful tool. Associations should be aware that FHA Condominium Approval Guidelines may prohibit mandatory tenant screening, so such provisions may affect FHA project approval.
- Neighborhood watch programs have been successful in many communities. Often, local law enforcement will work with local communities to set up such programs. Typically, these should be set up by volunteers, rather than through direct Board involvement.
- Regular maintenance, especially relating to lighting, security doors and gates, is a critical responsibility of associations and should be made a high priority.
- Private security is a viable option, and may be a necessity for associations in high-crime areas.

Every association is unique, but all share an obligation to act in a reasonably prudent manner and to protect residents from foreseeable harm. Associations should work with their managers, counsel and local law enforcement to determine the best way to address and prevent criminal activities, and to ensure that they have the necessary authority and procedures in place to address situations as they occur.