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Old covenants may require 'grandfathering' violations

Q. We currently have a situation in our subdivision where the new board of directors resurrected an old deed restriction that has been on the books for some 40 years, has never been enforced and one of which we and another homeowner were never advised. We were never even notified that our subdivision had a homeowner's association when we bought our home.

My question is this. We are now selling our home that is 42 years old.

The original owners who built the home built it with an attached garage and a detached garage providing us with availability to park four cars.

The deed restriction prohibits having a detached garage on any property in the subdivision. There are currently three houses that have a detached garage and the average age of the homes is 50 years old.

All of the garages were built with the home; they were not added later. The homeowner's association board is advising us that we either have to attach the garage or tear it down.

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Association law

They also have advised us that they intend to send a letter to the new owner that they have to comply within 60 days of occupancy.

A. When a board legislates policy, such as enforcing the covenants which have been overlooked or dealing with violations, several factors come into play:

Once the board gains knowledge of a material fact such as a covenant long overlooked, they must act.

Either begin enforcing it, or moving to abolish it.

If they opt to commence enforcement, they must then look at the individual facts surrounding each violator.

In this instance, since the violations have been in effect for such a long period of time, they have basically waived their right to enforcement (i.e. laches).

They must craft a policy that works around this problem dealing with the theoretical violators as well as future violations.

Thus, the "grandfathering" of the current violator, but strict enforcement against future infractions.

Thus, you can keep the conditions in effect until it has to be replaced or restored, or upon sale of the property. At that point, the property must be brought into compliance or it becomes the new owner's problem. It's as if the clock is rewound and it starts from scratch.

Cases involving covenant violations, particularly additions and improvements, are equitable problems which are handled in the Chancery division of each county court system.

These are not cases seeking monetary damages, only equitable relief. (The Association can recover its attorneys fees and costs.)

There are rules which govern equity differently than cases seeking monetary remedies.

Equity always looks at the "fair" disposition of the problem and restoring parties' positions to where they should be had the problem not arisen.

"Old" un-enforced covenants become a new problem when they are discovered — a new problem for the owner with the existing situation, the board that is correcting past board omissions and the prospective new owner.

Covenants, deed restrictions, rules; it does not matter. They must all be enforced uniformly and fairly.

The board is faced with a dilemma; if they attempt to enforce a long overlooked violation they could lose because it might be viewed as the association having waived its rights or they could be sued for failing to enforce the covenants by unhappy owners.

The best solution for a board is to do a complete inspection of the property. Note all violations.

Decide whether to change the policy, which would "legalize" some of the violations. Write new standards and send them out to all owners.

Look at each situation on a case-by-case basis. Be prepared to consider hardships.

Consider writing the policy so long time violators can be grandfathered but the amenity must be brought into compliance upon replacement or sale of the property. This seems like the overall fairest solution.

Q. We live in a rather contentious environment. The last president thought it was his responsibility to identify and prosecute violations. He walked the property and wrote up pages and pages of petty violations.

I got on the board to end this reign of tyranny. Now his cohorts (I am certain, with his prodding) are deluging the board with letters.

Why did we do this? For what reason did we do that? Do we have to spend the time and money to get them answers, as well as give up an enormous amount of personal time?

A. Pursuant to Section 19 of the Illinois Condominium Property Act, owners are entitled to inspect and/or obtain copies of an association's operating documents, minutes, contracts, insurance policies, names and addresses of owners, ballots from the last 12 months and books and records of account.

The failure to provide this information within 30 days upon written request can result in sanctions.

However, the written request must state a proper purpose; personnel files, litigation, delinquencies and sale and leasing information are not to be disclosed and nowhere does it state the board must spend hours and days answering rambling pages of questions.

Many association boards become the victim of an inquisition by an owner with way too much time on their hands, and the intent of the statute is not to compel boards to succumb to harassment.

• Association Law appears alternate Saturdays in New Homes. Jordan Shifrin is an attorney with Kovitz Shifrin Nesbit in Buffalo Grove. Send questions for the column to him at jshifrin@ksnlaw.com. This column is not a substitute for consultation with legal counsel. Past columns can be viewed at www.ksnlaw.net.