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CARPENTER HAZLEWOOD DELGADO & WOOD

E-NEWSLETTER

CC&R Enforcement: Mandatory or Optional? By Joshua M. Bolen, Esq..

Is an association required to enforce its governing documents in a down economy?

YES. Arizona law, in a case called, Johnson v. Pointe Community Association, mandates that an association has an affirmative duty to enforce the express terms of its governing documents. The law does not provide any exceptions to this legal obligation. We have long encouraged our clients that an association only has two choices: amend the governing documents or enforce them as written.

An association that chooses not to enforce its governing documents exposes the association and its board of directors to two distinct forms of risk. First, another owner in the community may file a lawsuit against the association and allege that the board has failed to enforce the governing documents. This type of lawsuit could include a personal claim against a member of the board for the board's breach of duty to the association. It is only logical that other owners purchased homes in the community with reasonable expectations regarding the governance and look of the community. An association's governing documents sets forth these expectations. If a board chooses not to enforce or abide by the governing documents, a claim can be made that the board has failed in a simple legal requirement: follow the documents.

Second, if the board chooses not to enforce the governing documents now, the Association may lose its ability to enforce certain terms of the governing documents in the future. Failure to consistently enforce the governing documents exposes an association to an owner's equitable defenses such as abandonment, waiver, estoppel, selective enforcement, discrimination, and laches. All of these defenses are somewhat different. But all of these defenses can prohibit or severely restrict an association's claim against an owner to enforce the governing documents.

Finally, we all must remember that banks are owners too. A bank owned property should not be treated any differently. Bank owners, like all other owners, are contractually bound to follow the association's governing documents.

With all of this in mind, we understand that budget constraints are an obstacle to enforcement. However, the law does not recognize this financial obstacle as an excuse to avoid enforcing the documents. Even in these challenging times, we have found that associations that are aggressive and consistent in enforcement are actually expending fewer funds. Being aggressive and consistent creates deterrence for other owner's violations and raises an owner's outlook of the community. Owners that see violations within a community are more likely to ignore their own obligations and mimic those violations. Stopping violations before problems spread among other owners is key. Therefore, we encourage boards to adopt an efficient and aggressive enforcement and fine policy. Much like collections, delaying enforcement action delays the overall objective: compliance.



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