36--What Can an Association Do About a Terrible Neighbor?

Boards have the authority to issue fines for neighbors who violate the Governing Documents, and usually have the authority to sue for failure to comply with the Governing Documents. For offensive behavior that violates the law, Owners and Board Members can contact the police, but often the behavior is not severe enough for the police to take action. Boards can ask a neighbor to change their behavior, and may try to involve an outside party, like a professional mediator, to help resolve disputes. Boards may also decide not to get involved in a dispute between neighbors, because the investment of time and energy may be unproductive. The Board may want to consider upgrading their security.

If the resident's conduct violates the law, we recommend calling the police immediately. Even if the police do nothing, they will write a report about the incident that can become evidence for other enforcement action by the Association. Sometimes a conversation with the police will change an occupant's behavior. Other times the result will be unsatisfying, because the police take no action. Example: a member of one community was shooting a gun off of his balcony. The police came, talked with him, and left. Example: a community member threw her TV off her balcony 5 times and harassed neighbors based on their sex and religion. Police knew of the resident and had spoken to her many times. But because they did not consider her conduct to be a threat to herself or to others, they could not do anything about the behavior.

Boards and managers want us to stop the behavior immediately, and often believe we have magical powers that will stop the neighbor's conduct. Certainly, there are times where an Owner was not aware that their conduct was disturbing others or was not allowed. So, one of our first questions to the client may be to ask if

anyone has spoken to the resident and asked them to stop the offensive behavior. Often, the resident willingly corrects the behavior because their intent is not to offend. We recommend that the first formal contact (in writing) from the Association assume that the Owner is not aware that their conduct is a problem, and attempt to educate the Owner, and ask for their compliance.

Even if a letter comes from an attorney, it is often intended to educate the Owner about the problematic behavior, and to cite specific provisions in the Governing Documents that prohibit the behavior, and to ask for compliance within some specific period of time. Example: Owner and boyfriend open an internet gun shop, selling firearms out of their third-floor condo Unit. An attorney letter may also state what actions will be taken (and when) if the offending Owner does not comply with the request.

Consider that there may be a solution (to what the Board is certain is a clear violation) which solves the problem for the neighbors, but also accommodates the needs of the Owner who is in violation. Noise problems often fall into this category. Example: loud piano. A professional pianist moves into a townhome, and one of her neighbors doesn't like hearing the piano play 20 plus hours a week. The Board approached as a strict violation and prohibited the piano being played. The pianist did not want to offend and looked at ways of reducing the sound levels of the piano to within what should be expected by her neighbors living in multi-family housing. Example: Sometimes behavior modifications like wearing slippers and using carefully placed carpets can make noise from a hardwood floor acceptable to the neighbors below.

Sometimes a third party can assist with resolving the problem. Family members and friends may be able to help deal with a problem Owner. Example: hoarding Owner, whose family did help. Example: paranoid Owner whose father agreed to intervene. There are neighborhood dispute resolution centers, and mediation programs at the local law schools, who might be able to help at little or no cost. There are also professional mediators, often

lawyers or retired judges, who can help Owners and Boards come to some kind of resolution and help calm tempers.

If asking and problem solving do not work, every community Association can issue fines for violations of its Rules, Regulations, and other Governing Documents. This is true even if the Declaration or CC&Rs are silent, because the authority comes from statutes.[1] The Board MUST follow the procedures required by the statutes giving fining authority, meaning that there must be a Fine Schedule distributed (in advance) to the Owners, and you must give an opportunity to be heard before a fine is assessed. It is not enough to allow an appeal; give them a period of time to request a hearing, then you can assess the fine.

The process of fining can at times be very unsatisfying. Some Owners will simply pay the fine and continue to violate the rules. Example: we have had Owners with multiple pets, in excess of those allowed by the community, simply pay fines rather than give up their pets. Example: we have had landlord Owners who find it more cost effective to pay fines than properly rent their homes.

So, what other options does the Board have? Litigation is usually an option but check your Governing Documents to be sure. Many developers installed provisions in the Declarations to protect themselves from being sued, by inserting binding arbitration as a substitute for the courts. Arbitration can be much faster and may reach resolution at a lower cost than the court but can still be unsatisfying in how long it takes, and how well it works.

