

BB REVIEW

Community Association News Spring 2009

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BALCH & BINGHAM LLP

ANNOUNCES NEW COMMUNITY ASSOCIATION NEWSLETTER

WELCOME!

This is the first edition of our newsletter tailored to property managers and the communities they manage. Our goal is to provide updates and information related to community association law. This edition focuses on information we learned at the annual Community Association Institute Law Seminar. We welcome your feedback to David Marmins at dmarmins@balch.com or (404) 962-3524.

USING RESTRICTIVE COVENANTS TO PROHIBIT REGISTERED SEX OFFENDERS FROM LIVING IN YOUR COMMUNITY¹

Georgia has approximately 16,500 people registered with the Georgia Bureau of Investigation as sex offenders. Unless you live in Glascock County, you have some living nearby.² The five counties with the most, in order, are Fulton, DeKalb, Chatham, Clayton and Gwinnett. We know this information because Georgia, as well as most states, started participating in a national registry of sex offenders in 2005. Anyone can go to the Georgia

¹ J. David Ramsey and Scott A. Tanner, two Indiana lawyers, presented this topic at the CAI Law Seminar on January 31, 2009.

² Of Georgia's 159 counties, Glascock County is the only one without a single registered sex offender.

Sex Offender website and perform a variety of searches to determine where the sex offenders live. Their pictures and descriptions of their crimes are also online.

Now that this important information related to neighborhood safety is available, buyers are beginning to take it into consideration when looking for a home. Since most buyers either have or are planning to have children, the presence of a registered sex offender in a community can stop a potential sale in its tracks. This is especially true today, as home buyers have a lot of choices. On the other hand, a buyer will look favorably on a community that can boast of having no registered sex offenders and a restrictive covenant prohibiting them from living in the community.

Of course, current residents should want a restrictive covenant banning registered sex offenders for the same reason potential buyers do: safety. Sex offenders have the highest rate of recidivism of any crime.³ While a

³ The risk of recidivism posed by sex offenders is "frightening and high." *McKune v. Lile*, 536 U.S. 24, 34 (2002). "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune*, 536 U.S. at 33 (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice,



LAND USE LITIGATION PRACTICE GROUP

To meet our clients' needs for dispute resolution and trial attorneys with demonstrated knowledge and ability in the field of real estate and land use law, the Balch & Bingham Land Use Litigation Group brings together attorneys with experience and expertise in the broad array of issues involving real estate, community associations, zoning and development, construction, and commercial litigation. We emphasize a "team approach" to solving particular land use disputes as well as related legal or business issues.

It is our goal to be a proactive "partner" working in conjunction with our clients and their stated goals and mission, not just a reactive legal advisor. We recognize that it is our role and our clients' expectation that we serve as a partner in their business and provide clear, responsive, and efficient legal counsel. We help our clients not only in times of crisis, but also through sound, strategic long-term planning.

restrictive covenant cannot ensure residents that nothing bad will happen in their community, there is value in the peace of mind of knowing that at least nobody in their community is a known sex offender.

The obvious question is "Is this legal?"⁴ While no court in Georgia has ruled on this issue, there are no clear legal barriers to a restrictive covenant that prohibits sex offenders from residing in a planned development community.

First, Georgia has a strong presumption in favor of upholding contracts and has consistently held Declarations to be an enforceable contract.⁵ Further, there are no federal or state laws that directly prohibit an association from passing a sex offender restriction. And, it is unlikely that a court would strike down such a restriction on the basis of public policy, especially now that the courts have allowed states to pass several laws restricting where registered sex offenders can live, such as nearby parks, schools or other public areas.

In light of the competitive housing market, safety issues and increased awareness of where sex offenders live, communities should seriously consider proposing a restrictive covenant prohibiting registered sex offenders from residing in their community.

Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997)).

⁴ This newsletter item is not meant to provide a comprehensive legal opinion on the legality of a particular covenant for a specific community. The language of your existing covenants must be considered and the proposed sex offender restriction must be carefully crafted to avoid running afoul of fair housing laws and constitutional rights.

⁵ *Bradford Square Condominium Assoc., Inc. v. Miller*, 258 Ga. App. 240, 245 (2002).

THE APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE TO PROPERTY MANAGERS AND THEIR COMMUNITIES⁶

Property managers provide key information to lawyers representing their communities and often find themselves in a gray area when it comes to the attorney-client privilege. The attorney-client privilege protects communications between lawyers and their clients from disclosure. Property managers are not the actual client of the association's lawyer, but their communications with counsel may be protected and it is essential to understand how and when to protect these communications. The relationship between the association members, board of directors, and counsel also creates confusing scenarios with respect to the attorney-client privilege. This article provides property managers with helpful information about how to identify and deal with two common scenarios: (1) responses to homeowners' demands to review attorney communications; and (2) protection of your communications, as the property manager, with counsel.

