

## WHAT'S A BOARD TO DO: A GUIDE TO RESOLVING DISPUTES IN YOUR COMMUNITY

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What happens when you're driving home from work and you witness an above-ground pool being constructed on your neighbor's lot? What do you do when you are being told by your management agent that he has received numerous calls about a barking dog in a Condominium Unit? How do you stop the violations? Can you afford to take legal action? Communities throughout Maryland and across the country grapple with these questions everyday. Resolving disputes within a community can be one of the most difficult aspects of being a member of the Board of Directors or a property manager. It can be a confusing process to the lay person and oftentimes is not as cut and dry as we legal practitioners would like. How a Board or property manager handles the first steps toward enforcement of a community's governing documents and dispute resolution can mean the difference between a functioning community and a dysfunctional one. But what, exactly, do you do?

This article is intended to walk you, step by step, through the dispute resolution process. Although this process is not concrete and may depend upon your association's governing documents and what type of community you live in, there are some basic rules that should always be observed when your community finds itself faced with violations. First, it is important to note that a board of directors does not really have a choice other than enforcement when it becomes aware that a homeowner is violating the governing documents of their community. The Board of Directors owes a fiduciary duty to the community. This means that the Board owes the highest standard of care imposed by law, the duty to exercise reasonable care and the duty of loyalty. Thus, when a Board is aware that a violation is occurring it must take action to protect the community by stopping the violation.

What a violation is in your community cannot be set forth here. You should familiarize yourself with the governing documents of your community. The governing documents include, in order of priority, the declaration, bylaws, rules and regulations and guidelines. All of these documents play a role in defining the responsibilities of the board of directors and the homeowners, and establish what can and cannot be done within your community. They typically also outline the process for making changes to your home and contain what are known as "use restrictions." Anything from parking to pet rules to fence styles to the definition of a nuisance can usually be found in the use restriction section of your documents. Where to find these use restrictions varies from community to community, but a rule of thumb is that if you are a condominium the use restrictions are usually in your bylaws, for a homeowners association they are usually in the declaration. Once you are familiar with the requirements of your community, you will be better able to determine whether a violation is occurring within your community.

So, what should happen when you discover a violation? I like to think about dispute resolution as a three-step process; 1) investigation; 2) administration; and 3)

litigation. Each step of this process, if properly handled, may gain the compliance of the violating homeowner before you end up in court. This is a goal that every association should have as they proceed with the dispute resolution process. The one stop that is frequently forgotten by neighbors is a neighborly approach, an approach that can resolve many problems without acrimony or cost. Litigation, on the other hand, can be costly and emotionally taxing on a community. It cannot always be avoided, but every association can know what to expect before and after your attorney gets involved.

## INVESTIGATION

One of the most important aspects of dispute resolution is investigation. Before a violation can be turned over to a manager for a violation letter or turned over to the association's attorney for enforcement, the Board should gather evidence about the violation that is allegedly occurring. The first step is to determine whether there is actually a violation of the governing documents, rules and regulations or governing law. Far too often our firm has had perceived violations turned over for enforcement and discovered that there really was no violation, or that the community would have allowed the shed or fence if an application for exterior modification had been submitted.

If you're unsure about whether a violation exists, call your manager or attorney first. Ask questions about what can be done if the only thing missing is an application or if there is a way to prevent someone from placing a dozen windmills on their front lawn. Open communication lines and asking the right questions can stop these issues from arising later on down the road.

What do you do to investigate? This is largely dependent upon how you receive the information. Some violations are obvious, like the guy on the corner who one day paints his house purple, or the shed that is put up under the veil of darkness when everyone knows that sheds are prohibited. Others can be more elusive, like a dog barking in a condominium unit that is disturbing another unit owner, or the operation of a family day care home in a community where such operation is prohibited.

The obvious violations are simple and need little in terms of investigation. The members of the board or architectural control committee should go to the site and make sure that the structure is there or that the house is, in fact, purple. Pictures of the structure or the changes help immensely, but these are straightforward violations that need little else. The more elusive violations may need much more in terms of investigation.

Take the case of the barking dog. The Board of Directors must determine if the barking is a violation of the nuisance provision, or a more specific pet policy that the community has established. What does the Board need to determine if the barking really arises to the level of a nuisance, or is a "reasonable" amount of barking for a dog? The first thing we recommend is that the Board suggest to the affected unit owner that they keep a log of the dates and times that they hear the barking, the duration and at what volume. With this information in hand, the Board can determine if the barking is, in fact, creating a nuisance.