The statutes and most Governing Documents allow the Association or any aggrieved Owner to sue a neighbor to get compliance with the Governing Documents. We generally recommend against going to court until you have made reasonable attempts to resolve the problem cooperatively.[2] When we go before any judge, we want to be able to demonstrate that the Board is being reasonable in its request.[3]

Most Declarations, and the statutes that govern community Associations, provide that attorney fees may be awarded to a prevailing party in litigation. Virtually every Board is certain that it will be the prevailing party, and so may be willing to spend the money required to force compliance. But an uncooperative Owner can make litigation a protracted and expensive process. Trial courts routinely grant attorney's fees in the neighborhood of $25,000[4] and it is not uncommon to see attorney fees in appellate court cases exceed $100,000.[5] Those amounts may be less than an Association actually spends.

Our experience is that sometimes, when a lawsuit is actually served on an Owner, they become incredibly cooperative. Example: one Owner we sued, because he refused access to his condo Unit to allow a fire alarm to be installed, contacted the manager within minutes of being served to arrange a time for the installation. Example: Owner evaded service for weeks, and when finally served at his place of employment, retained a lawyer to try and work out a solution, and offered to reimburse the Association's attorney fees.

Filing a lawsuit does not usually provide the instant gratification and results that clients imagine will happen. In most cases, conduct and behavior are not so severe that a court will skip due process to make any decision. Even the most straightforward cases can take months before any hearing can be obtained in front of a judge. And if there are disputed facts, it can require a trial to establish what the facts "really are," before a court can find a violation and order some change. And court procedures provide an opportunity for offensive Owners to make life more difficult for the Association and its manager. Example: we have a case where a judge ordered the Association to produce every complaint by the Association or any Owner against any other Owner for the past four years. Example: we had a case where every email from or to a Board Member that mentioned the Association had to be produced. It was over 3,000 emails.

If an Owner is threatening his neighbors, those neighbors may be able to get an anti-harassment order in a short period of time, but the Association is typically not able to get a temporary order, and especially not an order that would prohibit an Owner from returning to his home. If the Owner's conduct is a significant threat to the community, we can try and get a court to agree to impose temporary measures but cannot make any guarantees that a court will agree. Our client where the gun shop was opened was prepared to take that to court, but fortunately for everyone, the Owner agreed to shut the shop down before that step was taken.

Increasing security by installing cameras or hiring security guards may ease some of the community's concerns. These measures will also help document the behavior making it easier to confront the Owner or take other actions. Example: one community installed cameras that monitored the path an Owner took from the front door of her home all the way to her parking spot; allowing the community to monitor her whenever she left her home.

And then there are cases of bad neighbor conduct that a Board either cannot determine are actually a problem, or cannot justify the time, energy and expense of enforcing for the benefit of the neighbors. The statutes give Boards the power to enforce the Governing Documents, but not the obligation to.[6] The statutes also give any aggrieved member of the community the same power to enforce the documents that the Association has. Many Owners read the enforcement requirements of their Governing Documents to require the Board to sue their neighbor for them. WUCIOA specifically comments on a Board's option to choose not to enforce every infraction.[7]

Sometimes we advise our client Boards that they may have an obligation to determine if a violation of the documents has occurred, but that does not create an obligation to enforce the documents against one neighbor on behalf of another. Example: If the documents prohibit a tree from blocking a "view of significance," it probably falls to the Board or architectural control

committee to decide if a tree does actually block a "view of significance." The Association has to have people go to the homes to evaluate the claim.[8] The Board must adequately inquire to fulfill its duty of reasonable and ordinary care in making the decision. But then the Board can decline to take other enforcement measures and leave the resolution of the dispute to the Owners.[9]

Declining to enforce will of course anger the Owner who wants the protection of the documents as they interpret them. And it is certainly true that when an Owner sues his neighbor over something like a tree, the Owner will usually also sue the Association for failing to enforce the documents for them. This is a reason for every Association to have Directors and Officers Liability Insurance, because the value of a defense by the insurance company can be considerable. There will not always be insurance though; read your policies and determine if they will cover non-monetary claims. We recently had an Association that was sued to quiet title to a piece of land owned by the Association, and their insurance declined because no money was sought by the Owner who brought the suit.

