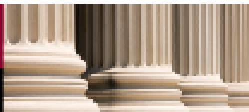

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PAVESE LAW FIRM | COMMUNITY ASSOCIATION NEWSLETTER

SPRING 2015

SECURITY AND WHY WE ADVISE ASSOCIATIONS NOT TO USE THE "S" WORD

BY: CHRISTOPHER J. SHIELDS, ESQ.

Recently, I have attended a number of association meetings where the topic of security and gated access arose. Members want security but all too often these same members resist any measures by the board to enhance security measures and further restrict access. In many communities "access is granted" simply by anyone punching a four (4) digit passcode. Problems arise when owners provide their gate passcode to the pizza delivery men, pet groomers, landscapers, repairmen, all their kids' friends, etc. and the list goes on. What is the board's responsibility to enhance security measures and should the association be representing to its residents that it is providing any level of security? Among association lawyers, we instruct our clients not to use the "s" word i.e. "security" and not to promise or otherwise represent that the association provides any level of security as the liability exposure to the association if someone is hurt, robbed or worse is substantial.

A recent decision of the Florida Supreme Court is perceived to have altered the burden of proof and raised the bar for associations concerning security.

In the case of Sanders v. ERP Operating, L.P., Case No. SC12-2416 (Fla., 2/12/15) the setting was an apartment complex advertised as a "gated" community. The suit was based upon the murder of two tenants, shot by an unknown assailant inside the victims' apartment. At the time of the murders, the complex's front gate was broken for approximately two months prior to the murders. However, there was no sign of forced entry into the tenants' unit.

Despite no identity of the alleged assailants and no determination of whether the victims actually voluntarily allowed the assailants into their apartment, the jury found the defendant apartment complex forty percent negligent with a verdict of $4.5 million dollars.

Here on appeal, the Florida Supreme Court found it significant that the inoperable front gate may have contributed to the murder. Further, the court found that even if a victim voluntarily opened their front door for the assailants, that did not negate the apartment complex's breach of duty by allowing the inoperable gate which was intended to limit access to only those authorized.

The moral of the story is that once a security measure or feature has been installed or otherwise implemented, then the security measure must be followed or breach may lead to an interference of a breach of a duty creating liability.

Keep in mind in the Sanders case, dwelling front doors contained peepholes and in the Sanders case, there was no sign of forced entry in the tenants' unit and no determination whether the victims may have voluntarily allowed their assailants into their apartment. So in light of the Florida Supreme Court's holding in Sanders, associations would be well advised to make sure that whatever security and gate equipment is operable for its intended purposes and to the extent that it is not or that access can be

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randomly gained due to passcodes being freely disseminated, then the board needs to evaluate the system's weaknesses and actively implement steps to enhance security measures, including regularly changing passcodes, and/or enacting measures to otherwise limit random access and evaluating the entire gate access procedures through the entry gates. Boards would be well advised to clearly communicate to its members and all of its residents (including lessees) that access to the gate is simply available to anyone who has knowledge of the passcode that may or may not have been disseminated freely to outsiders, and that as a result, the entry gate provides only a very limited impediment to outsiders entering the community and the association cannot and does not warrant or otherwise provide any level of assurance that persons who enter the community have been prescreened, restricted and evaluated at any level and that all residents should take steps on their own to protect their own personal safety including locking their dwellings and vehicle doors and windows at all times.

Finally, in light of the facts and the holding in the Sanders case, it would not be too difficult to imagine that a court would find that an association that has a fully functional entry gate but where the entry codes were unfortunately freely accessible to outsiders may be more culpable and have more liability exposure than an association that simply has an entry gate that is not operable and open to anyone.

The latter provides notice to all that no level of security is offered and where residents would be less likely to answer their door and to allow outsiders into their homes. While the former provides the residents with a false sense of security and where residents may falsely assume that persons knocking on their door are somehow permitted and acceptable persons.

EQUITY IS BACK

BY: SUSAN M. MCLAUGHLIN, ESQ.

Prices in the local housing market have been rising gradually for the last several years but have recently increased sharply. The combination has brought many previously underwater properties out of the water. Many Associations will miss the opportunity that this creates unless they re-set their strategies and policies.

This is particularly true if they have chosen not to hire counsel to defend their mortgage foreclose cases. However, all is not lost. If timely action is taken, the Association can apply for a disbursement of any surplus proceeds if the foreclosure sale price exceeds the amount owed to the foreclosing mortgage holder. This is true even if the Association has not been named as a party and even if the Association has been defaulted.

