THE OFFICIAL PUBLICATION OF THE NEVADA CHAPTER
OF COMMUNITY ASSOCIATIONS INSTITUTE

THE MAGAZINE FOR COMMON INTEREST COMMUNITIES

community interests

SEPTEMBER 2018

TODAY • TOMORROW • BEYOND

IT'S ALL ABOUT THE LAW

GOOD, BAD, AND ALMOST UGLY

NEVADA CHAPTER community ASSOCIATIONS INSTITUTE

2018 Media Sponsor
NAS NEVADA ASSOCIATION SERVICES, INC.

IT'S ALL ABOUT THE LAW
The GOOD, The BAD and The Indifference

By Matthew L. Grode, Esq. and Victor Luke, Esq.

Laws are not perfect. They do not always result in fairness or equality, and sometimes, laws are too vague or ineffective to be enforced. This article will provide examples of each of these concerns beginning with the recently enacted federal regulations which may unfairly hold associations liable for harassment by third parties. Next, we will highlight certain Nevada laws which had been adopted to strengthen the ability of the state and common interest communities to address certain criminal and related activities.

HARASSMENT

Discrimination in any form based upon race, color, religion, sex, national origin, familial status, gender preference, or disability is simply wrong. Fortunately, various federal and state fair housing laws have been adopted which provide protection to persons within these protected classes. That's the "Good." The potentially "Bad" relates to the recent adoption of regulations which seemingly hold associations liable for the discriminatory and harassing acts of third parties.

In late 2016, the U.S. Department of Housing and Urban Development (HUD) determined that it would strengthen existing law by adopting rules which relate to harassment

claims and to third-party liability. Title 24 Code of Federal Regulation (CFR), Section 100.600, prohibits "*quid pro quo*" and "*hostile environment*" harassment. Quid pro quo harassment occurs when an unwelcomed request or demand, based upon a protected class, requires victims to submit to the demand or request as a condition to the sale, rental, or availability of housing, terms, conditions, privileges of sale or rental, or the provision of services or facilities. By way of example, if a board member will only provide a parking permit to an owner if such person provides sexual favors, quid pro quo discrimination would exist. Similarly, such harassment would be found where a Muslim resident's use of a community pool is conditioned upon her not wearing religious garb (e.g., burkini). This type of harassment can also exist where the approval of an Architectural Review Committee application to install a jacuzzi is subject to the owner's agreement not to allow homosexuals to use the same.

Hostile environment harassment under 24 CFR §100.600 exists where the unwelcomed conduct is so "severe or pervasive" that it interferes with the sale, rental, or use of a dwelling, the terms, conditions or privileges of a sale or rental, or the provision of services or facilities. Examples of this variety of wrongdoing can be found where a director frequently makes sexually suggestive comments, offensively touches others, or there is repeated use of offensive racial epithets by such persons. In determining whether conduct is sufficiently severe or pervasive under these regulations, HUD and the courts will look to a number of factors including the nature of the conduct, its severity, frequency, duration, location, and the relationship of the persons involved.

Unquestionably, persons who participate in quid pro quo or hostile environment harassment may, and in fact should, be held personally liable. Associations may also be subject to a penalty for the harassing conduct of their employees and agents. A housing provider, such as an association, may be held liable for:

1. Failing to take prompt action to correct and end discriminatory housing practices by its employee or agent, where it knew or should have known of the discriminatory conduct;

2. Failing to take prompt action to correct and end a discriminatory housing practice by a third party where it knew or should have known of the conduct and had the power to correct it; and,

3. Vicarious liability for discriminatory housing practices by its agent or employee, regardless of whether the housing provider knew or should have known of discriminatory housing practice (24 CFR §100.7).

The duty to take prompt action to correct and end discriminatory housing practices mandates that housing providers reasonably exercise the powers which are available to it. Such action may include sending notices of violation, imposition of fines, suspension of membership privileges, and, in some cases, the commencement of formal legal action to obtain injunctive relief from the courts.

What can boards do to minimize the risk of liability for harassment, and potentially for third party liability? We believe the following measures should be an association's starting point:

1. Provide training for directors, officers, and association personnel to ensure that such persons recognize and do not directly participate in harassing conduct;

2. We suggest that community managers receive similar training;

3. Boards should adopt formal harassment reporting policies which would encourage victims and witnesses to report improper conduct;

4. Associations should consult with their legal counsel in order to ascertain what legal authority exists under the governing documents and federal and state laws, to respond to complaints in particular cases;

5. Associations should consistently monitor community themed official and unofficial websites such as Facebook, My Space, and Nextdoor and promptly take action to "correct and end" any prohibited activity upon the discovery of the same; and

6. Associations should establish a mediation protocol to address alleged harassment.

In most cases, governing documents do not provide express authority to take action against third parties. This being said, nearly all recorded CC&Rs include language such as this: "The duties and powers of the Association are set forth in this Declaration, Bylaws and Article, together with its general and implied powers of an "association" and a nonprofit corporation, generally to do any and all things that such a corporation may lawfully do which are necessary or proper in operating for the peace, health, comfort, safety and general welfare of its Members . . ." CC&Rs also frequently include provisions which allow associations to enforce all legal requirements, particularly where the governing documents deem violations of law as nuisances. Arguably, such language would create a duty on the part of the board to prevent discrimination and harassment in third party situations. Certainly, where harassment occurs within the common elements, the association is authorized to act. As stated in Nevada Revised Statute chapter 116.3102(1): ". . . the association: (f) may regulate the use . . . of the common elements."

