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Attractive Nuisances

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Board members and property managers of community associations should have a working knowledge of the attractive nuisance doctrine and how it applies to community associations.

In the community association context, an attractive nuisance is an object, structure, or condition located in the common area which attracts children as a play area without the intent of the board of directors and is potentially hazardous to children or subject to their dangerous misuse.

Almost without exception, a community association is not legally responsible for the injuries suffered by an individual who trespasses on the association's property or uses the association's equipment without authorization, provided that individual is an adult. But if that individual is a child, the attractive nuisance doctrine can change the way in which the law establishes the association's responsibilities. In short, the law requires boards to a) predict with a reasonable degree of accuracy the propensity most children have for being unable to appreciate the risks of certain types of play and b) take reasonable precautions to prevent injury to children of tender years even when those children may be acting without permission of the association or against association policy.

The case law in this area has established a general pattern which can assist boards of directors to determine which types of objects, structures, or conditions constitute an attractive nuisance. For example, the courts have ruled that creeks, standing

trees, and natural lakes are not attractive nuisances; however, courts have found unusual natural conditions such as fallen trees or sinkholes to be attractive nuisances and have ruled that community association boards are responsible to remove or abate the condition within a reasonable time frame. Courts have almost always found man-made objects such as playground equipment, wet ponds, stormwater detention facilities, treehouses, or heavy machinery left in an unsecured area to be an attractive nuisance, and, therefore, ruled that the Board was then responsible for maintaining these man-made objects in a fashion so that they would be safe for the use of children.

Some attractive nuisance situations are relatively easy for a board of directors to identify and correct. For example, a hole in a fence surrounding a swimming pool is an attractive nuisance because it may entice youths to sneak or wander into the pool area at night when the pool management company is not on service. In such a case, the Board is under a legal duty to fix the fence promptly. If it does not do so, the association may be held liable for injuries sustained by trespassing juveniles who gained access to the pool through the hole in the fence.

Other attractive nuisance situations have become political footballs within some communities. For example, some communities have had widely publicized internal brouhahas over an unapproved treehouse built in the common area by a member of a community without approval from the board of directors. Before the Board knows it, the unapproved treehouse becomes a very popular play area for some

children and their parents want the structure to remain. In such a situation, the board, as fiduciaries of the association, the owner of the premises where the treehouse exists - must presume that the treehouse is an attractive nuisance. The board would then be responsible to ensure that the treehouse is structurally sound and safe for the use of children of tender years. Obviously, it is very difficult to properly perform such responsibilities, and, therefore, the most practical course of action for the Board in most cases is to ban the use of the treehouse and to remove the structure. While the action puts the Board in the position of appearing to be a "scrooge", to do otherwise would run the risk of accidents, higher insurance premiums, and expensive litigation for the association, to say nothing about the type of encouraging precedent it would establish within the community for other unapproved uses of the common area.

Other attractive nuisance situations are very difficult for a board of directors to address because of the nature of the activity on the common property. For example, children who misuse the community's pedestrian pathways with skateboards or motorbikes are often the source of complaints to the board of directors in some community associations where extensive networks of pedestrian pathways exist. In these situations, the board of directors does not have a duty to physically fix anything, as the pedestrian pathways are not in need of any form of repair or remedial work simply because juveniles are using the pathways for a purpose for which they were not intended. The pathways serve a useful and legitimate purpose for pedestrians within the community. Nonetheless, there are cases where courts have found pedestrian pathways to be an attractive nuisance because the area attracted a risky form of play among youths who might not fully appreciate the dangers of high speed falls or dangerous collisions with other persons. Any board which ignores reports about such risky forms of play on the common areas is exposing the association to liability when an injury takes place.

But there is always a question about the degree of action which is necessary for the Board to take in order to discharge its duty and to avoid some form of premises liability claim against the Association. In many cases, the best course of action under these difficult circumstances is for the board to identify the individuals who are engaged in the risky play, to notify their parents (or guardians) of the problem, and to request the parents (or guardians) to take responsibility for the situation. If that fails to stop the activity, then a threat against the parents to impose a fine or to seek a court order against them will almost always work. For recurring activities not desired or approved by the Board, it is well-advised for the Board to adopt a formal resolution which establishes the Association's policy of prohibiting the activity in question, as well as the erection of signs near the areas where the risky play has occurred to inform the public of the Association's policy.

If anyone has any questions about these issues, please do not hesitate to contact any of the community association attorneys of the firm.