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# COMMON INTEREST DEVELOPMENT UPDATE

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**SHOUTING FIRE IN A CROWDED CHAT ROOM: HOMEOWNERS ASSOCIATIONS AND CENSORSHIP**

The benefits of social media to homeowners associations ("HOAs") and management companies are indisputable. An HOA's use of social media can increase transparency and efficiently place volumes of information a mouse click away from interested HOA members.

HOAs can also use social media to provide a platform for HOA members to voice their opinions and exchange their views regarding their HOA and community, in message boards and in chat rooms. HOAs have been called "mini-democracies," and it is tempting to expound upon that analogy by likening chat rooms to virtual "town hall meetings" where citizens peaceably exercise their First Amendment rights and discuss their views and opinions regarding matters affecting their community.


While tempting, it is not really an apt analogy. To begin with, members participating in HOA chat rooms are not, in the truest sense, participating in a "free speech" activity governed by the First Amendment. This is so because constitutional prohibitions against the restraint of free speech, whether founded upon the U.S. Constitution or the California Constitution, generally apply only to governmental entities and not to corporations such as HOAs. This fundamental concept was illustrated when disputes arose in California regarding HOA restrictions operating to prohibit the display of political signs and the American flag. Such restrictions were not invalidated by the courts on First Amendment or "free speech" grounds. Such restrictions were invalidated because the California Legislature passed Civil Code Sections 4705 and 4706, and thereby gave HOA members certain affirmative rights with respect to signs and flags which they did not enjoy under the U.S. or California Constitutions.

Another reason the chat room/town hall meeting analogy is inapt is because the tone and content of an unrestricted chat rooms can easily and quickly veer far beyond a peaceable exchange of ideas and into a venomous pit of member frustration or rage. Defamatory statements can be made, false and misleading information and innuendo can be communicated, foul language used, personal attacks launched, and suddenly what seemed like a great idea—providing owners with a platform to discuss issues affecting their community—can seem like a horrendous mistake.

Against such a backdrop, the word "censorship" can suddenly take on positive connotations, and certainly HOAs can—and many would argue should—engage in censorship of chat rooms. Indeed, for the reasons noted above, censoring member posts does not carry with it any constitutional or "free speech" implications. So how, then, should an HOA so inclined go about censoring chat rooms and what limitations, if any, are HOAs subject to when engaging in such censorship?


As to the how, an HOA's Board should enact specific guidelines pertaining to posted content, such as restrictions against foul language and personal attacks. The situation to be avoided is for a Board to simply designate a manager or Board member, sans specific guidelines, to "do what they

think is best" in monitoring and controlling the content of the website. Such a scenario is problematic for several reasons. First, the Board would effectively be entrusting a single director with the a power to be unilaterally yielded pursuant to his or her own conceptions of "right and wrong," a scenario antithetical to the notion that HOAs and Boards should act within defined parameters. Second, providing a person with such authority could grant such person *carte blanche* to improperly censor posts based upon the content of such posts, as opposed to based upon objective standards which operate independently of the views being communicated in such post.

Of course, even with guidelines, at some point whether to censor a particular post will invariably require a subjective determination be made. However, HOAs may well find that the fact that such subjective determinations cannot be entirely avoided as simply a "necessary evil" inherent in acting to ensure that chat rooms remain a place for the respectful and cordial exchange of ideas and opinions.

The Davis-Stirling act does not address HOA chat rooms, and there is no law or legal authority specifically pertaining to a HOAs ability to monitor and censor chat rooms. That said, Civil Code Section 5105 quite arguably prohibits HOAs from engaging in *any* censorship of certain content during an election cycle, *i.e*., the period of time between the nomination of directors and the election of directors. Section 5105 provides that HOAs must enact rules ensuring that "if any candidate or member advocating a point of view is provided access to association media . . . or Internet Web sites during a campaign, for purposes that are reasonably related to that election, equal access shall be provided to all candidates and members advocating a point of view . . . " Section 5105 further provides that HOAs "shall not edit or redact any content" from member communications made on the association media or website. Based upon the foregoing, a strong argument can be made that during an election cycle HOAs cannot validly edit or redact chat room posts which are "reasonably related" to the pending election.

The argument could be made that Section 5105 does not apply to chat rooms because such do not constitute "Internet Web sites" to which specific candidates are specifically "provided access"—rather, every member can decide for himself or herself whether to access and post on such site. Additionally, it could be argued that Section 5105 was not intended to apply to chat rooms, the contents of which are generally unsanctioned by HOAs. Rather, it was intended to apply HOA-sanctioned content and to prevent HOAs from publicizing the views of one candidate and not another. That said, the chief flaw in such arguments is that *not* applying Section 5105 to chat rooms could give rise to the very scenario such section seeks to avoid, *i.e.*, one candidate or interested members use an HOA website to express views while other candidates and members are not given such an opportunity. Accordingly, if an HOA intends to censor chat rooms, the more prudent approach is to enact guidelines which address periods of times that are likely governed by Section 5105, so as to avoid any disputes or challenges as to whether such section is being violated.