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“Why Enforcing the Rules Must Be a Priority of the HOA Board”

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INTRODUCTION

As Cathy mentioned, I’m Sheyna and I focus on the representation of community associations. What she didn’t mention is that I’m a Gemini which means, among other things, that I am two people occupying one person. That manifests itself in many ways including and especially my firm belief in the importance of having and enforcing rules AND my firm belief that rules are overrated.

CONGRATULATIONS! As leaders in your HOA or Condo negotiating the push and pull of rules enforcement officially is your problem. Rules mean stability, they bring order and consistency out of chaos. But they also offend the proud homeowner’s sense of his or her right to do what he or she wants on his or her property.

In today’s session, we’re going to address this conflict. We’ll start some good, old-fashioned, rule-related horror stories. Then, we’ll test your cleverness at resolving Board conflicts. Last, we’ll address how to enforce the right way, with some practical takeaways.

In honor of Halloween, let’s start with the horror.

HORROR STORIES

- In Ogden, N.C., Peter Carl Darius was involved in a dispute with the Planters Walk Homeowners Association over infractions that included a fluorescent yellow shed with green trim, a 5-foot windmill and a white picket fence. The HOA began fining Darius \$100 a day, then put a lien on his home and filed a lawsuit. The fines continued to mount, and even though he’d paid nearly \$50,000, the association eventually foreclosed on his home, saying he still owed more than \$24,000. In August 2010, just days before he was to be evicted, Darius doused his house with flammable liquid and set it on fire. He perished in the inferno, and his death was ruled a suicide.
- A mother of three in Tennessee told The Star that she attempted suicide after becoming wrought with stress over dealing with her HOA. The woman said that although she had a documented medical condition that made it difficult for her to move her trash cans to the back of her house, the association hounded her and repeatedly threatened to sue because she placed them on the side of the building. She said she also was written up for putting two 8-inch birdhouses — made by her children — in front of the garage. After she criticized some of the board’s actions on the community’s Facebook page, she said, she was blocked. The woman said she felt ostracized. “We were excluded socially, but also from community resources,” she said. “I was afraid to even go to the mailbox, worrying about getting another notice of a violation.” Last year, she took an overdose of pain pills but survived.

- In 2012, a Louisville, Ky., man shot and killed the president and another member of the homes association board during an HOA meeting in a church. Authorities said Jordanian-trained doctor Mahmoud Yousef Hindi had been in a dispute with the Spring Creek Homeowners Association over a fence and his driveway in the upscale neighborhood. Hindi committed suicide in jail in 2013 while awaiting trial.

That is the reputation of rules enforcement in property owners' associations and condominium associations – maniacal busybodies with too much time on their hands impose arcane and draconian rules on unsuspecting residents leading to stress and ... sometimes ... death.

Many of my community association clients are painfully aware of this reputation and their response is to over-correct – to abandon rules enforcement. They don't want to be *that* association that overburdens its residents with rules and hearings. Before we get too judgy, let's test your instincts for resolving a sticky rules situation.

HYPOTHETICAL



http://www.reporterherald.com/news/loveland-local-news/ci_31233383/tension-increases-hoa-dispute-critical-sign-remains-residents

- The facts:

Rich and Colleen Stephens erected a large sign in the front yard of their home at 1110 Crabapple Drive in the Alford Meadows neighborhood in northwest Loveland that claims they have been unfairly targeted by the Alford Meadows Community Association.

The 4-foot by 8-foot sign reads, "If you are considering purchasing a home in Alford Meadows, you may want to reconsider. You may be the next target of the HOA!"

Members of the association reportedly told the couple their yard decorations, including a wooden replica of an American flag and metal flower pots, were in violation of the association's covenants.

He claimed the allegations from the HOA were made due to his political beliefs. Stephens supported Donald Trump during last year's election cycle, placing dozens of campaign signs in his yard at one point.

Colleen Stephens said a meeting scheduled last week between she, her husband and the association's board was canceled at the last minute. The Stephenses have acknowledged the placement of the sign is a clear violation of the association's guidelines, but they say they feel the need to stand up for themselves.

