

# **RULING WITHOUT AN IRON FIST: APPROACH FOR EFFECTIVE RULE ENFORCEMENT**

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## **PRESENTATION OUTLINE**

### **I. Introduction.**

- A. Let us tell you a little about ourselves.**
- B. What we will talk about in this presentation.**

We believe that through understanding how and why rules and regulations are created and enforced, associations can establish better enforcement policies and procedures that promote community among their membership. Accordingly, we will discuss what makes a good rule and how that impacts enforcement. We will discuss the concept of due process and why it is important. We will touch on relevant statutory provisions. We will also look at different types of disputes that may arise in an association and the board's role in each. Ultimately, our goal is that attendees walk away with some practical knowledge that can be used to more effectively enforce their association's rules and regulations.

### **II. Why are rules necessary?**

- A. Are rules really necessary?**

Unfortunately, experience shows that, to a greater or lesser extent, rules are necessary. In other words, all associations do need some rules. When groups of people with different personalities, backgrounds, and experiences live closely together in a community with shared facilities, there is likely to be some friction at some point in time. Rules can establish an objective standard for easing or reducing that friction.

- B. There are three general reasons for having rules:**

- 1. To preserve and enhance the property.**

Rules can be used to ensure aesthetic uniformity of the property and restrict use of common elements/area for the purpose of maintaining and enhancing property values. For example, restrictions on the use of common areas reduces damage to and wear and tear on that area, which preserves the condition of that area and reduces the expenses to maintain that area.

- 2. To preserve and enhance community harmony.**

Rules can be used to prevent unreasonable interference with an owner's use and enjoyment of his or her unit and the common elements/areas. Rules also set expectations for acceptable and unacceptable owner, occupant, or guest conduct and use of the property.

**3. To supplement the declaration and bylaws.**

Sometimes the declaration or bylaws may be incomplete or unclear about something. The rules can be used to provide clarity.

**III. What makes a good rule?**

**A. A good rule should:**

**1. Address a real problem.**

A good rule should address a real problem that disrupts the community harmony or could result in injury or harm to persons or property. A board should be mindful to not hastily adopt rules as a reaction to a one-time occurrence or a very limited situation. Also, careful consideration should be given when a single owner or small minority of owners demand that the board adopt a very specific rule.

**2. Make sense.**

A good rule should pass the common-sense test. When proposing a new rule or change to an existing rule, the board should consider whether it make sense to require an owner to do or not do whatever the rule is expected to address.

**3. Be easy to understand.**

A good rule should be stated concisely and in plain language.

**4. Take the least restrictive approach.**

A good rule should not set a standard that cannot be reasonably met. Also, a good rule should avoid micromanaging the owners.

**5. Be easy for people to follow.**

A good rule is one with which people can easily comply.

**6. Be reasonable.**

In Illinois, it is well established law that rules must be reasonable.

Illinois Appellate Court has recognized two categories of restrictions on use<sup>1</sup>. The first category is a restriction found in the association's recorded declaration and bylaws. The second category is a restriction set forth in an association's rules and regulations. Since rules can be adopted by the board, without unit owner approval, rules are subject to a reasonableness standard. The rule must be reasonable in its purpose and application.

Whether a rule is reasonable is determined on a case by case, fact specific basis. When considering whether a rule is reasonable, courts will look at several factors. For example, the use that is to be prohibited or restricted must be “antagonistic to the legitimate objectives of the condominium association<sup>2</sup>.” Other factors may include, but not limited to, whether the rule addresses a real problem, prevents injury or harm, the original purpose for the rule, whether other less restrictive measures have been attempted.

<sup>1</sup>See *Apple II Condominium Association v. Worth Bank and Trust Co.*, 277 Ill.App.3d 345 (1<sup>st</sup> Dist. 1995).