The Association's claim against the surplus proceeds in mortgage foreclose case is generally superior to all other potential claims. If the Association fails to make a timely claim against the surplus funds, then the funds will be distributed to any other subordinate lien holder who made timely claims or will revert back to the owner.

Under Section 45.032, Fla. Stat., the deadline for a subordinate lien holder to apply for a distribution from the surplus is 60 days from the date the Clerk issues the Certificate of Disbursements. The Certificate of Disbursements is issued in conjunction with the disbursement of funds to the foreclosing mortgage holder at the same time that the Certificate of Title is issued to the new owner. That means that the Association has approximately 70 days from the date of the sale in the mortgage foreclosure case to make its claim.

Many Associations have deferred foreclosing liens or even recording liens because of the fear of not recovering at least the costs and attorney's fees invested. If there is any equity in the property then this risk is at least diminished. In fact one of the things that alerted us to the shift from no equity to at least some equity is the number of third party buyers taking title at the Association's lien foreclosure sales.

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GOLF CARTS v. LOW SPEED VEHICLES

BY: CHRISTOPHER L. POPE, ESQ.

Golf cart use by residents on the roads within community developments has increased dramatically, even in communities that do not have a golf course. This has led to an increase in the number of accidents and injuries caused by golf carts and, as a result, many community associations are now seeking to adopt or enforce restrictions on the use of golf carts.

When drafting new restrictions, community associations are often surprised to learn that there is a legal distinction between "golf carts" and "low-speed vehicles", even though the two vehicles could be the exact same make and model except for certain modifications. The laws for the two different classes of vehicles are vastly different, so it is critical that community associations understand the differences prior to drafting or enforcing restrictions.

Golf Carts

Florida law defines a "golf cart" as a motor vehicle that is designed and manufactured for operation on a golf course for sporting or recreational purposes and that is not capable of exceeding speeds of 20 miles per hour. See Sections 320.01 (22) and 316.003(68), Florida Statutes.

Golf carts may be operated on private roads, on roads within any self-contained retirement community, and on state and county roads that have been designated for use by golf carts. However, Section 316.212, Florida Statutes, prohibits the operation of a golf cart on public roads or streets by any person under the age of 14.

Generally, a person operating or driving a motor vehicle on a public street or highway in Florida must have a valid driver's license. However, Section 322.04, Florida Statutes, lists several exemptions in which persons are not required to obtain a driver's license, one of which is "any person operating a golf cart".

Many associations want to require that golf cart operators have a valid driver's license. However, since the Florida legislature has specifically exempted the operation of golf carts from the licensing requirements of Chapter 322, Florida Statutes, it is unclear whether the Association can impose or enforce such a requirement. One issue with this requirement is whether it is reasonable for an association to require someone to have a driver's license to operate a vehicle when the law does not require a license. Another potential issue with this requirement is that since the Legislature has determined that persons of 14 years of age are capable of operating golf carts, it could be found to unreasonably discriminate against age or familial status, since a person must reach at least 16 years of age in order to obtain a driver's license.

Another concern with golf carts is that they are not required to be registered with the state or insured. In fact, Section 319.14(10), Florida Statutes, was adopted in 2013 to allow owners of low-speed vehicles to convert their vehicle into a golf cart in order to avoid the annual costs of registration and insurance. Thus, if a person is injured or has his or her property damaged by a golf cart, it is unlikely the person at fault has insurance coverage to compensate for any damages. This is problematic because even minor golf cart accidents can cause very serious injuries or result in fatalities.

Low-Speed Vehicles

Florida law defines a "low-speed vehicle" as any four-wheeled vehicle whose top speed is greater than 20 miles per hour but not greater than 25 miles per hour, including, but not limited to, neighborhood electric vehicles. Low-speed vehicles must comply with the safety standards in Chapter 49, Code of Federal Regulations, Sections 571.500 and 316.2122; and Section 320.01(42), Florida Statutes.

Low-speed vehicles may be operated on roads where the speed limit does not exceed 35 mph and must be registered with the state, insured, and can only be operated by licensed drivers. They must be equipped with brake lights, headlamps, a horn, parking brakes, taillights, rear view mirrors, blinkers, turn signals, windshields, and seat belts.

