# COMMUNITY COUNSEL

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## Document Amendments to Ban Sex Offenders

We were recently contacted about an article from a July, 2001 CAI publication that suggested using document amendments to ban registered high-risk sex offenders from taking up residence. The suggestion was supposedly based on a New Jersey state court case. We reviewed the case and found the article to be an unrealistic reading of the case. We responded by declining to recommend following the article's suggestion.

The case was brought by the owner of a house who desired to sell her home to one of about 80 persons in all of N. J. who had been similarly classified. The appellate court declined to uphold the community's amendment for several reasons. First, the basis for the trial court decision had not been properly preserved for appeal. Indeed, the court stated: *"We decline to write a solution for a problem that has not been fully stated."* Further, in overturning the trial court's ruling approving the community's amendment, the appeals court simply pointed out that the trial court had an inadequate factual basis to make its determination:

*"Although not contained within the record before us, we are aware that other similar common interest communities within the State have passed similar restrictions upon residency by Tier 3 registrants. …. We do not know from the record how many common interest communities exist within the State and we do not know from the record how many of those communities have seen fit to adopt comparable restrictions and whether they have determined to include a broader group than Tier 3 registrants. We are thus unable to determine whether the result of such provisions is to make a large segment of the housing market unavailable to one category of individual and indeed perhaps to approach "the ogre of vigilantism and harassment," the potential dangers of which the Supreme Court recognized even while upholding the constitutionality of Megan's Law. …."*

Second, court ruled that the seller/owner did not have standing to assert a claim on behalf of the buyer/convict, stating, "*To the extent plaintiff is seeking to vindicate the rights of a Tier 3 registrant to reside in Panther Valley, she is not the proper party. 'Ordinarily, a litigant may not claim standing to assert the rights of the third party.'*" (citation omitted)

**WE CAN NOT RECOMMEND ADOPTING AMENDMENTS TO BAN OCCUPANCY BY REGISTERED SEX OFFENDERS**

Indeed, the court ominously speculated that such actions may not be legal, specifically warning: *"It does not necessarily follow, however, that large segments of the State could entirely close their doors to such individuals, confining them to a narrow corridor and thus perhaps exposing those within that remaining corridor to a greater risk of harm than they might otherwise have had to confront.*"

The court's statement raises the specter of substantial constitutional arguments, pitting lower income and high income communities against each other in their efforts to be safe from crime. Based on this we continue to recommend vigilance over adoption of exclusionary amendments.

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# RECENT CASE SUMMARIES

In **Emerald Estates Community Association, Inc., vs. Gorodetzer**, 27 Fla. L. Weekly D1164 (Fla. 4th DCA May 15, 2002), Owners brought a declaratory judgment action against their Association. Owners purchased their home in September of 1995. In June of 1996 they installed four ham radio antennae in their backyard. The antennae ranged in height from thirteen feet to twenty-three feet. The declaration provided that "unless otherwise permitted by law, no antenna .... of any type shall be placed upon a home or within a lot unless approved by the Architectural Control Committee." At the time the antennae were installed, Association was under the control of the developer. Turnover of Association to the homeowners occurred on April 21, 1998. Soon after turnover, the homeowner-controlled Association sent Owners a letter notifying them that the antennae were interfering with television reception in the community and, more importantly, the antennae had been installed without architectural approval. This letter demanded that the antennae be removed within ten days. After several more demand letters were sent by Association, Owners finally removed the antennae. After the removal of the antennae, Owners filed a written application to reinstall the antennae. Association denied Owners' request to reinstall the antennae. Thereafter, Owners filed a declaratory judgment action against Association accusing it of unreasonably rejecting the application to reinstall the antennae and requesting permission from the court to re-erect the antennae. The trial court ruled in favor of the Owners on two independent theories: (1) that Association did not act reasonably in rejecting the application to reinstall the antennae, and (2) that the originally erected antennae were "grandfathered" when control of the Association was turned over from the developer. The Fourth District Court of Appeal reversed the trial court and held that the clear and unambiguous language of the declaration required the approval of Association prior to installing any type of antennae. Furthermore, the appellate court noted that the clear intent of the declaration was to permit the Association to reserve control over the architectural design and aesthetics of the community. The Fourth District Court also reversed the trial court's ruling that the antennae were "grandfathered" and therefore Association was estopped from enforcing the restrictions against the Owners. The appellate court noted that the Owners never obtained approval from the developer for the antennae installation. The fact that Association was controlled by the developer at the time of the antennae installation provided no shelter for Owners from the formal written application procedures outlined in the declaration. Association could enforce the declaration against the Owners because they failed to obtain approval of the Association prior to the installation of the antennae.

In **Garcia vs. Crescent Plaza Condominium Association, Inc.**, 27 Fla. L. Weekly D569 (Fla. 2nd DCA March 8, 2002), Association was a commercial condominium operating as a retail strip center. Garcia sued Association seeking the removal of a commercial cooler which blocked three of Association's common element parking spaces. The commercial cooler was installed by Flowers by Fudgie, Inc., one of the businesses located in the Association. Flowers by Fudgie, Inc., was owned by the president of the Association. Rather than require the removal of the coolers, Association leased the parking spaces to Flowers by Fudgie, Inc., for a nominal fee. The trial court granted Association's motion for summary judgment and held that Association had the power to lease the parking spaces pursuant to Florida Law and the declaration. Furthermore, the trial court held that the *business judgment rule* prevented the court from substituting its judgment for that of the Association's, so long as Association acts in a reasonable manner. The Second District Court of Appeal agreed with the trial court that the Association had the power to lease the parking spaces pursuant to both Florida Law and the declaration. The appellate court noted that while Association had the authority to lease the parking spaces, this authority must be exercised in a reasonable manner. The Second District Court of Appeal reversed the summary final judgment because whether or not the Association's action in leasing the parking spaces to Flowers by Fudgie, Inc., was reasonable was a disputed question of fact which precluded entry of summary judgment without an evidentiary hearing.

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