Colleen Stephens reportedly mailed a letter to an agent of the association last week demanding that the board apologize for making its original allegations that the yard decorations were in violation of the association's covenant.

- Your mission: You and your “Board” have gone into Executive Session to determine how to respond to this. Your meeting room in the library closes in 5 minutes ... figure out how to resolve this issue before the library closes.

[Discussion of how folks would handle this]

HOW TO DO IT RIGHT/PRACTICAL TAKEAWAYS

The title of today’s presentation is “Why Enforcing Rules Must Be a Priority of the HOA Board”. This assumes that rules enforcement should be a priority. We just spent twenty minutes talking about how horribly wrong enforcement can go. Why bother when enforcement can be so fraught with peril?

There are a few reasons why you, as a member of an HOA or Condo Board, must bother – let’s discuss four of them:

1. The first and most obvious reason is that you’re contractually obligated to do so. The Declaration of Covenants can be viewed as the association’s *de facto* Constitution, but it also is a *quasi*-contract between you as a Board member and the association. Most Declarations specifically charge the Board with enforcing the covenants and related rules.
2. The second reason to enforce the rules is because someday, at some time, some member of your community is going to do something crazy. The performance artist in your community is going to install a commode on the front lawn. The “handyman” is going to build a deck as unstable as he is unqualified to build it. The naturalist is going to decide to let her lawn grow wild and free as mother nature intended. The economist is going to refuse to pay his assessments because he never uses the clubhouse anyway. Someday, there will be a rule you want to enforce, but if your Board has been casual about enforcement of some rules, you just might find yourself precluded from enforcing the rules you care about. The doctrine is called “Selective Enforcement” and it stands for the proposition that if you have a list of rules, but you don’t enforce all of them (or worse, you only enforce them against certain community members who maybe get on your nerves) you may be blocked from enforcing any of them. The theory is that your residents are relying on your behavior as a Board, not just the docs. If your behavior conveys a lack of concern about the rules, the court may hold you to that.
3. The third reason to enforce is because your budget depends on it. This is the part when I stress the importance of a vigorous but fair collections process. Your assessments are but one of many bills that confront your residents. Most will be diligent about paying. Some will only be as diligent as you “encourage” them to be. You should have a collections resolution that spells out your process for identifying and resolving delinquencies. If your Declaration is structured in a way that limits your ability to collect, you should do the work to amend your Declaration. And while collections can be a slow process, you have to stick to it – it’s a marathon, not a sprint. If you establish in your community that you have a culture of systematic collections, word will get around and you’ll find it easier to motivate compliance. [SIDE NOTE: The violation charges (NOT FINES) authorized by both the POA Act and the Condo Act can amount to a nice little bit of “found money” in your budget. Forgive my moment of mercenary.]
4. The fourth reason to enforce is because nobody likes litigation except litigators. You, as a Board member, have a fiduciary duty to enforce the rules and failure to live up to that duty is to expose the association to a lawsuit. The association’s governing documents can become the thing used to hurt it – if a disgruntled owner feels that the Board is not taking care of business as required by the docs, the disgruntled

owner will use the association's own sword against it. The best way to handle litigation is to avoid getting mired in it, which requires knowing and enforcing the covenants and rules.

If those are the reasons *why* you should bother, how do you do it effectively?

