

Should California Community Associations Form A Community Emergency Response Team (“CERT”)?

By David Swedelson, Esq. and Stephanie Rohde, Esq.
Swedelson & Gottlieb

We have seen a number of directors, managers, and even well intentioned members of California community associations try to implement various measures to ensure that their associations are prepared in case of an emergency, such as forming Community Emergency Response Teams (“CERTs”). While these ideas are meant to help the residents of the association, they often can cause more problems than they solve. Although we do not mean to discourage pro-activity and safety precautions, there are some questions that any manager or board member should consider if your association is considering implementing any emergency preparedness precautions. This article specifically addresses the formation of CERTs; however, the same principles apply to other emergency preparedness measures.

1. IS MY ASSOCIATION COMPLIANT WITH THE SAFETY MEASURES THAT ARE REQUIRED?

Before looking to extraneous measures in order to prepare your association for an earthquake, terrorist attack, or even medical emergency, you should ask yourself whether the association is in compliance with the health and safety requirements that are mandated by law and the association’s governing documents.

Although there is a trend of associations implementing extraordinary measures, the basics of health and safety can be even more important. Is the building in compliance with the fire code? Are pets being controlled and cleaned up after appropriately? Are mold and water leakage complaints being promptly addressed? The association’s building should have adequate fire exits, fire extinguishers and smoke detectors, and the board should strictly enforce the governing documents provisions that prohibit homeowners from making structural changes to the association’s common area, as to do so could impact the fire break and/or impair the structural integrity of the building.

If your association’s members have suggested that they would like more of the board’s and/or management’s attention to be paid to their health and safety, compliance with the law and the association’s governing documents is the best place to start.

2. WHY NOT IMPLEMENT EMERGENCY PREPAREDNESS MEASURES?

We are often asked by board members how it can possibly be a bad thing to take steps to protect

Branch Offices

Orange County
5000 Birch Street
Suite 3000, West Tower
Newport Beach, CA 92660
Telephone: 949/476-3789
Facsimile: 949/752-2160

Ventura County
1484 E. Main Street
Suite 200
Ventura, CA 93001
Telephone: 805/650-7899
Facsimile: 805/653-2518

Inland Empire
3400 Inland Empire Boulevard
Suite 101
Ontario, CA 91764-5510
Telephone: 909/476-3530
Facsimile: 909/460-0018

an association's residents in case of an emergency. How can doing something to help possibly be any worse than doing nothing? The answer is that an association is not required to protect its members in the case of an emergency, unless it undertakes a responsibility to do so. If the association does take on such a duty, if anything bad happens, the association can then be held liable.

Many board members are familiar with the "Good Samaritan Law" and assume that it somehow protects the association from incurring liability. Unfortunately, it does not. The Good Samaritan Law in California protects individuals from liability for rendering emergency medical and non-medical care or assistance at the scene of an emergency unless such person is acting in a way that constitutes gross negligence or willful or wanton misconduct. This law does nothing to protect organizations from incurring liability for the actions of their members, nor does it provide protection to individuals other than the person performing the aid.

There are a number of potential sources of liability that an association should be concerned about when implementing any kind of emergency preparedness procedures. A member of the CERT could provide emergency assistance in a way that injures a resident, for example breaking their arm when pulling them from a burning building. In this circumstance, if the injured party sued, the Good Samaritan Law would preclude recovery from the individual (unless

the act was grossly negligent), and so the association would likely be named as a defendant because of its deep pockets. The Good Samaritan Law does not protect entities, such as the association, and therefore this lawsuit would proceed. Secondly, someone could be injured in the process of an emergency when the CERT did not attend to their needs, and claim that he or she relied on the CERT in failing to take other emergency preparedness measures. The Good Samaritan Law also does not apply when someone fails to act. Finally, a member of the CERT team who is injured while undertaking CERT duties could sue. The Good Samaritan Law does nothing to protect the individual or the Association in these latter two situations.

3. DOES THIS MEAN THAT AN ASSOCIATION CAN NEVER TAKE ON THIS KIND OF LIABILITY?

Of course, there are always ways to minimize the liability that an association undertakes. Limiting liability often involves insurance, and this is no exception. You will need to check with your insurance broker or agent in order to determine whether your existing insurance would cover the formation of a CERT, and if not, whether extending coverage as necessary would be prohibitively expensive.

In order for your insurance to cover the actions of a CERT,

you'll need to confirm that the definition of "insured" on both your commercial general liability and directors and officers liability policies includes volunteers. Depending on your D&O policy, it may be necessary to officially appoint the CERT volunteers to a committee of the Board. These details need to be carefully understood, and the necessary insurance should be obtained before forming a CERT. As stated above, one of the concerns is that a member of the CERT could get injured and sue the Association. It is possible for an association to obtain a workers' compensation policy that covers volunteers. This should also be discussed with your insurance broker.

We do not ever recommend that a Board take action that exposes the association to unnecessary liability, and to do so could present a problem for both the association and the individual board member (as to do this may be considered a breach of fiduciary duty). However, if the association can obtain adequate insurance, there is no, or at least very little, increased liability. If the association is able to afford the additional insurance that would be necessary in order to cover the actions or inactions of the CERT, the question of whether or not to do so becomes a business decision to be made by the board using its best judgment.

4. IS THERE ANYTHING THAT CAN BE DONE TO MEET THE ASSOCIATION'S NEEDS SHORT OF FORMING A CERT?

If the association wants to avoid liability but the homeowners are adamant about wanting a CERT, it is possible for the homeowners to form a CERT that is not officially affiliated with the association. The association would need to make very clear that it is not endorsing or sponsoring the CERT and that it has no affiliation with the CERT. However, the CERT could operate independently, by a group of concerned homeowners. Unfortunately, as its own organization, the CERT still faces the same liabilities that the association would otherwise face. For example, if the CERT fails to come to the rescue in the case of an emergency, an injured homeowner could sue the chairperson of the CERT, or any of its members for failing to assist. Assuming that the CERT is careful not to represent that it makes any guarantees, and that it is only there as a volunteer organization that should not be depended on for safety, such a lawsuit would likely be unsuccessful, however the CERT members could still be out a substantial amount in legal fees defending themselves.

In order to determine the association's best route of action, the pertinent question is what purpose is the association attempting to accomplish with the CERT? If the main purpose is simply to advise homeowners to ready themselves for an emergency, an association, through its board, can distribute

newsletters with safety tips and emergency preparation suggestions to its members, however the association must include a statement that it is only providing recommendations, not undertaking the responsibility of protecting its residents in the case of a natural disaster. These notices can remind homeowners where their fire exits are located, and advise them to change the batteries in their smoke detectors and put together their own emergency kits.

We do not mean to minimize in any way the important work that is done by sheriff's and fire departments in providing CERT trainings to individuals. This training can be extremely valuable, and the purpose

of this article is not to discourage individual participation. Even if an association ultimately decided not to form a formal CERT team, homeowners would be welcome to attend CERT training, and the association could even print CERT training information in its newsletters or allow a representative to speak at a membership meeting. However, unless the board at an association is willing to supervise the CERT's activities and ensure that adequate insurance coverage is obtained, we caution California community associations against providing a CERT as an additional association service or activity.

David Swedelson is a partner at Swedelson & Gottlieb, Community Association Attorneys, and a principal of Association Lien Services, the Assessment Lien Foreclosure Specialists. Stephanie Rhode is an associate at Swedelson & Gottlieb. Readers are invited to visit hoalawblog.com for more articles relating to California community association issues.