In light of the differences between golf carts and low-speed vehicles, your community association should review and establish or update its policies to specifically address golf carts and low-speed vehicles. In fact, if your community does not have a golf course or does not allow residents to use their personal golf carts on the golf course, the community association may want to consider prohibiting the use

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of “golf carts” and allowing only “low-speed vehicles”. By doing so, all the motor vehicles operated in the community will be required by Florida law to be registered, insured, and only operated by someone with a valid driver’s license. Other issues the Association may wish to consider are:

1. Requiring all vehicles to be equipped with efficient brakes, reliable steering apparatus, safe tires, a rearview mirror, and red reflectorized warning devices in both the front and rear;
2. Maximum occupancy standards;
3. Hours of operation restrictions;
4. Prohibitions against gas golf carts;
5. Speed restrictions;
6. Requiring registration with the Association and proof of insurance; and
7. Signed waivers of liability for the Association.

IS THERE A GROUP HOME IN YOUR COMMUNITY’S FUTURE?

BY: CHRISTOPHER J. SHIELDS, ESQ.

Community residential homes, also sometimes referred to as “group homes” are defined by F.S. 419.001(1) as meaning a dwelling unit licensed to serve clients at the Department of Elderly Affairs, the Agency for Persons With Disabilities, the Department of Juvenile Justice or the Department of Children and Families or licensed by the Agency for HCA which provides a living environment for 7 to 14 unrelated residents who operate as the functional equivalent of a family. Moreover, F.S. 419.001(2) provides that homes of six (6) or more residents which otherwise meet the definition of a community residential home shall be deemed a single-family unit and a noncommercial, residential use for the purpose of local laws and ordinances. The only condition is that no such group homes may be located within the radius of 1,000 feet of another existing group home.

At issue in the case of Dornbach v. Holley, 854 So.2d 211 (Fla. 2nd DCA) is whether the association’s single family restriction could preclude a group home where four to six developmentally disabled adults would reside. Keeping in mind that the statute literally only forbids local laws and ordinances that limited use to single family purposes, the Appellate Court in Dornbach found that enforcing the subdivision’s restrictive covenants against a group home resulted in incidental discrimination and amounted to a refusal to offer a reasonable accommodation, and thus the homeowners’ action to enforce the deed restrictions was impermissibly discriminatory in violation of state and federal law, and even if the homeowners’ action was not motivated by the desire to exclude disabled persons from the neighborhood. The court further found that the act of enforcing these deed restrictions resulted in making residence unavailable for the handicapped and as a result public policy made a group home the functional equivalent of a single-family residence.

The lesson here is if and when your community first learns that a home in your community is scheduled to be occupied or used as a group home, tread lightly, seek counsel and get good advice. In some cases, further inquiry should and can be made. In some instances, the association may still have recourse. However, it is not wise to “shoot first” and ask questions later.

NEW CASE FINDS HOA RESTRICTIONS NOT EXTINGUISHED BY MRTA

BY: SUSAN M. MCLAUGHLIN, ESQ.

The Marketable Record Title Act, (“ MRTA”) is a threat to homeowners’ associations because it may bar enforcement the community’s declaration of covenants against the successors in title to original purchasers after 30 years.

Section 712.03, Florida Statutes provides an exception if the use restriction is disclosed in:

> …the muniments of title on which said estate is based beginning with the root of title; provided, however, that a general reference in any of such muniments to easements, use restrictions or other interests created prior to the root of title

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> shall not be sufficient to preserve them unless specific identification by reference to book and page of record or by name of recorded plat…

A muniment of title is a deed or will or order of the court or other document that transfers title to the property. This issue does arise in condominiums because the legal description for a condominium unit references the declaration of condominium with its recording information. On the other hand a typical conveyance of lot does not reference the community's declaration of covenants by book and page number or instrument number.

In 1993, the Supreme Court, in *Sunshine Vistas Homeowners Association, Inc. v. Caruana*, 623 So. 2d. 490 (Fla 1993) considered the following typical conveyance:

> Lots 16 and 17, Block 5 of SUNSHINE VISTAS, according to the Plat thereof, as recorded in Plat Book 16 at Page 29, of the Public Records of Dade County, Florida subject to limitations, restrictions and easements of record, if any, applicable zoning ordinances and regulations and taxes for the year 1978…

The Court in *Sunshine Vistas* held that the reference to "SUNSHINE VISTAS" preserved the restrictions.

Opponents of preservation have argued that the restrictions at issue in *Sunshine Vistas* were set forth in the plat itself or that the plat in the *Sunshine Vistas* case referenced the declaration by official records book and page number. This argument has persisted for decades even though the Court's opinion in *Sunshine Vistas*, says nothing to suggest its decision is based on the content of the plat rather than the language in the deed that references the name of the subdivision.