We must begin the inquiry with the definition of the attorney-client privilege. The attorney-client privilege as applied to corporations, including nonprofit homeowners' associations, applies where: (1) a communication is made; (2) so a corporation can secure legal advice; (3) the subject matter of the communication is within the scope of the employee's corporate duties; and (4) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.⁷ The attorney-client privilege does not only arise during litigation, but may cover communications related to general legal advice, including items

⁶ Michael Karpoff, a California lawyer, presented on this topic at the CAI Law Seminar on January 31, 2009.

⁷ *Marriott Corp. v. Am. Academy of Psychotherapists, Inc.*, 157 Ga. App. 497, 505 (1981).

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such as declaration amendments and covenant enforcement.

The association and its property manager must understand how to protect the attorney-client privilege when responding to a homeowner's demand to review communications between the association's board and its attorney. Individual members of a community association are not clients of the association's attorney. Although members of a community association have a right to certain disclosures from the association under the Nonprofit Corporation Code, Property Owners' Association Act, or otherwise, they do not have an absolute right to pierce the association's attorney-client privilege.⁸ Instead, members of the association are limited to those books and records detailed in the Nonprofit Code, which without a proper purpose, will not include privileged documents.⁹ Disclosures to association members, however, must be addressed on a case-by-case basis with the association's attorney to avoid violating state disclosure requirements or the association's governing documents.

The application of the attorney-client privilege to association managers is another potentially confusing issue. Property managers are often an integral part of communications with counsel. Quite often, association boards, which are made up of unpaid volunteers, are not informed of all issues concerning an association. Instead, the board relies on professional management agents to consult with, obtain information from, and relay information to attorneys regarding legal issues. These communications, when made at the direction of the board, should be privileged. It is essential for

⁸ O.C.G.A. § 44-3-220, et seq. (Property Owners' Association Act); O.C.G.A. § 14-4-101, et seq. (Georgia Nonprofit Corporation Code); *Smith v. Laguna Sur Villas Community Assn*, 79 Cal. App. 4th 639, 644 (2000); *The Cove on Herring Creek Homeowners' Assn. v. Riggs*, 2001 W.L. 1720194, *2 (Del. Ch. 2001).

⁹ O.C.G.A. §§ 14-3-1602, 14-3-1603.

management personnel to understand, however, that further dissemination of these communications may run afoul of the agent's duty of loyalty to the association.¹⁰ Consequently, the agent should not disclose confidential communications to anyone outside the scope of the privilege, including to members and shareholders of the association, without the express authority of the board.

CASE LAW UPDATE

This section of the newsletter will provide brief updates of recent court opinions relevant to community associations. This issue focuses on two Georgia cases involve waiving the right to enforce restrictive covenants and inspection of association records.

Waiver: *Glisson v. IRHA of Loganville, Inc.*, 289 Ga. App. 311 (2008). A homeowners' association brought suit against a homeowner alleging the homeowner violated the restrictive covenants by building a metal dog pen on her property. The homeowner claimed the association waived its right to enforce the covenants by failing to enforce them against others in the subdivision. The court held waiver could occur if the association received complaints about violations, and thus was on notice of them, but failed to act to enforce the covenants, which was not the situation in this case. Instead, the court found no evidence that the association failed to address other violations of which it had notice. Consequently, the association was within its right to enforce the restriction against exterior structures inconsistent with the construction of the main resident and the homeowner was ordered to remove the dog pen.

Inspection of Records: *Park Ridge Condominium Association, Inc. v. Callais*, 290 Ga. App. 875 (2008). A condominium resident brought suit against the condominium association seeking to inspect and copy association

¹⁰ Restatement (Third) of Agency § 8.01 (2006).

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records pursuant to the Georgia Nonprofit Corporation Code. The resident claimed she needed to review the records to further understand the association's proposed budget. The association believed the resident simply sought to harass the association and denied the request. The court held the association failed to prove it had a reasonable, good faith basis for the denial and ordered the association to permit the inspection and pay the resident's attorneys' fees related to the lawsuit to inspect and copy the records.

**BALCH & BINGHAM PRESENTS AT
CAI'S NATIONAL CONFERENCE IN
NEW ORLEANS**

Balch & Bingham lawyers David Marmins and Natalie Christensen will be joined by Community Management Associates' Randi Anderson leading a panel discussion at the Community Association Institute's 2009 National Conference in New Orleans. They will present the topic "Dealing with Incomplete Projects and New Developments In Your Community" on Saturday, April 25 at 10:30 am.

CAI's National Conference brings together hundreds of your peers, colleagues and industry experts in the community association field to discuss the present and future of the industry. CAI is returning to New Orleans for the 2009 conference. Our dates fall on the first weekend of New Orleans' famous Jazz Fest – April 22-25th. For more information about the conference please follow this link.

<http://www.caionline.org/events/conference/Pages/2009.aspx>