Questions&Answers

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Regarding CC&R Enforcement for Community Associations

How should an Association go about drafting a CC&R enforcement procedure?

First, include any CC&R provisions that contain mandatory procedures. Second, develop a step-by-step procedure which includes (1) what happens if a violation is found (warning letters, etc.), (2) what happens if the homeowner refuses to comply (e.g., a hearing), and (3) what further steps the Board will take with respect to alternate dispute resolution (mediation, arbitration) and litigation. Try to avoid self-help procedures, and consult with legal counsel whenever self-help is contemplated.

How many warnings should be given to a homeowner before further action is taken?

There is no precise requirement, but giving a homeowner ample opportunity to comply is always looked upon favorably in court. Be sure the warnings tell the homeowner exactly what he or she is expected to do to eliminate the violation.

Must violators always be given a hearing?

Simply put, yes! It is required by Civil Code Section 1363(h). Any decisions by the Board which result in a fine or other punitive action should always be made at a hearing which the violator has the opportunity to attend. If he or she chooses not to attend, he or she should have the opportunity to submit his or her position in writing. The hearing should be well documented. A written summary of the hearing should be prepared in order that the association need not rely on anyone's memory if it ends up in court. The summary should identify the evidence relied upon by the Board in reaching its decision. Also, be sure to develop a written fine schedule. It is required by the California Civil Code.

How should a hearing be conducted?

A hearing may be as formal or informal as the Board desires, but should always provide the homeowner a fair opportunity to present his or her version of the incident. Here is a sample: (1) Chairperson reads or states the alleged violation; (2) homeowner is given five minutes to present his or her evidence; (3) board members ask questions when necessary (homeowner is not allowed to ask questions or argue with the board members, except for clarification purposes); (4) homeowner is excused; (5) Board deliberates privately and documents the basis for the decision; and (6) Board's decision is provided to the homeowner in writing (required by Civil Code).

Can an Association grant variances or "exceptions" to homeowners?

Generally, yes. However, be aware that "variances" are not authorized in the law, so if they are not authorized in the CC&Rs, there is a risk that granting one can be challenged in court. If you contemplate issuing variances, make some reference to them in your written procedures. Variances should be granted only in unique situations where there is minimal or no effect on other homeowners. Otherwise, you risk establishing a precedent which other homeowners may also request. The idea of a variance is to accomplish the desired result (e.g., reduce noise, eliminate illegal parking) without leaving a violation open to view or affecting other homeowners. In other words, you enforce the "spirit" of the law, not necessarily the "letter" of the law. One tool is the Restrictive Use and Indemnity Agreement where the homeowner agrees to defend and indemnify the Association if another homeowner complains or files a lawsuit over what is technically a violation. This agreement can also be used to limit a prohibited condition to a fixed period of time after which it must be removed.

What impact do recent court decisions have on CC&R enforcement?

The Nahrstedt case held that an Association may enforce restrictions or prohibitions (e.g., a prohibition on cats) even if the violation is one nobody can see, hear, or otherwise identify. This means homeowners cannot claim they are entitled to keep the violation because it does not affect anyone else. The Lamden and Dolan-King cases have established a policy whereby courts will defer to the decisions of the Association on maintenance and architectural matters. This of course still requires the Association to act in good faith, not arbitrarily, and according to the Association's procedures and standards. All of these court decisions are helpful to Associations in enforcing their CC&Rs.

Must an Association always offer a homeowner mediation or arbitration (alternate dispute resolution)?

California Civil Code Section 1354 requires you to offer mediation or arbitration prior to filing a lawsuit to enforce the CC&Rs, except for a few limited situations. Otherwise, it is optional. Boards should think ahead, and as soon as it appears litigation is probable, or even possible, make the offer since the process can force you to delay filing a lawsuit by several months, especially if the homeowner "accepts" the offer.

Must the Association always enforce the CC&Rs against a violating homeowner?

Probably yes. The Nahrstedt case appears to state that enforcement should be undertaken as part of the proper operation of the community. And, there is an excellent argument that enforcement is a fiduciary duty of the Board of Directors. Only if a CC&R provision is unreasonable should enforcement be avoided. Consult legal counsel if this issue arises.

Can an Association recover its costs and attorney's fees in enforcing the CC&Rs?

Yes, if litigation results. Most CC&Rs, as well as Section 1354 (f) of the Civil Code, provide that in any lawsuit to enforce the CC&Rs the prevailing party is entitled to an award (judgment) of costs and attorneys' fees. In cases where no lawsuit is filed, check your CC&Rs. Some allow the recoupment of attorney's fees by means of a "special" assessment against the individual violator. In other cases you might be able to recoup some or all of the attorneys' fees by means of a fine if this is made part of the Association's fine schedule and policies. In either case, a hearing is required.

What is the best way for an Association to ensure success in enforcement?

First, document every step in the process. Second, be fair and flexible, and demonstrate you have given the homeowner every opportunity to voluntarily comply. Third, take photographs of any offending structures or activities. Fourth, be impersonal, since homeowners often claim some form of "selective enforcement." Finally, take the approach that you will end up in court, so that when you do, you will be able to simply hand the judge your documentation. It should clearly show the nature of the violation, what you did to obtain the homeowner's compliance, what evidence you considered at your hearing, and what decisions were made by the Board. This document-oriented approach consistently proves to be the most effective.

Can the Association enforce a CC&R provision prohibiting satellite dish antennas?

Not entirely. The Federal Telecommunications Act of 1996 required the Federal Communications Commission ("FCC") to establish regulations to ensure that television services were easily available to everyone in the United States. The FCC regulations apply to direct broadcast satellite receiving dishes of one meter (approximately 39 inches) or less in diameter. The FCC regulations state that these types of antennas and satellite dishes must be allowed within a lot or unit and any exclusive use areas, such as patios and balconies, but they can be prohibited in common areas. Since any antenna restrictions in the CC&Rs have been superseded by the federal law, the Board of Directors should consult with legal counsel to establish rules and regulations governing the installation and maintenance of the antennas and satellite dishes covered by the FCC regulations.