1. Take the time to know and understand the covenants and Board-issued rules. Likely, your legal counsel (please tell me you have legal counsel) will offer training programs designed to build your familiarity with the rules. You don't have to be able to quote them chapter and verse – and it's weird if you can – but you need to know them well enough that you can pass a quiz if it's open book.
2. Build and maintain a Book of Resolutions. Frequently, Boards will adopt a resolution to address either a policy or administrative issue and it will live in the Meeting Minutes, never to be heard from again. Whether it is a physical book or a digital one, be sure that you have a way of tracking and indexing current and former resolutions (you need to know what has been superseded).
3. And speaking of Resolutions, build them carefully. Nobody needs three pages of “whereas” clauses at the beginning of a Rules Resolution, but it is critical that you establish on what authority the rules are based. You must be able to tie the rules you develop to the Declaration or Articles or state/federal law or regulations. Resolutions of Rules may only flesh out those things; if you don't have the power in the Declaration or Articles or law/regs then you cannot give yourself the power in a Board-adopted Resolution.
4. Okay, let's say it's been a while since you've had a really consistent enforcement practice. Be purposeful about getting back into the fray.
 - Go through the existing covenants and rules and get rid of those that don't make sense. If your community is very bohemian and you've successfully marketed yourself as a place where people are free to use their lawns to express themselves then don't allow strict rules to remain on the books. Amend that away. If the rules are too onerous, say they anticipate monthly inspections by a property manager and your condo has been self-managed for the last three years by volunteers who do not have time to inspect all 75 of your units every month, amend that away. If your docs are outdated and, say, require that roof shingles be made of a material that doesn't make sense given technological advances, amend that away. Before you begin enforcement, make sure that the scope of things you must enforce make sense for your community.
 - Once your rules are in good shape, tell the community. Of course, your docs probably require you to inform the residents of changes to the rules. But whether there are changes to the docs or you're just “relaunching” the enforcement process, it's important to remember that this is not a gotcha moment. Hopefully, rules enforcement isn't exactly something that you *enjoy*, and, assuming that to be the case, you should let the resident know when the pop quiz is coming so that they can study in advance. Tell them what the rules are in a way that they reasonably can be expected to have access to them – newsletter, website, special townhall, YouTube video, carrier pigeon – whatever works. Tell them when the inspections will be. Tell them the consequences for violating. Give them reasonable opportunities to get their lives right so that if you do find something and you are forced to enforce, your hands and consciences will be clear.
 - Have a plan. Have a Due Process Resolution that spells out enforcement processes. Have an inspections calendar that clearly identifies who is assigned to conduct them and how they are to

track what they find. Have a complaint process that offers non-Board members the opportunity to share what they find.

5. And what is my favorite recommendation to Boards about enforcing rules? **BE MORE THAN THE RULES YOU ENFORCE.** Rules are not the end, they're part of the means. The *end* is having a self-sufficient, aesthetically and financially pleasing environment whose property values go up. Consistent rules enforcement is half the battle. The other half is helping the community to be excited about the fruits of your enforcement labor.
- Send thank you notes to owners who are getting it right. Nothing condescending, of course, but express sincere gratitude for those folks whose compliance makes your gig easier.
 - Create an Annual Report that highlights the community's accomplishments including pictures. Be sure to celebrate the fact that delinquencies are way down, or you negotiated a new garbage collection contract that's going to save money, or that the budget is whipped into shape and there won't be an increase for next fiscal year, or you upgraded to the *good* bags at the dog waste stations. Websites are an efficient and cost-effective way of "publishing" the Report.
 - Build trust. Be transparent in your finances, be diligent about putting contracts to bid, be compliant yourself. Give the residents reason to believe that you are working hard to protect the community.
 - Host community events or partner with local organizations to provide your residents with opportunities to interact with you and remember that you are a human person. Some communities are built for cookouts and potlucks. Others respond to group discounts to see local orchestras. Others celebrate the holidays at a nearby watering hole. Others partner with civic organizations to do beautification projects or to volunteer at local nonprofits. Others partner with local businesses to give out discounts or gift cards. Whatever the culture of your community, find ways for the Board to be more than the warm body that signs off on the hang tag reminding me to clean my soffit, as soon as I figure out what that is.

I know, these are awfully touchy-feely recommendations for a presentation about rules enforcement, but the truth is that when people feel engaged, are reminded that the enforcer is a human person looking out for the community, and see a return in their investment (and compliance), enforcement will be less burdensome. And when enforcement is less burdensome, you'll be more likely to do it. It's human nature.

CONCLUSION

Why must rules enforcement be a priority? Because. Because it's required by law. Because the community benefits from it. Because it's your job. Being Judge Dredd is not your job unless you want to be my next horror story, but being a reasonable, cooperative, knowledgeable Board member is.

If you do it purposefully, consistently, transparently, and pursuant to a plan, enforcement doesn't have to be a bad word.