

Can Community Associations Restrict Sex Offenders?

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Over the past decade, municipalities in New Jersey have taken concerted efforts to protect the safety of their residents – especially their children – through the use of “Drug-Free School Zones,” DNA identification programs, criminal background checks for Youth Athletic League coaches and, most recently, “Pedophile-Free Zones.” In August 2005, Lower Township in Cape May County became one of more than 40 municipalities in New Jersey to pass a “Pedophile-Free Zone” ordinance. Lower Township’s ordinance, as written, prohibits convicted sex offenders from residing or loitering within 500 feet of where children congregate, such as schools, parks, or playgrounds, and mirrors similar ordinances throughout the many municipalities in New Jersey that have enacted similar legislation. However, in December 2006, a New Jersey Superior Court Judge found Lower Township’s ordinance to be unlawful and in violation of the state constitution, as well as at odds with Megan’s Law.¹

So where does this leave community associations who wish to employ similar methods to protect its members – especially its youngest and most vulnerable? The fact of the matter is that some associations already have taken such affirmative steps to restrict sex offenders from their



communities. In the 2001 case of *Mulligan v. Panther Valley Property Owners Ass’n*,² the New Jersey Appellate Division addressed the issue of whether a condominium association could ban all “Tier 3” offenders – the highest level sex offenders in New Jersey – under Megan’s Law.³ In the Trial Court, Ms. Mulligan’s claim that the association’s amendment to its declaration, which precluded “Tier 3” offenders from residing within the community, was dismissed, and, on appeal, the Appellate Court upheld the Trial Court’s determination. The Appellate Court rejected plaintiff’s argument that this restriction unlawfully infringed on her right to sell or lease her property, but the Court refused to address the

ultimate validity of such an amendment due to an insufficient record.

In *Mulligan*, the Appellate Division left two questions unanswered, namely: (1) whether community associations should be considered private entities or “quasi-municipalities”; and (2) whether the Court must analyze amendments to associations’ governing documents based on the “business judgment rule” or based on a higher, constitutional standard. These issues have been subsequently addressed in the New Jersey Supreme Court’s recent 2007 decision in *Committee for a Better Twin Rivers v. Twin Rivers Homeowners’ Association*.⁴ In *Twin Rivers*, the Supreme Court answered both of these questions in favor of community associations, holding that because the primary purpose of associations is private in nature, the minor restrictions imposed by such associations are “not unreasonable or oppressive” and that the association in question was not acting as a de facto municipality.⁵ The Court left the door open for future challenges, however, stating that certain restrictions enacted by associations may be declared unenforceable if they violate public policy.⁶

In the *Lower Township* case, the Court found that the “Pedophile-Free Zone” ordinance was unlawful for [Continues on page 14.]



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several reasons, including that it was preempted by the requirements of Megan’s Law and, in addition, was in violation of the due process rights of the individuals it banned. Because of the holding in Twin Rivers, which does not subject associations to this higher constitutional standard, it is unknown whether the courts in New Jersey, based on the Lower Township decision, would uphold a similar restriction as was enacted by the association in the Mulligan case. Even though community associations are not subject to these higher constitutional standards, and the “business judgment rule” would be controlling, the argument can be made, as discussed in Twin Rivers, that such a restriction would violate pub-

lic policy. As such, associations are cautioned to consult with legal counsel before attempting to amend any governing document restrictions to prohibit sex offenders from residing in their communities.

So what can associations do to protect their members with respect to sex offenders? Associations must be cognizant of the potential ramifications of any actions they take with respect to all their members. By way of example, identifying a sex offender living in your community by name in the association’s newsletter or on an association website could expose the association to potential liability from both the offender and from other members of the community. As such, an association should never identify the name or address of a purported sex offender or even the

fact that a registered sex offender may be living in the community. However, understanding that the residents have a vested interest in protecting the safety of their family and neighbors, it is acceptable for an association to provide or publish information on how residents may obtain information on whether sex offenders are living in their community. For instance, sex offender registry information is readily available from a variety of sources, including online, and an association can identify how members can access this information about their community.

So while the issue of whether an association can actually restrict sex offenders from residing in their community remains an open one, there are steps associations can and should take to help protect and safeguard their community. ■

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(Endnotes)

- 1 See Elwell v. Township of Lower, Docket No. CPM-L-651-05 (Law Div. December 22, 2006).
- 2 337 N.J. Super. 293 (App. Div. 2001).
- 3 See N.J.S.A. 2C:7-8(c)(3).
- 4 192 N.J. 344 (2007).
- 5 Id. at 366-68.
- 6 Id. at 370-71.

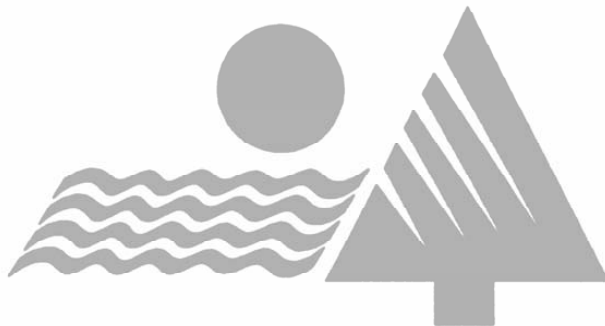
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