



AND BALANCING THE LIABILITY LINE

BY JILLIAN M. WRIGHT, ESQ.

With more people working from home in the last year, you might have noticed an increase in neighbor disputes. Often, neighbors will turn to the association first to resolve the dispute. The board must determine when a neighbor-to-neighbor dispute becomes an association issue; which complaints are based merely on bad relations between the neighbors and which are based on substantial and documented violations of the governing documents. It also must determine what to do if the complaints are substantiated.

WHEN AND HOW TO INVESTIGATE

It can be tempting to write off neighbors' complaints as outside the role of the association. However, the board is tasked with enforcing the governing documents. If an association fails to conduct an adequate investigation into a complaint which might involve a violation of the governing documents, an owner could sue the association for failure to enforce those governing documents. Typically, governing documents prohibit noxious, offensive behaviors and/or nuisances. One of the primary neighbor-to-neighbor disputes occurs when one or both parties are accusing the other of committing a nuisance – whether it be an offensive noise, sight, or smell.

When an association receives a nuisance complaint the first step should be to investigate the claim. In-person investigations by the manager or non-interested board member should be the first step, if at all possible, as this is often the best way to determine if the alleged nuisance is offensive to a reasonable person.

If the offensive conduct happens late at night, seek other evidence to substantiate the complaint. Ask other neighbors about their experience. Ask for videos or pictures with time stamps.

If the dispute takes place solely online or on social media, then the association should not intervene. Governing documents typically define nuisance as actions affecting a resident's ability to quiet enjoyment of the common area and separate interest property. As such, complaints of online conduct should be directed to the website host (such as Facebook or Nextdoor) or law enforcement as necessary. However, if the dispute takes place on the association's own forum the board may need to institute codes of conduct and decorum or limit posting rights in order to avoid defamation claims.

Additionally, if a resident complains that their neighbor has discriminated against them based on their protected class (including race, color, religion, national origin, sex, disability and familial status) federal law requires the association to investigate (See Code of Fed. Reg. §100.7(a)(1)(iii)). Failure to investigate and enforce quickly could result in liability for the association.

However, if an association acts too quickly, without investigating, it could also face liability. For example, if an association sends a violation letter to an owner who is a member of a protected class, that owner could allege that the association's enforcement was based solely on the board's discriminatory beliefs. If the association did not investigate or substantiate the neighbor's complaint, it might not have enough evidence to disprove this allegation.

WHEN AND HOW TO ENFORCE

If a complaint is substantiated, then the association needs to follow the enforcement procedure within the governing documents: send the violation notice and/or call the offending owners to a hearing at which the association can impose fines or suspend privileges. Alternatively, boards can request owners to mitigate the alleged nuisance, for example, install rugs to dampen sound or insulation to lessen the transmission of smoke smell.

If basic enforcement does not garner results, the board may need to consider litigation (and mediation prior, if necessitated by Civil Code §5925 et seq.). However, while the board is dutybound to enforce the governing documents, the law does not necessarily require the association to see the matter through to the end. In *Beehan v. Lido* (1977) 70 Cal.App.3d 858, the court held that a board's decision whether or not to file an action to enforce the CC&Rs is governed by the business judgment rule. If the board determines that filing suit is not in the best interest of the association after reasonable inquiry, then the complaining neighbor has the right to bring suit pursuant to Civil Code §5975.

TOOLS FOR ENFORCEMENT OR RESOLUTION

Common interest developments are seen as quasi-governmental organizations, so owners often assume associations' power reach farther than it does. Associations should make clear to owners the limited scope of the association's authority and offer tools to help neighbors address issues with each other directly.

One tool is law enforcement. An association cannot and should not guarantee a resident's safety. Complaints of violence, harassment, or threats of violence should be directed to law enforcement. An association may have a corresponding role to law enforcement if the actions or threats are directed toward board members or vendors or violate the governing documents, but an association's ability to intervene to prevent or stop someone's behavior may not be effective remedies when someone is potentially committing a crime.

Another little-known tool to neighbors is mediation. Some dispute resolution centers offer low or no-cost mediation. California's Department of Consumer Affairs has a list of mediators which offer these services and the local county bar association may offer more options as well. If owners seek mediation, the association is not obligated to participate.

In sum, this is a difficult balancing act. An association could face liability for both refusing to get involved and getting involved too soon, without a proper investigation. As always, consult legal counsel with questions.



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