

Association struggles with apathy, lack of enforcement

Q. Our homeowners association has been in existence for six years. Participation is low and enforcement is nonexistent. People move into our subdivision who do not know that there is an association.

Our HOA board and the management company said that noncompliant units that have sheds, fences and the like have been fined and sent numerous notices. They have been up for quite some time. If enforcement is never likely, what is the point of the HOA? The suggested solution is to grandfather in the violations but go forward against only the new violations.

Lately, participation is so low that no one wants to be on the board or vote for a board. What do we do?

A. You ask a number of different questions so I will try and address each of them separately.

First, associations are created either voluntarily or by recording covenants. Assuming there is a recorded set of covenants, then any prospective purchaser



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takes title to their new home subject to the restrictions of record. This should be pointed out to them at their closing by their attorney and the title company would require

the association to issue an assessment and lien status letter.

Second, if the covenants prohibited the construction of sheds, fences and other improvements, or require board approval, then it is up to the board of directors to enforce the rules. Should they choose to ignore them entirely, they are guilty of nonfeasance and possibly a breach of fiduciary duty. However, if these homeowners who are in violation have maintained these amenities for a period of time then the association has effectively waived its

right to enforcement against these owners.

There is a legal doctrine known as LACHES, which is the equivalent of a common law statute of limitations. Any time the association permits a condition to remain unabated for a considerable period of time they are barred from raising it against the owner. There is no precise time frame, it's just what would be considered reasonable. That is why it is critical for boards to initiate enforcement immediately upon learning of these types of situations.

In fact, some declarations have a 30-day rule; if enforcement does not commence, sometimes the necessity to file suit, then the association has deemed to have accepted the change and loses all rights of challenge.

If the board wanted to begin enforcing the rules, it would have to "grandfather" these existing improvements until such time as the person sold or it needed to be replaced. Then

the board would have to strengthen its policies, announce its intentions and commence strict enforcement against all new violations.

Third, apathy is a common affliction of many associations. Everyone wants to live in a maintenance-free community association except nobody wants to pay for the maintenance (it's maintenance-free — not free maintenance) and everyone wants to be part of communal living and self-government but they all want the other guy to do it. It comes down to, 1 percent of the people do 99 percent of the work (it also comes down to 1 percent of the people cause 99 percent of the problems). My suggestion is to see if you can rally together several intelligent, informed people to take over the board and begin the process of real self-government.

If you do not attempt to solve every problem in one day, and take your time by setting an agenda of goals, prioritizing

them and knocking off one at a time, it will be rewarding and you will accomplish your objectives. The ultimate reward will be enhanced property values. Good luck.

Q. Our association board of directors recently sent notice to all owners that at the last board meeting, the board adopted a resolution banning all new leases and grandfathered all existing investor owners until they sell. At this time, I have no intention of renting out my unit, but I might in the future.

How can the board adopt a resolution when I always thought the association needed to amend the declaration to do this. In our association, this requires the approval of over 75 percent of the owners.

A. For many years, the courts in this country upheld the position that to eliminate or restrict leasing, it was considered a "vested property right," which required an amendment to the covenants approved by a "super-majority" (two-thirds,

three-fourths, etc.).

In 1995, in the case of *Apple II Condo Assoc. v. Worth Bank & Trust Co.* (213 Ill. Dec. 463; 1995), the Illinois Appellate Court held that Illinois condominium associations may prohibit leasing of units by either condominium board action or by vote of entire association pursuant to terms of condominium declaration.

As a result, under certain circumstances a board could restrict or eliminate leasing entirely without a vote of the owners. It is definitely not the preferred method but occasionally a board will take this position. It is a more aggressive approach and must meet certain tests if challenged in court.

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