COMMUNITY MATTERS

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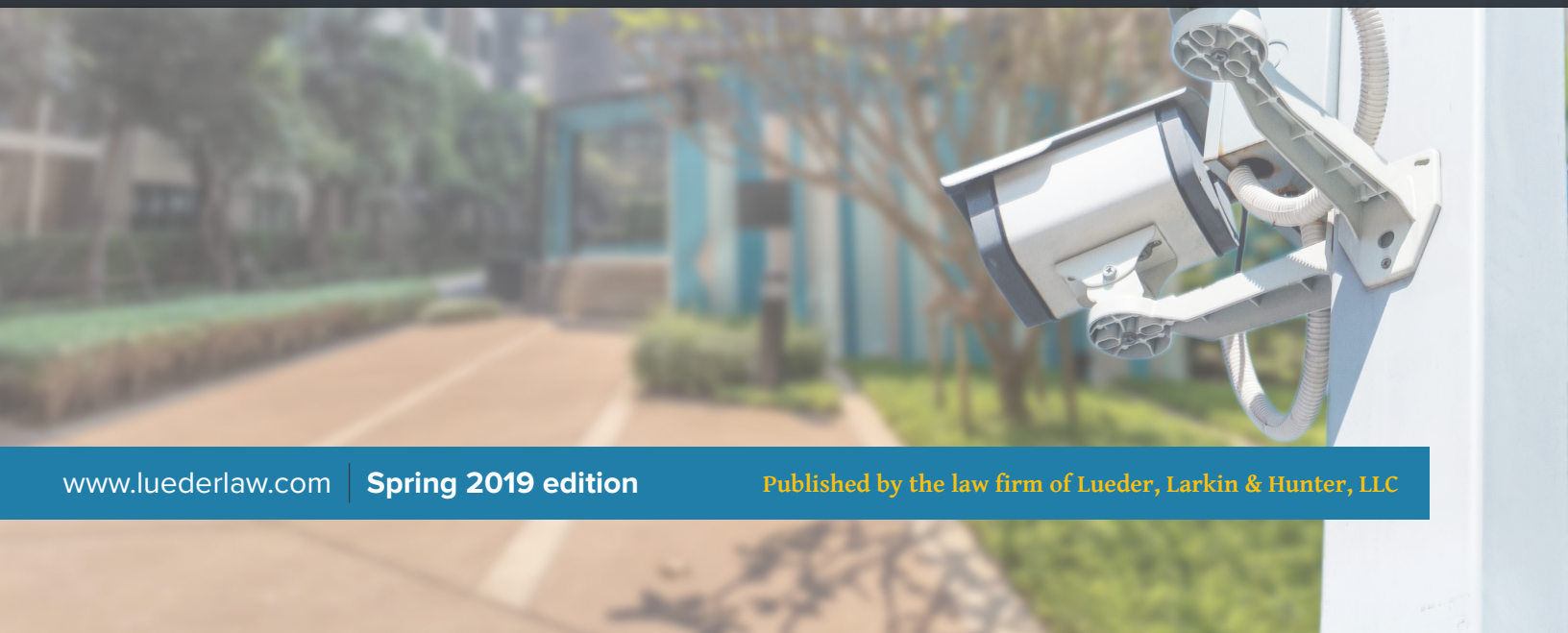
News and Trends in Community Association Law

Articles:



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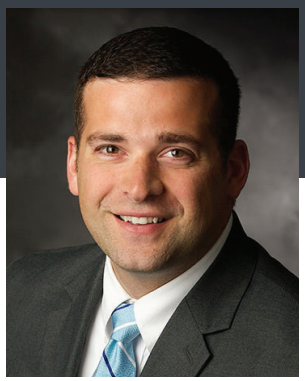


The Risks and Rewards of Installing Security Cameras

by | Joseph C. Larkin, Esq.

How do you catch the person who left the couch or a mattress outside of the community's dumpster? Who is the criminal responsible for the graffiti at the pool's club house?

