

8--Sex Offenders and Criminals: Can They Be Banned by a Community?

Associations generally have the right to regulate their communities. In Washington, this probably includes the right to ban registered sex offenders¹ and other persons with criminal history from living in the community. However, an Association's right to evict existing occupants based on their status as a sex offender is less clear. In addition, Associations considering a covenant banning occupants with criminal history must consider several sources of potential liability.

Banning Prospective Occupants with Sex Offender Status and Other Criminal History: The Fair Housing Act

The federal Fair Housing Act prohibits discrimination in housing based on race, color, religion, sex, national origin, familial status, and disability.² State and local enforcement agencies may extend this protection to other classes.³

No federal, state or local protections applicable to Washington communities specifically prohibit discrimination based on an individual's criminal history or status as a sex offender.^{4 5} No Washington court has ruled on the issue of whether an Association may ban such individuals from moving into their communities. However, guidance published by the Department of Housing and Urban Development ("HUD") warns that such bans can still violate the Fair Housing Act's prohibition on racial discrimination. A finding of discrimination would not require a finding of intentional discrimination. Instead, courts will strike the ban if they find that it disproportionately affects a protected group and that the ban is not the least restrictive means of obtaining a legitimate, non-discriminatory objective.⁶ Critically, HUD warns Associations that blanket bans of Owners with criminal records

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are likely to be construed by the courts as discriminatory, and that the objective of ensuring the safety of the community can be obtained through less restrictive means. To support this conclusion, HUD cited to federal cases which have rejected similar justifications for blanket bans on offering employment to convicted criminals.⁷

Fortunately, HUD's guidance makes it clear that it is possible for communities to construct bans which would likely survive a challenge on the basis of disparate impact on a protected class. First, HUD advises avoiding blanket bans on the basis of a history of arrests without conviction. Second, the Association should demonstrate that there was some consideration as to whether the prior conviction actually demonstrates a risk to the community. As such, avoid blanket bans on criminal convictions, and instead focus on specific categories of criminal activity, such as violent crimes or sex offenses. Third, HUD recommends that Associations consider how recently the crime was committed. According to HUD, bans on criminal convictions which have occurred more recently are more likely to survive a challenge. Lastly, this disparate impact analysis does not apply to individuals convicted of the manufacture or distribution of a controlled substance. Therefore, it is perfectly acceptable for a community to ban individuals convicted of the illegal manufacture or sale drugs.

Given the current state of the law in Washington, it appears an Association may ban registered sex offenders or other criminals from residing in their community. Because restrictions on use or occupancy of a Unit or Lot must be in the community's Declaration, a provision prohibiting registered sex offenders or others with criminal history would have to be in the Declaration (or the Declaration would have to be amended in accordance with the Association's Governing Documents and state law).⁸

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Association Membership

No Washington court has considered whether an Association has any recourse when a registered sex offender or person with other criminal history purchases a home in the community. However, it would be unlikely that an Association could either force a sale of the property or block the new Owner's membership in the Association.⁹

Eviction of Existing Tenants with Sex Offender Status or Other Criminal History

In at least one Washington case, a registered sex offender was evicted from low-income housing operated by a religious entity landlord that had been unaware of the tenant's sex offender status at the time of rental.¹⁰ If a court were to apply the rationale used in that case, a tenant's failure to disclose criminal history might be grounds for eviction if, in the interest of resident safety, the tenant's landlord enacted a rule banning residents with certain criminal history.

Potential Liability

If an Association decides to impose a residential ban on registered sex offenders or persons with other criminal history, there are several risks to consider. First, the Covenant may give residents a false sense of security and put them at additional risk. Although an Association has no general duty to control or protect residents from criminals, this promise of safety may give rise to a greater duty to protect.¹¹ In addition, if an Association enacts a ban against registered sex offenders, an offender may challenge the ban in court, subjecting the Association to litigation costs.

On the other hand, if an Association allows registered sex offenders or persons with other criminal history to live in the community, it is well advised to consider neighborhood safety issues, including protection of the sex offender from potential harassment.

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Other Considerations

Real estate sales require that a seller provide buyers notice that information relating to registered sex offenders can be obtained from local law enforcement.¹² This is not part of the Association's Resale Certificate. Information on registered sex offenders may be found online at:

- A) The national sex offender site:
<http://www.nsopw.gov/Core/Portal.aspx>
- B) The Washington state site:
<http://www.icrimewatch.net/washington.php>

Information obtained through these websites may not be used to threaten, harass, or intimidate anyone.

Registered sex offenders convicted of certain crimes may not live within 880 feet of the facilities and grounds of a public or private school.¹³ Certain offenders may also be prohibited from entering places like the neighborhood pool, playground, park, community center, and the like, if written notice is provided to the offender.