Investigation and gathering evidence before turning the matter over to a manager or attorney is crucial to the dispute resolution process. A board or manager should gather this evidence and keep a working file open for all violations that are reported. Remember, it is best if a community member is making a complaint, to have that homeowner submit the report in writing and that it is signed. Having a written, signed report not only documents the complaint, but it makes the homeowner responsible for what they are reporting. Any and all reports, correspondence and communications should be logged in this file. Doing so will make taking the next step much easier for a community.

## ADMINISTRATION

You have gathered all of the evidence, you have pictures in hand and you're ready to take the next step. What is it? The next step in the process is to send a violation notice to the homeowner. This can be done by the property manager, a member of the board designated to perform this task or by the association's legal counsel. Typically, the manager will send at least a first violation notice to a homeowner. At times, managers will send a first, second and final violation notice to the homeowner, often including a notice of a hearing in the final letter. This process and the necessity for at least one violation notice is set forth in Section 11-113 of the Maryland Condominium Act (the "Act"), unless otherwise provided in the communities governing documents. Although homeowners associations are not governed by the Act, I recommend that, if the association does not have a formal procedure outlined in its governing documents, it also follow the steps outlined in this Section because this law has been approved by the legislature, and, it is tried and true reasonable "due process" for dispute resolution.

What Section 11-113 of the Act requires is that a notice to cease and desist the violation be sent to the alleged violating homeowner. This notice must include a description of the alleged violation (i.e. existence of a shed prohibited by the declaration or bylaws), the steps the owner must take to abate the violation and a time period, not less than 10 days, during which the violation must be abated without the homeowner facing the imposition of a sanction or monetary fine. Once this notice is sent, the Board or manager should wait the 10 days and re-inspect or verify whether the violation has been abated or is continuing. If the violation has been abated, the process stops, but if not, or if the violation is a repetitive one and occurs again within a 12 month period, the next step should be taken.

The next step in the administrative process is to send a notice of hearing to the alleged violator. It is vital that the notice of hearing contain certain information in order for it to afford the alleged violator with the appropriate due process. What has to be in a notice of hearing? A list can be found in Section 11-113 of the Act. It includes the following: 1) the nature of the alleged violation; 2) the time and place of the hearing, not less than 10 days from the giving of notice; 3) an invitation to attend the hearing and a statement that the alleged violator may make any statement, produce evidence and present and cross-examine witnesses; and 4) the proposed sanction or monetary fine to be

imposed by the Board (if it has the authority to do so in its documents). Each of the items listed above **must** be set forth in the notice of hearing in order for it to be effective.

Once this notice is sent and a hearing date is set, the board should take a few preparatory steps before holding the hearing. Because the hearing shall be held in executive session, without the presence of other residents of the community, unless they are witnesses, the board should take the opportunity just prior to the hearing to review the allegations and all records that have been created regarding the alleged violations. The board should make sure that each of its members understands the purpose of the hearing, to determine if a violation exists, and if such determination is made in the affirmative, what it will do to attempt to remedy the violation. If there is any question, the board or manager should contact its legal counsel prior to the hearing in order to establish what it may do in terms of sanctions or monetary fines, if the homeowner is determined to be in violation of the governing documents. Many boards ask their attorneys to attend the hearings when they know that the homeowner will be represented by counsel. Although this is a good practice if the homeowner has displayed his or her unwillingness to settle the dispute and the board believes that litigation is imminent, or that the issues have created a hostile or contentious environment, it is not always necessary.

Recently I have been asked by several boards to draft introductions to be read by the president of the board at the beginning of the hearing, in place of attending the hearing. These introductions restate much of the information contained in the notice of hearing, as outlined above. The purpose of such introduction is to set the tone of the hearing and let the homeowner know what his rights are and what is expected of him during the hearing. An example of such an introduction is as follows:

The Board of Directors has called this hearing in accordance with Article I, Section 1 of the Condominium's Bylaws and 11-113 of the Maryland Condominium Act. The Board has determined prior to this hearing that Homeowner, owner of the Unit located at 123 Main Street, is leasing her Unit in violation of Article X, Section 10 of the Condominium's Declaration. Leasing is prohibited within the Condominium. A reminder notice regarding the leasing of the Unit was sent to Homeowner on January 1, 2007. Homeowner was notified in that letter that she must cease leasing her Unit at the conclusion of the term of the lease, January 1, 2008. After that date, the Board was informed that Homeowner had not ceased the practice of leasing her Unit and a Notice to Cease and Desist was sent to her by the management agent on January 15, 2008. Having failed to comply with that Notice, the Association's management agent sent a Notice of a Hearing to Homeowner on February 1, 2008, via first class mail. A copy of the Notice shall be attached to the minutes of this hearing.