Whose car damaged the entrance gate? Who are those teenagers that are loitering around in the common areas after hours? These are some of the problems that community associations face that could potentially be mitigated or potentially solved with the installation of security cameras. Generally speaking, installing security cameras is not a bad thing. But, as with everything in our society today, it carries some risk. The following are some of the more common issues or concerns that are raised:

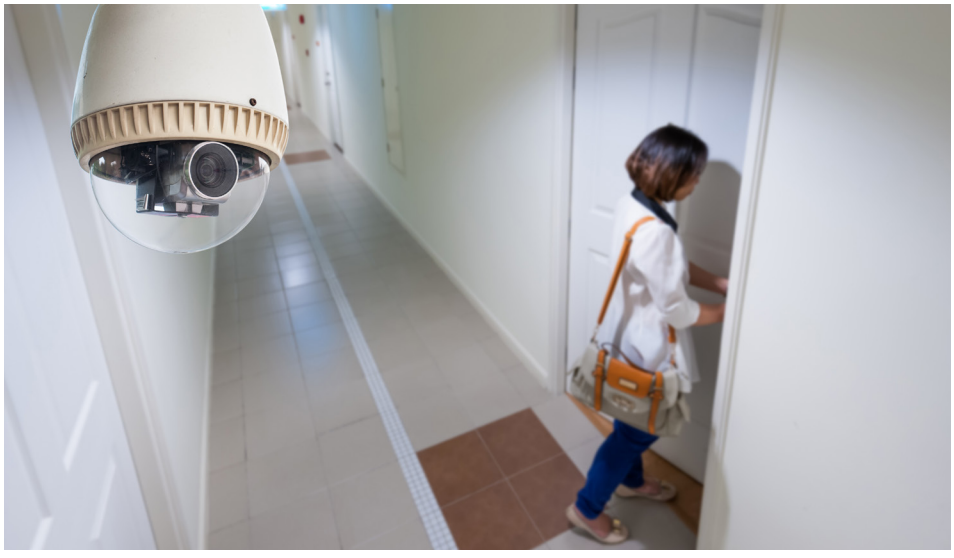
Invasion of Privacy. The main concern faced by many associations are those members citing the invasion of their privacy or that of their children. The bottom line answer is that, so long as the cameras are not installed in an area where a person has a reasonable expectation of privacy, the installation of a camera will not be an invasion of privacy. Any area that is used for the general public, like the garbage area, pools, tennis courts, or entrances and exits to the clubhouse are not areas where a person would have a reasonable expectation of privacy. On the other hand, cameras in areas such as bathrooms or areas where people change clothes are off limits.

Liability to the Association. Another concern when it comes to the installation of security cameras is potential liability to the association. If your community's governing documents include an exculpatory clause, it will be in a significantly better position. An exculpatory clause states that the association is not responsible for providing safety or security to its residents or guests. This is an important provision to have. The lack of this clause can create a risk for an association potentially guaranteeing the personal safety and security of each individual resident and guest, as well as their personal belongings. In the absence of an exculpatory provision, an association should avoid any actions which give the impression that it is taking affirmative steps to ensure the safety and security of residents and guests. Accordingly, the board should notify all residents that the cameras have been installed solely for the purpose of deterring criminal activity, and they have not been installed as a means of ensuring the safety of the residents and their guests. Owners should be reminded on a fairly regular basis that they remain responsible for their own safety and security. Boards should also notify owners that the cameras are not being monitored. Associations do not want people thinking that there is someone watching the cameras at all times, possibly making them less inclined to call for help when help is needed.

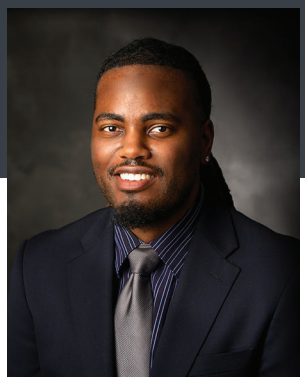
Policy Regarding Footage. A discerning Board of Directors may want to adopt a policy making it clear that the cameras and any content captured is association property. This resolution should also define who can review the video recordings. Generally, it is recommended that the resolution provides that no one will be monitoring the video live and that, other than the Board and/or property manager, no one can review the recordings. The only exception to viewing the recordings is if the Association is served with a subpoena or a court order to provide the video recordings. Having a defined policy in place can help reduce disputes over access to the footage to settle homeowner disputes or matters which are unrelated to vandalism at the pool or infractions of association rules.

Signage. The word "surveillance" should be avoided because it implies that someone is actively monitoring the cameras and that the subjects of the footage are being surveilled. Ideally, a proper sign will put people on notice that cameras exist, but not imply that anyone is actively monitoring them.