The Court's decision in *Barney v. Silver Lakes Acres*, 5D14-137, issued by the Fifth Circuit Court of Appeals on February 6, 2015 (not yet final pending disposition of petition for reargument) is helpful in opposing the anti-preservationist position. In the *Barney* case the restrictive covenants were recorded in 1968 and the Court found that they survived based on the following language in the deed:

> SUBJECT TO Restrictive Covenants, Reservations and easements of record for Silver Lake Acres

Regardless, it not wise to rely on the language in the muniments of title, over which the association normally has no control, to preserve the community's covenants. The board of directors can and should follow procedures to preserve its covenants contained in Chapter 712, Florida Statutes. The process ends with recording a notice of preservation before the expiration of the 30-year period running from the date that the declaration was initially recorded. No ownership vote is required. The preservation procedure is notice oriented and it is very affordable. Expired covenants can also be revived but the revival procedure is complicated and only the original restrictions are revived by this process. This often leaves the community in a sorry state if, for example, the original assessment was capped at $15.00 per year. There are other strategies to deal with extinguished covenants, but they need to be explored on a case by case basis. If you have questions on your situation, then consult the association's attorney.

EMOTIONAL SUPPORT ANIMALS - THE SAGA CONTINUES

BY: CHRISTOPHER J. SHIELDS, ESQ.

Those who have read or have otherwise become involved with emotional support animal requests recognize that while associations are not always without valid basis to deny requests, the deck is squarely stacked in favor of those who request to keep or have an emotional support animal. In each case, legal guidance as to what information or proof can be required in support of said request and the legal basis for any denial is always prudent. Further complicating these line of cases which favor emotional support animal requests is the very recent case of State of Florida ex rel Hoffman v. Leisure Village, Inc., Stuart (Fla. 4th DCA 4/22/2015) where the court found that a "new" handicap status can change circumstances and undermine the terms of a previous settlement of the parties.

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In the parties first lawsuit, Leisure Village and Ms. Hoffman ended their litigation by the parties entering into a settlement agreement allowing Ms. Hoffman to keep her pet but prohibiting another pet and requiring her to move if she did acquire another pet.

Shortly thereafter, her dog died and (you guessed it) Ms. Hoffman was then diagnosed with chronic depression. Her doctor recommended an "emotional support dog". Leisure Village denied her request and sought to enforce the parties' previous settlement agreement and she obtained a second dog anyway.

On appeal, the court found that Ms. Hoffman's change in circumstances after the settlement agreement justified her disregarding the very settlement agreement that she agreed to be so bound. This case illustrates how a "new" handicap can undermine the parties' previous agreement to allow the current pet but agree not to replace it when it died. Unfortunately for associations, whatever agreement you have with the owner not to repeat the situation will not be enforceable if the owner simply obtains a diagnosis of a new malady that constitutes a handicap.

This newsletter is provided as a courtesy and is intended for the general information of the matters discussed herein above and should not be relied upon as legal advice. Christopher J. Shields (christophershields@paveselaw.com) is a Florida Bar Certified Real Estate Lawyer and Partner in the Pavese Law Firm and heads the Community Law Section for the Firm. Christina Harris Schwinn (christinaschwinn@paveselaw.com) is a Partner in the Pavese Law Firm. Ms. Schwinn also practices in Labor/Employment Law. Susan M. McLaughlin (susanmclaughlin@paveselaw.com) is a Partner in the Pavese Law Firm. Keith Hagman (keithhagman@paveselaw.com) is a Partner in the Pavese Law Firm. Brooke N. Martinez (brookemartinez@paveselaw.com) is a Partner with the Pavese Law Firm. Charles B. Capps (charlescapps@paveselaw.com) is a Florida Bar Certified Real Estate Lawyer and Partner with the Pavese Law Firm. Chené Thompson (chenethompson@paveselaw.com) is a Partner with the Pavese Law Firm. Kathleen Oppenheimer Berkey, AICP (kathleenberkey@paveselaw.com) is an Associate and Certified Land Planner with the Pavese Law Firm. Matthew P. Gordon (matthewgordon@paveselaw.com) is an Associate with the Pavese Law Firm. Christopher Pope (christopherpope@paveselaw.com) is an Associate with Pavese Law Firm. Matthew E. Livesay (matthewlivesay@paveselaw.com) is an Associate with the Pavese Law Firm. Every attorney listed above is a member of the Firm's Community Association Law Section and is experienced and capable of handling all aspects of community association law, including but not limited to governing document interpretation, covenant enforcement, collection of assessments, lien foreclosures and general litigation matters. Please feel free to contact them via the e-mail addresses listed above.

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