Under 24 CFR §100.7(iii), an association may become "directly liable" for "failing to take prompt action to correct and end a discriminatory housing practice by a third party, where the person knew or should have known of the discriminatory conduct and had the power to correct it." Based upon this regulation, an association may be liable for harassment by a resident or even a vendor where his/her conduct is: (1) based upon a protected class; (2) the association knew or should have known of the harassment; (3) the association had the power to correct and end the harassment; and (4) the association failed to take prompt corrective action.

NEVADA LAW

Closer to home, the Nevada legislature has been seriously tackling the area of homeowners' associations in a comprehensive way since at least 1991, when it adopted the Common Interest Ownership Uniform Act. Over the past decade, the Nevada legislature has made numerous changes to the Act. Some of these recent changes were undoubtedly efforts to prevent the reoccurrence of a scandalous conspiracy exposed in 2008. In that case, federal law enforcement officers uncovered a plot by a construction defect attorney and a construction defect remediation company to corrupt and take over homeowners' association boards for the purpose of steering lucrative legal cases and repair contracts their way. All the recent changes to the Act, of course, cannot be explained simply as a response to that scandal. Rather it appears that Nevada lawmakers are eager to both learn from past problems and innovate improvements to the quality of life for Nevada residents. The results have thus far have been a mixture of good, bad and indifferent.

To provide a failsafe in the event the other reforms described below do not prevent unit owners' harm, the law has been modified to require associations to carry significant insurance coverage for board members' bad conduct. In 2011, NRS 116.3113 was amended to require at least five million dollars of coverage (or three months of assessments, whichever is less) for criminal wrongdoing by the board. Last year, in 2017, that same law was changed to also require at least one million dollars of coverage for negligent conduct by the board of directors. Reactions to these changes seem to be like insurance in general—nobody likes paying premiums unless and until there is a valid claim, and then that insurance is a savior.

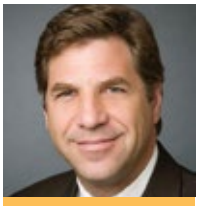
Removing board members from their positions of power has been made easier, at least in theory. In the great construction defect scandal from a decade ago, unit owners often tried to purge their boards of corrupted members but failed. A significant challenge these unit owners faced was intimidation and harassment. So, in 2009, NRS 116.31034 was modified to require that board recall votes must be by secret ballot. Subsequent changes also made recall elections easier to instigate. NRS 116.31036 was amended in 2011 to reduce the total number of unit owners needed to cause a recall election. That change left in place the requirement that at least 35 percent of total owners needed to vote for removal, but reduced to only 10 percent the minimum number of owners whose signatures would be needed to put a recall election on the ballot. That law furthermore began expressly outlawing any interference with such signature collection efforts.

Normal board member elections have also faced efforts to protect the integrity of the franchise. In a direct response to the construction defect conspiracy, interfering with elections and ballot stuffing, though never exactly legal, were finally and expressly made illegal in 2009 by the enactment of NRS 116.31107. Campaigning limitations were also streamlined in 2009 with the amendment of 116.31034, requiring all candidates for board positions to utilize a single page candidate statement.

At the core of the construction defect criminal enterprise from the last decade was the conspirators' success in planting the contractor's employees onto boards in sufficient numbers to constitute a majority, thereby having the power to grant the lucrative contracts back to the conspirators. Laws were put in place, therefore, which expressly prevent such conflicts of interest. In 2011, NRS 116.3103 was amended to hold board members responsible for avoiding conflicts of interest. In 2015, Nevada law on this subject was strengthened further with an amendment to NRS 116.31034, forbidding anybody with a close relationship to another board member from being eligible for the same board. These changes appear to all address the notion that even if corruption might not be eradicated altogether, concrete steps can be made to slow its spread enough to prevent a corrupted majority.

On top of changes designed to impact who sits on the board are statutory amendments focused on improving the quality of the vote itself. Sunlight, as they say, is the best disinfectant, and a corrupt board has greater chances of succeeding where unit owners are kept in the dark. In 2011, 116.31175 was amended to require associations to provide upon request free or nearly-free copies of HOA financial statements, budgets, reserve studies, etc. within twenty-one days of the request. In 2017, NRS 116.31083 was changed so that notice of even purely executive sessions, conducting no public business, must be fully provided to unit owners.

Finally, with an eye toward the future, in 2011 Nevada freed up associations to allow electronic voting except for elections which require secret ballots, with an amendment to NRS 116.311. Similar laws have passed in other states. While in theory this may expand owner participation in the affairs of their HOAs, we have not seen a great wave of interest in electronic voting . . . yet. Perhaps a bit of "indifference" facing the somber work of sorting the good from the bad.



Matthew L. Grode, Esq., Gibbs Giden Locher Turner Senet & Wittbrodt LLP

Victor F. Luke, Esq., Gibbs Giden Locher Turner Senet & Wittbrodt LLP