If you have questions about the installation of security cameras at your community, or if you need assistance drafting a Security Camera Resolution or amending the governing documents to include an exculpatory clause, we encourage you to contact your association's legal counsel.



An **INTEREST**ing Refresher



by | **Brandon D. Wagner, Esq.**

Interest is a vital part of our financial system. We have all seen it in almost every financial transaction we encounter: mortgages, auto loans, investments, and bank accounts.

It is no different for community association homeowner accounts. Nearly all governing documents authorize associations to recover interest (if your documents do not, please contact your association's attorney to recommend strategies to amend the covenants to allow for this important financial tool), but the rate at which interest is computed is not always so clear. Rather than providing a fixed, stated interest rate, many associations' governing documents contain a clause similar to this: "All such assessments, together with late charges in the amount of Ten Dollars ($10.00) or ten percent (10%) of the amount of each assessment or installment not paid when due and *interest at the lower of the highest legal rate or eighteen percent (18%) per annum.*"

This clause states two interest rates with one being 18% and the other being "the lower of the highest legal rate." For condominiums, the Georgia Condominium Act governs and provides for a maximum rate of 10%. Similarly, the Georgia Property Owners' Association Act (POA) provides for a maximum interest rate of 10% for homeowners associations that have submitted themselves to the POA. Given our example, since 10% is less than 18%, condominium associations and POA-submitted homeowners associations could seek a maximum interest rate of 10% per annum on unpaid assessments.

However, for common law HOAs, the proper interest rate is a little more difficult to determine. Thankfully, the Georgia Court of Appeals has provided some guidance. In the 2016 decision in *Northside Bank v. Mountainbrook of Bartow County Homeowners Association, Inc.*, the Court defined what the applicable interest rate should be in covenants that contain language that do not provide a stated interest rate and simply allow for interest at the highest (or maximum) interest rate permitted by law. The Court held that in situations where the covenants do not provide a stated amount at all, O.C.G.A. § 7-4-2 applies because it is the default interest rate (7%). However, it is not the maximum rate allowed in Georgia; in fact, Georgia does not have a maximum interest rate. In the example above, since Georgia does not have a maximum legal rate, the applicable interest rate therein would be 18%.

As always, it is best to contact your legal professional for assistance in determining which interest rate you should be using.

Directors' and Officers' Fiduciary Duties

by | **Haley H. Bourret, Esq.**

When considering serving on the board of an association, potential directors and officers should educate themselves on the fiduciary duties they would owe to the association if they are elected or appointed. In order to understand and appreciate those duties, it may be helpful to study an example scenario. Imagine the following: *You are currently two months into your two-year term on the Board of Directors of ABC Hills Homeowners Association, Inc. While at a Board meeting, you and your fellow Board members, Charlie and Savannah, decide that the ABC Hills tennis courts are in need of resurfacing. Charlie, the Association's President, happens to own a business specializing in renovating tennis courts. Charlie says that, in his professional opinion, the renovations are long over-due. He offers to submit a "very competitive" bid for the project on behalf of his business. Seeing an opportunity for a big payoff, Charlie writes up a "bid" on the spot that simply says, "I'll clean, repair, resurface, and stripe the two courts for $50,000, and it will be done by April 30th." Savannah, the Association's Treasurer, who is preparing to embark next week on a ninety-day around-the-world cruise, says "We have plenty of money in the reserves, let's just get the project over with." You ask if the Board should consider other bids, but Savannah interrupts and says "I don't have time for this. We have the money in reserves and I need to go home & pack - I move to accept Charlie's bid." Before you can respond, Charlie says "Approved! – We'll get started soon. Meeting adjourned!"*

Have Charlie and Savannah discharged the fiduciary duties they owe to the Association? Do those duties even apply to this situation? To answer those questions, you first have to consider the two types of fiduciary duties Charlie and Savannah owe to the association: (1) the duty of care and (2) the duty of loyalty.