<sup>2</sup>See *Board of Directors of 175 East Delaware Place Homeowners Association v. Hinojosa*, 287 Ill.App.3d 886 (1<sup>st</sup> Dist. 1997) (Rules must be objective, evenhanded, nondiscriminatory, and applied uniformly)

## **7. Be legal.**

The board must have the power or authority to adopt any particular rule in question. Also, a rule cannot conflict with the association’s declaration and bylaws or any applicable law. For example, if provisions of an association’s declaration address a specific situation (e.g. permitting leasing), then the board would lack the authority to adopt a rule that conflicts with those provisions<sup>3</sup>. Also, federal law severely restricts the board’s authority to adopt rules that restrict an owner’s ability to install satellite dishes.

<sup>3</sup>See *Stobe v. 842-848 West Bradley Place Condominium Association*, 48 N.E.3d 310 (1<sup>st</sup> Dist. 2016) (The Appellate Court held that the board did not have authority to further restrict leasing by rule because such rule conflicted with the declaration provisions, which permitted leasing subject to only limitations set forth in the declaration.)

Examples of statutory provisions granting or limiting authority to adopt rules and regulations include, but not limited to:

- Section 12(h) of the Condominium Property Act expressly provides that the board may require owners to obtain certain personal insurance by rule. Note that the *Stobe* case may be limit the board’s ability to adopt such a rule if the declaration or bylaws contain provisions addressing unit owner obligation to maintain insurance.
- Section 18(b)(9) of the Condominium Property Act authorizes the board to adopt rules for conducting elections by direct ballot, and not by proxy.
- Section 18(b)(10) of the Condominium Property Act authorizes the board to adopt rules for conducting elections by secret ballot.
- Section 18.4(h) of the Condominium Property Act gives the board express authority to adopt rules and regulations “covering the details of the operation and use of the property.” However, that section prohibits the board from adopting rules that (a) may

impair First Amendment rights or (b) “prohibit any reasonable accommodation for religious practices.”

- Section 18.4(s) of the Condominium Property Act gives the board authority to adopt rules and regulations authorizing the use of technology (e.g. email) to send notices and communicate with owners.
- Section 18.6 of the Condominium Property Act provides that the board of a condominium or master association cannot adopt rules that would prohibit the display of the American flag or a military flag on “limited common areas and facilities of a unit owner or on the immediately adjacent exterior of a building in which the unit of a unit owner is located.”
- Section 1-20(c) of the Common Interest Community Association Act, in situations when an association goes from allowing leasing to prohibiting leasing, provides that a board cannot adopt a rule prohibiting an owner that is a charitable organization and leasing its unit at the time the leasing prohibition goes into effect from continuing to lease its unit until it chooses to sell its unit.
- Section 1-25(i) of the Common Interest Community Association Act authorizes the board to adopt rules for conducting elections by direct ballot, and not by proxy.
- Section 1-70 of the Common Interest Community Association Act provides that the board cannot adopt rules that would prohibit the display of the American flag or a military flag on “limited common areas and facilities of a unit owner or on the immediately adjacent exterior of a building in which the unit of a unit owner is located.”

## **8. Be enforceable.**

There are two aspects of enforceability; a good rule incorporates both. One, the rule must be adopted properly, i.e. in accordance with required procedures set forth in the governing documents and applicable law.

Examples of statutorily required procedures to properly adopt rules include, but not limited to:

- Section 18.4(h) of the Condominium Property Act requires that a unit owner meeting be held for the purpose of discussing (not approving) proposed rules before the board can adopt them. The notice for that unit owner meeting must give owner not less than 10 and not more than 30 days prior notice of the date, time, place, and purpose of the meeting. That notice must also include the full text of the proposed rules.
- Section 18(b)(9) of the Condominium Property Act sets forth both procedural and substantive requirements that must be followed when adopting to rules permitting elections by direct ballot. Note such rules must also comply with the requirements of Section 18.4(h).

Two, there must be a feasible means to attain compliance. This is more of a practical consideration than a legal requirement. If a board finds it too difficult or burdensome to enforce a rule, resulting in the board simply not enforcing it, then that rule is meaningless. There is no point in having a rule if it is not enforced; instead, those rules should be eliminated. Also, the requirement of the rule must be clear and certain. For example, if a rule uses permissive terms such as “suggested”, “recommended”, “preferred”, etc., then the rule cannot be feasibly enforced. Instead, a good rule affirmatively requires or prohibits something.

