

Thinking Outside the Box: Preserving Architectural Integrity Without Financial Distress

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One of the most disruptive and costly undertakings for an association is the enforcement of architectural norms and procedures. What follows is a brief discussion of the reasons for violations, and some suggestions about handling the issues without the use of attorneys and courts--all the while building a sense of community.

Why violations occur. The reasons for violations can generally be summarized under the following headings: ignorance, cussedness, poverty, health, "you're pickin' on me!" and time.

Sometimes, an owner who, without the prior consent of the Association, paints the wrong color, or adds a patio extension or other improvement, is heard to say, "I didn't know." A word to the wise, whether the homeowner knew or not, if the 'improvement' is one that would have been approved, or for which a variance could have been granted, simply ask for plans and approve it retroactively. Yes, some owners will take advantage of the association (reasoning that it is 'easier to ask for forgiveness than to seek permission!') But it's the community's money the Board would be spending, and all to make the wrong point. As noted below, adopting written guidelines and procedures is a wise preventative measure.

Cussedness--we've all seen it. It's usually prefaced by a loud assertion that the Constitution guarantees certain freedoms--yada yada yada. We all know that the fact of the matter is the Constitution does NOT guarantee that an owner, subject to CC&Rs, is free to ignore them. In cases of cussedness, it's best to send a stock letter that sets forth the law and stand your ground. (The attorney can draft that letter in advance for the board to send, since it's simply a summary of the law that says an owner must obey the governing documents of the community.)

If the issue is poverty ("well, yes, I did pay to have the house painted fuchsia, but I have no money to have it repainted! ") consider entering into an agreement with the homeowner as to when the corrective work WILL be done, even if that's some time in the future, and tacking on a hefty fine (by agreement of the parties) if the work isn't done by that time. (Need I say that agreement needs to be in writing, notarized and recorded against the property, in order to bind future owners should this homeowner sell or lose the property?) If you can't persuade the owner, maybe one of the community solutions below will help. And if all else fails, well, there's still the attorney.

What about health? The sad truth is that bad health isn't just a physical disaster; it's a financial one as well. I strongly recommend the Association consider non-litigious means, such as those discussed in the next section. It's always possible that the extended family or a church group or other membership organization might be able to help, but you run the risk of discussing very confidential issues with those whom the homeowner may not want to know. If the homeowner is amenable, by all means contact third parties, but tread cautiously.

"You're pickin' on me!" Normally, not true (if it is, you've got a bigger problem than architectural eyesores.) Generally when confronted with this excuse, the board needs to (1) ascertain from the homeowner just what violations he has in mind when he tells you everybody else gets away with the same thing, and (2) assure the homeowner that just because the board hasn't made public its attempts at enforcement on those other violations doesn't mean it isn't working on them (and remind the homeowner that just as he would want the details of his violations to be kept confidential, so do those others). Just a reminder: most CC&Rs have a "non-waiver clause" to protect the association from periodic non-enforcement; the clause says, usually, "the Board's failure to enforce on one or more occasions does not prevent it from other enforcement." Having said that, the only good reason for refraining from enforcement in cases of serious violation is a "risk/benefit" type decision, that is, that an examination of the evidence and costs of enforcement persuades the board that enforcement is "iffy" and the cost is high.

Absolutely unforgiveable (and not covered by your D&O policy) is a decision to enforce prompted by unlawful discrimination (where the true motive for selective enforcement is animus on the basis of race, creed, religion, ethnicity, disability, marital or familial status.)

Time: there's never enough. It's always a question of priority. If that's the issue, you need to spell out the 'risk-benefit' factors for the homeowner: we're willing to work with you, but if it isn't a reasonable period of time, you run the risk of large attorney fees, as well as spending time in depositions, and a lengthy trial. That is definitely not "time well spent." Again, the non-court solution is a written agreement setting out the time by which the violation will be remedied, which is then recorded against the property.

Solutions that don't involve attorneys and courts

"Be a good neighbor!" While the Board isn't free to spend association money to take care of one owner's problems, there's nothing that says board members, or other community volunteers, can't offer their own time and money to correct a problem. The only kind of attorney assistance you might want to consider is releases to protect those volunteers if anything is damaged or broken (including the volunteers!) in the process.

Community-wide clean-up, paint-up spruce up day. Make it a party! Have a committee volunteer time to coordinate requests for help from owners, with neighbors who have the time to help. While the Association can't buy the supplies for repairs (those need to come from the owner or the volunteers), at the end of the day, the Association

CAN spring for refreshments as a thank you. It could turn into an annual event. And look: no attorney, no court, no problem!

"Most improved" home contest. Sponsor a "most improved home" contest. Anybody can nominate a recipient, and the Board can give a plaque (money awards are a little iffy, but organizers of the contest can contribute prizes--how about a gift certificate to a garden or 'do it yourself store?) And if the association has a website, post photos of the candidates and winners. Encourage "before and after" photos.

Spending the government's nickel. Every once in a while, an architectural violation is also a violation of local code (*e.g.*, junk stored in the yards, stagnant pools breeding mosquitos, weeds posing a fire hazard). In extreme cases (and after frequent complaints by citizens), sometimes code compliance or the fire department can be persuaded to take up the enforcement issue. Better the government than the Association: your tax dollars at work!

An ounce of prevention. Two simple precautions on the part of the association can often win the day in architectural violation issues: written guidelines and consistent enforcement. While it is time-consuming and controversial (sometimes), generation of written guidelines and procedures will ultimately save the association money and build a stronger community. Written guidelines are also a precursor of consistent enforcement: they let all residents know, in advance, what's appropriate and what's not, and tells them how to obtain prompt permission for changes.

If all else fails... Sometimes these alternative solutions simply won't work, and you will have to 'hire a hit man', er, bring in counsel. Even then, a good attorney will work very hard to resolve the matter without litigation, where possible. This may mean urging the association to employ internal dispute resolution, or offering mediation or some other form of alternative dispute resolution. A good attorney will not pour oil on a potential fire, but will instead facilitate a sense of community -- by defending and preserving the community's norms as well as complementing the community's attempts to resolve disputes by resort to neighborly solutions.