Duty of Care

The duty of care is codified in Section 14-3-830 and Section 14-3-842 of the Georgia Nonprofit Corporations Code (the "Nonprofit Code"), which states, in part:

Unless a different standard is prescribed by law:
(1) A director (or officer) shall discharge his or her duties as a director (or officer), including his or her duties as a member of a committee:
(A) In a manner the director (or officer) believes in good faith to be in the best interests of the corporation; and
(B) With the care an ordinarily prudent person in a like position would exercise under similar circumstances;

To discharge the duty of care, directors and officers must discharge their duties as directors and officers, and as committee members, in a manner that they believe, in good faith, to be in the best interest of the association, with the care an ordinary, prudent person in a like position would exercise under similar circumstances. In reality, there is an

continued...

objective and a subjective component to this duty of care, skill, and diligence.

In the scenario above, Savannah, the Association's Treasurer, did not act with the care of an ordinarily, prudent person in a like position, since she didn't consider any additional bids, didn't engage in any meaningful discussion of the project, and voted to advance the project because it was in her best interest, not in the best interest of the Association. Similarly, Charlie, as a tennis court resurfacing professional, knew that the price he quoted was far too high, and that paying such a high price was in his best interest, but not in the best interest of the Association.

In the scenario above, Savannah and Charlie both acted in a manner that they could not have believed, in good faith, to be in the best interest of the Association, and they failed to act with the care of an ordinarily prudent person in a position like their own under the circumstances. Accordingly, it could be found that Charlie and Savannah have breached their duty of care as directors and officers of the Association.

Charlie may have also breached his duty of loyalty to the Association.

Duty of Loyalty

The duty of loyalty is codified in Sections 14-3-860 and 14-3-865 of the Nonprofit Code. The duty of loyalty includes avoiding prohibited conflicting interest transactions and disclosing corporate opportunities. In the scenario above, Charlie knew that, if his $50,000 bid to complete the tennis court resurfacing was accepted, he personally, and his company, would realize a significant financial benefit. Given that Charlie participated in the limited deliberation on the bid, and the fact that his vote, along with Savannah's, were the only two votes in favor of accepting the bid, Charlie has engaged in a transaction where his own interests conflicted with the interests of the Association. If challenged, Charlie's actions could be found to be a breach of his duty of loyalty to the Association.

What could have been done differently in the scenario above? For you and Savannah, it would have been better for you to consider other bids for the project, which, by doing so, may have revealed the inflated price of Charlie's bid. Moreover, further discussion and deliberation on the scope of the resurfacing project and the ability of the Association to cover the cost would have given you and Savannah, as disinterested directors, more insight into the project, putting you in a better position to vote in the best interest of the Association. Finally, acknowledging Charlie's conflicting interest in the transaction and requiring that he play no part, indirectly or directly, in the deliberations or vote on the project would have better secured the final decision of the Board.

If you have questions about the fiduciary duties of officers and directors, and how those duties may apply to specific situations in your community, we encourage you to contact your association's legal counsel.

Don't Forget About Me: Update Contacts to Ensure Bankruptcy Trustee Disbursements Are Received

by | **Daniel E. Melchi, Esq.**

"Don't you / Forget about me / Don't, don't, don't, don't / Don't you forget about me…"
--Simple Minds, 1985

This tune from the way-back machine (made famous perhaps one of the most iconic movies of the '80s, "The Breakfast Club") came on my earbuds the other day as I was filing address change requests for bankruptcy payment checks. The Trustee's office had called earlier in the day and told us (for about the fifth or maybe tenth time that week for various clients) that Trustee checks were being returned to them because a community association had changed management companies or addresses. It made me think, "This association changed management companies, but did not tell us. Hey… They 'forgot about me…'"

So I thought, with Spring here and many associations either having recently elected new directors at the annual meeting, recently appointed officers, as well as possibly switching vendors or vendors moving to new offices, maybe we should send out a friendly reminder not to "forget about us." Generally speaking, our firm has all Chapter 13 bankruptcy disbursement checks mailed directly to the association or its management company from the Trustee. But if a change has occurred, we need to be sure to file an official Proof of Claim Change of Address Notice to make sure those payments keep going to the right place for deposit.

Our firm wants to remain in contact with and be able to reach current Board members should a situation arise that needs immediate attention. Please take a moment to let our firm know if your association has changed management companies, addresses, contact persons, Board members, or any other change you think might impact our ability to reach you. Our Client Services Coordinator, Leslie Walker, can be reached at lwalker@luederlaw.com, and she can update your information in our system.

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