



Making Sense of a Senseless Act

The Newtown Tragedy and the Uncomfortable Questions to Come

As I write this article, it's a week before Christmas, and I am still trying to process the tragedy at Newtown, Conn. As children were involved, my heart is broken. Whether it would be a failed gun control policy, underfunded or misunderstood mental health policies or just that we've become a desensitized and increasingly violent society, I have no answers. What I am certain of is that whatever comes of this, the matter will hit close to home for people living in community associations. And if by raising questions the dialogue continues and leads to a safer environment for all of us, especially children, then maybe getting over this will be easier.

For now though, as a condominium law practitioner, I can anticipate the questions that will inevitably arrive: Can we limit or ban guns in condominiums? And the next, more unsettling question would be, can or must the association protect its members from unit owners with mental or emotional health issues who could be considered "dangerous," but may not in fact be dangerous? As I said, I have no answers, but there are certainly plenty of questions. I have raised a few below, and the list is by no means exhaustive:

Regulations Within the Common Elements and Limited Common Elements

Let's say a particular condominium is situated in an area containing acres of open space woods, or contains storage sheds or stand-alone garages. In all three cases, if those areas were defined as either common elements or limited common elements, the

association would have manifest authority to ban the possession, storage or discharge of any kind of firearm, pistols or even AK-47 automatic weapons. The authority is typically found in either the declaration or bylaws with provisions to the effect that the executive board has authority to operate the common elements in express language, or, if not, by reference to the applicable provisions of the Rhode Island Condominium Act. The relevant provision within the Act is 34-36.1-3.02 (a), which expressly provides that the association may:

(6) Regulate the use, maintenance, repair, replacement and operation of common elements.

The bylaws would typically give the governing body of the association, such as the board of directors or executive board, the authority to make rules and regulations. If the language banning either the storage or discharge of firearms on the common elements and limited common elements was not in the documents as originally drafted, then these boards would have the ability to institute the ban prospectively. In certain instances, as in a case where the existing rule permitting firearms is in the declaration or bylaws and not in the rules section, then there may need to be a vote of the unit owners to amend the rule or institute the ban. Percentage of approval may vary from 51 to 67 percent or more. But, what if a large percentage of a particular condominium consists of responsible gun owners? Good luck getting such a ban passed.

What if a unit owner or a member of his family has a mental or emotion-

al condition, which in certain instances could render him "dangerous" to other unit owners? Suppose that unit owner commits acts on the common elements or limited common elements that harm or threaten imminent harm to other unit owners. In other words, suppose the shooter in Newtown lived in a condominium community, and the board had reason to believe he had dangerous tendencies. What steps should it take, or could it take? Neighboring unit owners and friends who bring up these issues risk ostracizing themselves and their friends. So much of the time, behaviors that could foreshadow future dangerous acts are swept under the rug because it's just easier to keep the peace that way.

But what of those who choose to confront the situation? The governing documents and again, section 3.02 of the Act, permit the association to seek injunctive relief in court or to fine persons who materially and unreasonably interfere with another unit owner's use and enjoyment of the property. But who decides whether a man entering the clubhouse "packing" a gun poses an unreasonable risk? What if a person with emotional problems starts yelling and waving his hands wildly? Is that a nuisance, a bona fide threat or a harmless form of "stimming?" What can and should a board do in that instance? What rules could be put in place that would be fair to everyone?

Regulations Within the Units

Though Homo sapiens in general are social animals, when it comes to liv-

ing space, we, especially Americans, crave our privacy. Nobody is going to tell us what to do or how to behave in our units, including possessing more guns and firepower than a small police precinct. Look at the problems boards are having attempting to regulate smoking in units. And, for sure, nobody is going to tell us how to raise our children, especially those with mental or emotional issues.

Indeed, the ideal of rugged individualism is deeply ingrained in our culture. Moving into a condominium setting in which by definition, we give up a portion of our privacy, presents some unique problems. Given the close proximity of each individual in stacked or side-by-side units, does the governing board have a right to ban guns in a unit? Or, alternatively, do they have a right to ban automatic weapons? Who decides which unit owner or use is

more dangerous — a World War II veteran who maintains an extensive collection of antique guns, never before fired, but who lives with a child that has opposite defiance syndrome; or the local minister who happens to be a gun enthusiast that enjoys firing his automatic weapons for fun on weekends? Who decides?

Sure, the board can ban the storage of ammunition, fireworks and things that go “boom” in the night, but guns are funny devices — they do not spontaneously combust, like a crystal meth lab — that is, it takes a human operator to make them dangerous. What we are really talking about here is the “opportunity” to fire them that is dangerous. Will the board have the

ability to regulate that opportunity? Since we live in a society with a legal system that respects due process, regulation simply based on opportunity alone, with no prior bad act, may be difficult to implement, let alone enforce. That reality, coupled with the ingrained notion of privacy rights within the confines of one’s own home, makes it easy to see the quandary boards will face.



What if a board is asked to ban guns by a large segment of the membership? Are they on notice of a potentially dangerous condition that if it later turns out turns tragic, would expose them to liability on failure to warn and failure to protect theories? Can, or should, the board at least make an attempt at a full ban or at least a partial ban on automatic weapons within a unit? If a neighboring unit owner or a board feels that he or the association is being threatened, then as with acts on the common elements, there are anti-nuisance provisions available in the governing documents and the Act that they may rely on to attempt the ban of guns. For instance, the catchall provision of

association powers, 34-36.1-3.02 (a) permits the board to:

17. “Exercise any other powers necessary and proper for the governance and operation of the Association.”

How do future boards treat “disruptive” unit owners at annual meetings? Must they hire police or private security? Must they have them removed?

There are cases nationally of shootings at annual meetings. This is very real. Do boards owe a duty to the other unit owners to provide a safe meeting environment? Who decides whether the unit owner is, in fact, disruptive, or is it just a case of politics as usual? In past cases, and I am sure future cases, my advice to boards will be the same — if they reasonably feel unsafe, they should have a police officer present. The above statutory regulation will support the expense.

As in most instances, the tools may be there, but there may need to

be an association-wide “gut check” to muster the courage to implement those tools to effect real change, or at least move closer to a fair and reasonable regulation of guns and a realistic and humane policy of governing emotionally and mentally ill individuals for their benefit and those living with or around them as well. As we have seen, the cost of doing nothing is unacceptably high to our country’s innocent, especially our children. ☐

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