Architectural Decisions:

How Should Decisions be Made When an Owner Fails to Submit an Application?

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In 1979, Bernard and Perlee Solomon purchased a home in the Ironwood Country Club. Four years later, they planted eight date palm trees without first seeking or obtaining approval from their association's architectural control committee, in violation of the CC&Rs.

The association sued the Solomons and sought a mandatory injunction compelling the removal of the palm trees. The association obtained the injunction by summary judgment (i.e., without a trial), but the Solomons appealed. They argued that the association was not entitled to have the trees removed, because it did not show that it followed its own standards and procedures before pursuing that remedy. In fact, the association had not submitted any evidence to the trial court showing that the trees were disapproved, who disapproved them, or why they were disapproved. In 1986, the Court of Appeal reversed the trial court's judgment on that basis. (*Ironwood Owners Association IX v. Solomon* (1986) 178 Cal.App.3d 766 (*"Ironwood IX"*).)

Since 1986, the Davis-Stirling Act was written and rewritten. Civil Code section 4765 (formerly section 1378) requires associations to adopt and follow architectural review procedures.

Of course, these procedures typically describe how applications for architectural or landscaping changes will be reviewed. It is very common for CC&Rs to describe the criteria that the committee or board should consider when evaluating these applications. However, governing documents rarely address the obvious question raised by Ironwood IX. How can an association follow its own procedures to review an application that was never submitted?

In general, associations should consider two separate issues. First, associations should address the failure to submit architectural or landscaping plans like all other violations. This may include a demand to correct the violation by submitting plans, fining the homeowner after notice and a hearing, submitting the matter to IDR or ADR, and/or filing a lawsuit to compel the owner to submit plans.

Separately, whether or not the owner submits plans, before seeking an injunction to compel the owner to return the property to its original condition, the board or architectural committee should consider whether it would have approved the changes if the owner had submitted an

application. In other words, it should evaluate those changes based on the criteria for approval or disapproval described in the governing documents. Essentially, the board or committee should ignore the fact that the owner failed to submit plans and consider only the physical changes to the property. Seek legal advice to determine what particular procedure should be followed in each case.

Associations may want to follow the spirit of their architectural review procedures even when the letter of those procedures may not apply to situations in which an owner fails to submit plans. For example, if an architectural committee disapproves the changes, the association might notify the owner of that decision and give the owner the option to appeal that decision to the board of directors even if the architectural review procedures only provide a right of appeal to owners who submit plans. Likewise, if the application process requires an owner to notify his neighbors who may be affected by the proposed change, the association might notify those neighboring owners and invite them to the meeting at which the changes will be considered for approval or disapproval.

Taking these additional steps accomplishes several goals. First, it ensures that the decision to sue an owner to compel him to return the property to its original condition is based on the association's best interest, rather than the offense of having been snubbed by the failure to submit an application. It may even avoid an unnecessary trial if the board realizes that it can live with the unapproved architectural change. Second, it establishes a paper-trail to show that the association did not act arbitrarily, capriciously, or for discriminatory reasons. Third, it may allow the court to defer to the committee's or board's discretion on matters of aesthetics that are within their decision-making authority under the governing documents.

Finally, it allows the association to go to court with clean hands. In other words, if the association can show that it gave the owner every opportunity to comply with its reasonable requests before deciding to go to court, the judge is more likely to view the association's actions favorably. Then, when the association achieves its litigation objectives and seeks its reasonable attorneys' fees and costs, the court is less likely to reduce that fee award.