¹ Under Washington law, convicted sex offenders and persons convicted of certain other crimes, such as kidnapping, must register with the state. RCW 9A.44.130(1)(a) (Registration of sex offenders and kidnapping offenders -- Procedures -- Definition -- Penalties). Any felony committed with sexual motivation is also an offense requiring registration. RCW 9.94A.030(46)(c), (47) (Definitions). And anyone who is found not guilty by reason of insanity of a sex offense or kidnapping offense must also register. RCW 9A.44.130(3)(vi).

² 42 USC § 3604, et seq.

³ For example, the King County Office of Civil Rights investigates and resolves complaints of housing discrimination based on Section 8 housing subsidy, sexual orientation, and age, in addition to the classifications protected under the Fair Housing Act. See <http://www.kingcounty.gov/exec/CivilRights/FH.aspx>. The Seattle Office for Civil Rights provides additional protection against housing

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discrimination based on political ideology, gender identity, and military/veteran status. See <http://www.seattle.gov/civilrights/fair-housing>.

⁴ The Fair Housing Act expressly notes that “nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals.” 42 USC § 3604(9). This may be a fact-specific analysis on a case by case basis. See American Civil Liberties Union of Washington State: Second Chances Project Homepage (<https://aclu-wa.org/second-chances>).

⁵ We note that in June 2016, the City of Seattle adopted Resolution 31669, which affirms the City’s commitment to assisting those with criminal backgrounds find housing and provides landlords with a list of best practices for conducting criminal background checks and guidelines for assessing an applicant’s criminal background. See City of Seattle Res. 31669, *available at* <http://seattle.legistar.com/LegislationDetail.aspx?ID=2737445&GUID=4E0573F5-8990-47D2-BE8D-85BE81C1E83B&FullText=1>. However, to date the City has not passed an ordinance prohibiting landlords from rejecting applicants based on their criminal records. Thus, an Association who chooses to ban anyone with a criminal record would not face penalties.

⁶ Kanovsky, Helen, *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (April 4, 2016)

⁷ See, *Green v. Missouri Pacific Railroad Company*, 523 F.2d 1290 (8th Circ. 1975).

⁸ RCW 64.34.216 (Contents of Declaration) provides, in relevant part:
(1) The Declaration for a condominium must contain:
(n) Any restrictions in the Declaration on use, occupancy, or alienation of the units

RCW 64.32.090 (Contents of Declaration) provides, in relevant part:
The Declaration shall contain the following:

(7) A statement of the purposes for which the building and each of the apartments are intended and restricted as to use

Procedures for amending a condo association’s Declaration are set forth in RCW 64.34.264 (Amendment of Declaration) for New Act condo associations, and in RCW 64.32.090(13) (Contents of Declaration) for

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Old Act condo associations. Each community's Governing Documents must also be examined for additional requirements. Under RCW 64.34.264, restrictions on use require approval by 90% of the unit owners and the owner(s) of every affected unit.

⁹ Under both the New Act and the HOA Act, all owners are entitled to be members of the association. RCW 64.34.300 ("The membership of the association at all times shall consist exclusively of all the unit owners" (RCW 64.34.300); RCW 64.38.015 "The membership of an association at all times shall consist exclusively of the owners of all real property over which the association has jurisdiction, both developed and undeveloped.") Thus, while an association could prohibit a new owner who was a registered sex offender from actually residing in the community, it would be unable to exclude the owner from association meetings solely based on his or her status as a registered sex offender.

¹⁰ In *Archdiocesan Hous. Auth. v. Demmings*, 108 Wn. App. 1035 (2001), the court upheld the eviction of a registered sex offender, stating that a landlord may adopt any rule and apply it to current tenants with 30 days' notice, so long as the rule is reasonable. The court found that the landlord's blanket rule prohibiting sex offenders was reasonable in that case, noting that both state and federal governments have recognized that recidivism in sex offenders presents an increased risk to the public and that, accordingly, registered sex offenders are precluded from federally subsidized housing. Although the case provides traction for landlords arguing that they are entitled to evict tenants based on sex offender status, the unpublished case is of little precedential value. Additionally, the case is unhelpful in cases where a tenant disclosed his or her sex offender status at the time of rental.

¹¹ See Chapter 30: "Association Duties: Does an Association Have a Duty to Prevent Crime in Common Areas under Its Control?"

¹² RCW 64.06.015 (Unimproved residential real property—Seller's duty—Format of disclosure statement—Minimum information); 64.06.020 (Improved residential real property—Seller's duty—Format of disclosure statement—Minimum information); 64.06.021 (Notice regarding sex offenders).

¹³ RCW 9.94A.030 (Definitions); RCW 9.94A.703 (Community custody – Conditions).