



Singled Out

Some community associations are banning registered sex offenders. Can these restrictions stand up in court?

By Julie E. Blend, ESQ., and Laurie S. Poole, ESQ.

Valley View Village Condominium Homeowners Association in Texas adopted a rule in 2012 that registered sex offenders could not live within 2,000 feet of places where children congregate—school bus stops, parks, greenbelts, the community pool and other common areas. The association later amended its declaration to incorporate the ban.

Residents Theodore Whipple, a registered sex offender, and his wife, Joan Cawfield, sued claiming the ban was a breach of contract; violated public policy; restricted the right to sell or lease property and the constitutional right to personal choice; and infringed upon the Texas deceptive trade practices law.

Community association attorneys hoped the outcome of the Whipple lawsuit would clarify some of these issues. However, the parties settled earlier this year before an Austin, Texas, federal court could render a decision. Despite the lack of a legal opinion, the arguments presented are worth considering.

The Tier System

BACKGROUND

There are more than 700,000 registered sex offenders across the U.S., and Valley View isn't alone in restricting them on association property. Many communities have adopted or are considering bans.

Sex offender registration laws have been developed over the years as a result of violent crimes against children. Federal law now requires all states to register convicted sex offenders and keep track of where they live. All 50 states have complied, but their requirements vary. States also are supposed to make sex offender registries available to the public.

Additionally, many local and state governments have created child-safety zones, which prevent sex offenders from living within 200 to 2,500 feet of places where children tend to gather. These restrictions have withstood legal challenges. Community associations should familiarize themselves with their state's laws.

UNLAWFUL INFRINGEMENTS

Panther Valley Property Owners Association in New Jersey adopted an amendment to its declaration banning Tier 3 offenders, who are considered to have a high risk of offending again. (See "The Tier System," above.)

An owner—who wasn't a sex offender—sued on the grounds that the ban was an unlawful infringement on the right to sell or transfer property, that it required owners to seek out and identify Tier 3 offenders, and it violated public policy. The association won, and the owner appealed.

The federal Sex Offender Registration and Notification Act mandates minimum requirements for state registries and community notification procedures, the creation of a national sex offender registry database and a three-tier classification of sex offenders.

TIER 1: Low-level offenders must update their location in the local registry once per year for 15 years.

TIER 2: Moderate-level offenders must update their location every six months for 25 years.

TIER 3: High-level offenders must update their location every three months for life.

because there were only 80 Tier 3 registered sex offenders in New Jersey at the time (2001), and the ban would apply to all association members equally. Furthermore, the association's ban did not require owners to seek out Tier 3 sex offenders.

The appeals court questioned whether such bans make "a large segment of the housing market unavailable to one category of individual" and referred to a 1995 New Jersey Supreme Court decision that upheld the law requiring states to make sex offender registries available to the public. In its ruling, the Supreme Court stated, "Some ostracism of offenders will result, but ... (the) government has done all it can to confine that impact, providing public notification only for those whose apparent future dangerousness requires it."

interests. The association said the ban was in the owners' interest because children live there, grandchildren visit and it promotes a safer community and maintains property values. The association also noted the common understanding that owners "relinquish some of their freedoms of choice" when they choose condominium living.

THE RIGHT TO SELL OR TRANSFER

The Whipples claimed the ban violated their right to lease or sell the unit, but the association's ban merely restricted where sex offenders could reside, not what they could own or sell. Like the Panther Valley case, the association said the right to lease or sell property was not a valid issue.

The Whipples, however, argued the ban "goes beyond existing law (and) is unreasonable." They pointed out that when Whipple was subject to parole laws, he was required to stay only 500 feet away from children's areas, not the 2,000 feet required by the association.

PUBLIC POLICY

The Whipples believed the ban violated public policy because it would "severely and unreasonably restrict the residency options of sex offenders" and "prevent sex offenders ... from living with their spouses." Besides, they noted, a "comprehensive statutory framework for sex offender residency and registration" already protected the general public.

However, the association said a contract term is unenforceable only if "the

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The New Jersey appellate court declined to rule—because of insufficient information—on whether the ban was legal, but it provided some insight into the bans and the legal issues that arise with them.

The court said the ban did not infringe on the right to lease or sell property

AUTHORITY TO BAN

As for the Whipple case, the couple had questioned the association's authority to restrict how units are used, but the association argued in court that its bylaws give it the duty and authority to administer the association's affairs and owners' common

interest in its enforcement is clearly outweighed in the circumstances by a public policy." There is no legislation that "makes privately enacted rules (regarding) sex offender residency unenforceable," and no Texas public policy that would invalidate the association's restriction.

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If anything seems amiss, contact local law enforcement. Do not get the association involved.

STATE ACTOR

To make their case, the Whipples needed to prove the association was a "state actor" and that it had violated one of their constitutional rights. They said the association acted as a "de facto municipal government" and regulating sex offenders was conduct "clothed with the authority of state law."

Courts in Texas and other states have ruled repeatedly that associations are not state actors. Furthermore, the association countered that no constitutional rights were implicated.

FUNDAMENTAL RIGHTS

Perhaps the most intriguing legal issue raised in this case was whether the ban implied that a person has a right to choose where to live and whether such a right is protected by the Constitution. The Whipples believed the ban violated their fundamental right to make personal choices regarding family matters.

The association argued that if states can create child-safety zones and laws specifying how close to children's areas registered sex offenders may live, then choosing where one lives is not a fundamental right.

LESSONS LEARNED

Absent any solid court rulings on banning registered sex offenders in community associations, legal challenges probably will arise again. Like the Panther Valley and Whipple cases, most challenges will include public policy, constitutional rights and contract claims.

The most effective way to adopt a ban against sex offenders is with a declaration amendment approved by association members. An owner-approved amendment carries more weight than a bylaw change or a rule that is adopted solely by the board. An association may not restrict sex offenders from purchasing property, only from residing on the property.

Short of, or in addition to, banning sex offenders, associations can take other important steps:

■ **Inform residents that the board, manager and staff are not responsible for locating sex offenders or letting residents know about their presence.** The association needs to minimize its potential liability if it fails to disclose information or inadvertently misinforms residents.

■ **If the association wishes to notify residents about the presence of a sex offender in the community, adopt strict guidelines.** Do not provide an offender's name or address. Most state laws protect sex offenders from harassment; this may create liability for the association if residents harass a registered sex offender based on information the association disseminated.

■ **Inform residents how they can obtain information from public sources.** Provide links on your website or in your newsletter to information about registered sex offenders.

■ **Get the facts.** If an association believes a registered sex offender lives in the community, verify the information: Is the address correct? Is it definitely the same person? A South Carolina condominium learned a hard lesson in 2013 when a jury awarded nearly a million dollars to James E. King, who sued the association for defamation. Board members posted fliers in the community with a photo of William James King Jr., a registered sex offender, and some mistakenly told residents that James E. King was the man in the photo.

■ **If anything seems amiss, contact local law enforcement.** Do not get the association involved.

Before taking any of these steps to protect your community from registered sex offenders, seek guidance from your legal counsel. **CG**

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