---

[1] RCW 64.34.304(1)(k). ("…the association may…levy reasonable fines in accordance with a previously established schedule thereof adopted by the board of directors and furnished to the owners for violations of the declaration, bylaws, and rules and regulations of the association…")

RCW 64.38.020(11). ("…the association may…levy reasonable fines in accordance with a previously established schedule adopted by the board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the association…")

RCW 64.90.405(2)(l). (…the association may…enforce the governing documents and, after notice and opportunity to be heard, impose and collect reasonable fines for violations of the governing documents in accordance with previously established schedule of fines adopted by the board of directors and furnished to owners…")

[2] *Christiansen, et al. v. Heritage Hills 1 Condominium Ass'n*. No. 06CV1256, (Colo. Dist. Ct. 2006). ("It is apparent that the shared

airspace in the soffit area permits smoke or smoke smell to migrate. Thousands of dollars of contract work has not solved the problem. The smoking ban was reasonably investigated, drafted and passed by three out of four owners after years of trying to address the problem by other means. There can be no finding that the passage was arbitrary or capricious or done in bad faith.")

[3] Kawawaki v. Academy Square Condominium Ass'n. 176 Wash.App. 1038 (Wash. Ct. App. 2013). ("We must first consider whether the House Rule here…is reasonable in purpose and…application. A house rule has a reasonable purpose when it is one that is reasonably related to the promotion of the health, happiness, and peace of mind of the unit owners. To be reasonable in application, a house rule must not be selectively enforced…" (Internal Quotation Omitted) (Internal Citation Omitted)).

[4] *Fairway Estates Ass'n of Apartment Owners v. Unknown Heirs, Devisees of Young*, 172 Wash.App. 168 (Wash. App. Ct. 2012). ("Appellate court affirmed award of $24,196."); *White v. Lakeland Homeowners Ass'n*, 187 Wash.App. 1040 (Wash. App. Ct. 2015) (Appellate court affirmed trial court's award of $24,774.98.); *Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wash. App. 697 (Wash. App. Ct. 2000) (Appellate court affirmed trial court's award of $25,000.)

[5] *Riss v. Angel*, 131 Wash.2d 612 (1997). (Trial court awarded $103,989.85, 20 years ago.)

[6] RCW 64.32.060. ("Each apartment owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either may be lawfully amended from time to time, and with the covenants, conditions, and restrictions set forth in the declaration or in the deed to his or her apartment. Failure to comply with any of the foregoing shall be ground for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the manager or board of directors on behalf of the association of apartment owners or by a particularly aggrieved apartment owner.")

RCW 64.34.304(1)(k). ("…the association may…impose and collect charges for late payment of assessments pursuant to RCW 64.34.364(13) and, after notice and an opportunity to be heard by the board of directors or by such representative designated by the board of directors and in accordance with such procedures as provided in the declaration or bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule thereof adopted by the board of directors and

furnished to the owners for violations of the declaration, bylaws, and rules and regulations of the association…"

RCW 64.38.020(11). ("…an association may…impose and collect charges for late payments of assessments and, after notice and an opportunity to be heard by the board of directors or by the representative designated by the board of directors and in accordance with the procedures as provided in the bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule adopted by the board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the association…")

RCW 64.90.405(2)(l). ("the association may…enforce the governing documents and, after notice and opportunity to be heard, impose and collect reasonable fines for violations of the governing documents in accordance with a previously established schedule of fines adopted by the board of directors and furnished to the owners…")

[7] RCW 64.90.405
(8) The board does not have a duty to take enforcement action if it determines that, under the facts and circumstances presented:
- (a) The association's legal position does not justify taking any or further enforcement action;
- (b) The covenant, restriction, or rule being enforced is, or is likely to be construed as, inconsistent with law;
- (c) Although a violation may exist or may have occurred, it is not so material as to be objectionable to a reasonable person or to justify expending the association's resources; or
- (d) It is not in the association's best interests to pursue an enforcement action.

[8] *Riss v. Angel*, 131 Wash.2d 612 (1997). ("However, the association's decision was unreasonable and arbitrary and in violation of the covenants because it was made without adequate investigation and was based upon inaccurate information.")

[9] *See*, *Ducharme v. City of Bellevue*, No. 15-2-1106-0 SEA (Wash. Super. Ct. 2016) (The court sided with City and HOA and against the homeowner who instituted the lawsuit on his own. The court found that the owner was not entitled to sightlines he claimed was blocked by trees owned by the city.)