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Community Associations Newsletter

LAYING DOWN THE LAW: Enforcing Your Community's Covenants, Rules and Regulations

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By almost any measure, 2013 was a bad, but instructive year for high-visibility cases involving rules enforcement by community associations.

Whether you are enforcing architectural guidelines, rules pertaining to pets, trash or noise, we hope that the following discussion provides some food for thought.

Ultra Vires: Are your Rules and Related Sanctions Enforceable?

Borrowing from corporate law, Judges in several cases asked if a particular rule or sanction was "Ultra Vires" meaning, roughly, "beyond the powers" of the Board to enact or impose, and they wound up concluding that the answer was yes - the action was beyond the Board's authority. The adverse ramifications for the community associations involved were serious, and the impact upon the rest of the community association marketplace is still registering.

One of the most publicized cases involved a townhome association in Alexandria. The origin of the conflict actually went back all of the way to 2008 when owners of one of the lots placed a

political sign in their front yard in support of one of the Presidential candidates. The size of the sign was acknowledged by all parties involved to be 4 inches higher than permitted under the Association's pre-existing policy; however, an unfortunate war of wills then ensued.

The Association corresponded with the owners, telling them that their sign was too large and had to be taken down.

The owners responded with a request for a temporary variance, and, in addition, claimed that their rights of free speech should be prioritized over a minor infraction of the Association's rules.

The Board did not relent. They demanded that the owners take the sign down. All of this took place in October, one month before the election.

The owners responded by cutting their sign in half as a way of spiting the Board and complying with the technical requirements of the rule.

The Board then responded by adopting a resolution that empowered the Board to levy

finances as sanctions for violations of the Association's rules, and then the Board enforced that policy by levying a \$900 fine against the owners.

Later, when the owners filed suit against the Association to challenge the validity of the fine, a Judge in Fairfax County had an opportunity to review all of the facts and circumstances of the case. The Judge detected several problems. One, the Board adopted the resolution and then enforced it in a pending case rather than doing so prospectively. Two, the Judge ruled that the Association could fine a member only when the power was expressly and specifically authorized by the covenants recorded against the titles of the lots, as opposed to a resolution of the Board.

These results were bad enough for the Association, but the litigation wound up spilling into other issues as well. Hard-copies of all of the emails between members of the Board were subpoenaed, and some of those emails reflected a high-pitched tone about the case that the Judge did not believe was proper for a Board. In addition, the Judge determined that some of the meetings conducted by the Board had not been the subject of any form of notice to the members. All of these factors undoubtedly influenced the Judge when he awarded the owners with a judgment against the Association for over \$100,000 as an award of their legal fees.

The aftermath of the case continued to go poorly for the Association. By referendum, the ownership voted to file for bankruptcy relief rather than a special assessment to pay the judgment and the Association's own attorneys' fees. While this filing provided the Association

with some time and some relief from all of its debt, there were some problems. The Court-appointed Trustee decided that the Association's common area should be liquidated by public auction for the benefit of the owners who obtained the judgment. At the auction, a 3rd party purchased the common area with the intention of developing it, only to later back out. A complicated settlement was then worked out wherein a 3rd party gifted \$60,000 to the Association so that this money could then be given to the owners with the judgment, and the common area would remain under the ownership of the Association.

Needless to say, this case is a horror story that is not the norm; however, there are several principles that are instructive. If your community is involved in enforcing a rule or policy, make sure that the rule or policy has an authoritative basis that derives from the legal documents of your association that are part of the chain of title of the lots or units within your community. In addition, please remember that the general rule of law is that the judiciary is supposed to narrowly construe the covenants and rules. If there are ambiguities or judgment calls, those ambiguities or judgment calls are to be resolved against the party trying to enforce the covenants or rules. As a result, expansive interpretations and applications of your covenants by your Board or committees are not likely to be upheld by a court if your enforcement efforts are challenged. In the context of rules adopted by the Board, the analysis is whether the Board has sufficient authority to adopt that particular rule or policy in the first place.

In 2013, the courts were consistent. Actions or rules of the Board must be rooted in the express language of the legal documents that are recorded against the title of the lots/units. Boards should be careful not to assume authority exists for any given action simply because the Board has previously acted in a certain way. For this reason, it is important for a Board to review the specific provisions of the Association's governing documents pertaining to the rule to be enforced to ensure the Board has the proper authority before initiating any enforcement action. Following this simple step may prevent the Board from overstepping their bounds and subjecting the Association to unnecessary liability.

Be Reasonable/Act with Restraint When Imposing Fines or Punitive Measures.

One of the most difficult tasks that Boards face in relation to rule/covenant enforcement is to find the proper balance between upholding their responsibility to reasonably enforce the rules and regulations of the Association and levying sanctions for violations.

In a highly publicized case, one Board found itself getting extremely frustrated with the conditions with 16 units owned within their condominium by Fairfax County and leased to residents under a subsidized housing program. The Board eventually issued multiple citations to the County, citing the County for violations of the rules requiring certain colors of blinds, vehicular registration with the Association, and other such rules. When the violations continued, the Board got aggressive and wound up fining

the County over \$20,000 as a sanction for all of the violations.

Rather than pay the fine, the County chose to sue the Association, seeking a permanent injunction to restrain the Board from fining the County and/or suspending their privileges as a member of the Association.

The Court ruled in favor of the County, citing a lack of express authority in the development's master deed to fine or suspend privileges of membership. The other factor that no doubt influenced the Judge was that the Judge did not believe the Board's "punishment" fit the "crime", as the saying goes. The Judge commented that a Board with the authority to adopt *and* enforce rules must act judiciously when deciding to levy fines or other punitive measures.

What Remedies are available?

Ultimately, the goal of any enforcement action is to obtain the owner's compliance. In choosing its remedies and pursuing enforcement, the Board should exercise due care to avoid the appearance that it merely wants to punish a non-compliant owner. The Board should also focus on the violation itself, and do its best to ignore the personal attacks and general poor behavior that tends to occur in these cases.

There are a variety of remedies available to Boards in enforcing their governing documents. Although it has become complicated in Virginia, assessing charges/fines is still one of the most popular remedies for those associations with the proper authority. It's inexpensive, and offers a

great deal of flexibility when dealing with minor, everyday violations.

Additionally, Boards may have the option of suspending the privileges of owners who violate the rules. Typically, Associations are capable of suspending owners voting rights, rights to run for the Board, parking privileges and/or access to community facilities (such as a pool or gym). Again, a Board must be sure to review their governing documents to determine what remedies are available and the process that must be followed.

Of course, the Board also has the right to file a lawsuit and seek a court order requiring that the owner comply. While litigation can be time consuming and expensive, it is often the best remedy when dealing with particularly egregious violations. Assuming that you are successful, the Association will have not only obtained a court order requiring the owner's compliance, but also a judicial determination that the association's actions were justified and its rules and covenants enforceable.