We have called this hearing in order to determine if a violation of Article X, Section 10 exists with regard to Homeowner's Unit and to allow Homeowner the opportunity to present evidence, present and cross-

examine witnesses, and make statements. That being said, I shall turn the floor over to Homeowner for this purpose.

Having a prepared statement formatted for the applicable provisions and allegations involved can put the board at ease and let the homeowner know what is expected of him and what he is supposed to do. If there are witnesses present from the community, or the board expects a lengthy presentation, the board may also include a limiting instruction informing the witnesses that they will be afforded a certain amount of time to make statements -- 3 minutes each, for example. Because the hearing may be the only opportunity for the alleged violating homeowner to present their case in an informal setting, similar time restrictions should not be placed on the homeowner.

After the homeowner is afforded the opportunity to make statements, introduce evidence and present and cross-examine witnesses, the board should consider all of the information presented at the hearing outside of the presence of the homeowner. If some settlement offer has been made by the homeowner during the hearing, the board should be careful to respond by stating that they will take it under advisement and will discuss any offers in its executive session following the hearing. Once a determination has been made, the homeowner will be notified in writing, through a notice of outcome of hearing. Although not required by the Act, I always recommend that if the board has determined that the imposition of sanctions or a monetary fine is appropriate that the board give the homeowner another reasonable abatement period, usually 15 days, in which the homeowner may abate the violation. If the homeowner abates the violation, I recommend that the Board waive the sanction or fine imposed.

If a notice of outcome of hearing is sent and the Board has determined that a violation exists, the Board must follow-up on the violation after the reasonable abatement period has ended in order to determine if the violation is still in existence. Oftentimes, the violation will be abated by this stage, but if a homeowner has determined to dig in her heels, there is only one option....

## LITIGATION

The term litigation, as used here, can actually refer to two processes that the Board may employ for purposes of gaining compliance. If the board has the authority to fine a homeowner and file a lien, it may also initiate proceedings to foreclose on that lien. Although this is an extreme measure, it may be called for when the governing documents restrict legal action or when the circumstances of the case call for such measures. The other, more common option is the filing of a complaint in the Circuit Court. The circumstances of each case and the approach that an attorney may take in litigation are too numerous to set forth here, however, if you are at the litigation stage, you are already talking to an attorney who can advise you of the options and express an opinion about how to proceed. Every case is fact specific and may call for a slightly different approach.

Generally, when a complaint is filed, the association asks the court to order that the violation be abated and (if the documents or statute allow) that the association be

awarded the attorney's fees and costs of bringing the action, which brings up a question that resounds throughout associations: How much will it really cost to get compliance? Unfortunately, that question is not easily answered. The first question is whether the association has a provision in its governing documents which allows it to **recover** such costs. One of the first things I look for in a new client's documents is such a provision and I strongly urge any association without such provisions to amend its documents – and fast. Without such a provision, the so-called “American Rule”<sup>1</sup> applies and the association may not recover attorney's fees or the costs associated with litigation. For condominiums this is not crucial because Section 11-113 of the Act allows you to recover attorney's fees – although I like to add stronger language if it is not already present in the condominium's governing documents. I have emphasized “recover” above, because the association must pay the attorney's fees charged despite the court's determination of what amount to award on the basis of what it determines is reasonable.

Although the cost of litigation can range widely depending on the issues in the particular case, it can be a very expensive process especially if the other party files numerous motions or discovery requests. Still, a board must enforce its governing documents and has little choice at this stage but to proceed. Your attorney should be able to talk to you openly and honestly about the cost of proceeding and may have suggestions for handling the matter as economically as possible. I should note that in the vast majority of cases handled by my law firm of this nature, we are awarded and recover all of the attorney's fees expended by the association when it has the necessary provisions in its governing documents.

Again, every violation, every dispute is unique and has different issues involved. This article is an attempt to give boards and managers general guidelines to follow. Because each case is different, when in doubt, have a discussion with the individuals you have in place to assist you with these matters. Good managers and community association attorneys are experienced in handling disputes and can guide an association through this process.

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<sup>1</sup> The so-called “American Rule” states that attorney's fees may be awarded only when (1) parties to a contract have an agreement to that effect; or (2) there is a statute which allows the imposition of such fees. Although Maryland courts have held that an association's governing documents are contractual in nature, the governing documents must have an attorney's fees provision in order to recover attorney's fees pursuant to this principle of law.