#### **IV. How should rules be enforced?**

##### **A. Requirements.**

##### **1. Statutory.**

###### *(a) Condominiums:*

Section 18(a)(9)(A) of the Condominium Property Act: “that every meeting of the board of managers shall be open to any unit owner, except that the board may close any portion of a noticed meeting or meet separately from a noticed meeting to:...(iv) discuss violations of rules and regulations of the association...; that any vote on these matters shall take place at a meeting of the board of managers or portion thereof open to any unit owner”.

Section 18.4(l) of the Condominium Property Act: “...after notice and an opportunity to be heard, to levy reasonable fines for violation of the declaration, bylaws, and rules and regulations of the association.”

###### *(b) Master associations:*

Section 18.5(c)(4) of the Condominium Property Act: “meetings of the board of the master association shall be open to any unit owner in a condominium subject to the authority of the board of the master association, except for the portion of any meeting held:...(C) to discuss violations of rules and regulations of the master association...Any vote on these matters shall be taken at a meeting or portion thereof open to any unit owner of a condominium subject to the authority of the master association.”

Section 18.5(c)(7) of the Condominium Property Act: “the board of the master association or a common interest community association shall have the power, after notice and an opportunity to be heard, to levy and collect reasonable fines from members for violations of the declaration, bylaws, and rules and regulations of the master association or the common interest community association. Nothing contained in this subdivision (7) shall give rise to a statutory lien for unpaid fines.”

###### *(c) Common interest community associations:*

Section 1-40(b)(5) of the Common Interest Community Association Act: “meetings of the board shall be open to any unit owner, except that the board may close any portion of a

noticed meeting or meet separately from a noticed meeting:... (iv) to discuss violations of rules and regulations of the association... Any vote on these matters shall be taken at a meeting or portion thereof open to any member.”

Section 1-30(g) of the Common Interest Community Association Act: “the board shall have the power, after notice and an opportunity to be heard, to levy and collect reasonable fines from members or unit owners for violations of the declaration, bylaws, operating agreement, and rules and regulations of the common interest community association.”

## **2. Governing documents.**

The remedies provisions of some declarations or bylaws may set forth specific requirements that could apply to circumstances involving rules violations.

The notice of violation must be mailed or delivered to the unit owner in conformance with the applicable notice provisions of the declaration or bylaws and the applicable statute. For example, a declaration may provide that all notices required by the declaration or the Act must be sent by certified mail.

If an association is not subject to the Common Interest Community Association Act, then its authority to levy fines would depend on the provisions of its governing documents.

### **B. What is due process and why it is important?**

In legal terms, we are talking about procedural due process (not substantive due process\*). Generally, procedural due process is about establishing minimum requirements for specific procedures that protect a person from mistaken or unjustified deprivation (typically by government) of life, liberty, or property. Due process involves a person’s right to notice and the opportunity to be heard before he or she is deprived of life, liberty, or property. It also includes the right to know what one is accused of, present evidence and argument, cross-examine witnesses, and a decision by an impartial panel/adjudicator based on evidence presented.

However, in more lay terms, due process is about basic fairness. That means that an accused owner is treated fairly and is afforded basic due process rights; specifically, notice of the alleged violation and the opportunity for a hearing on that alleged violation.

Due process benefits both the association and owners. It protects owners from arbitrary and unreasonable board conduct, while protecting boards from claims of acting arbitrarily and unreasonably. Ideally, due process should result in a more objective process for considering and making determinations on alleged rule violations.

\*A discussion on substantive due process is beyond the scope of this presentation. Suffice it to say that substantive due process limits the government’s ability to act (e.g. deprive a person of fundamental rights and liberty interests) without regard to procedural safeguards.

## **C. General guidelines for running a hearing.**

### **1. Who should attend?**

- Chair – The person who will run the hearing in a fair and orderly manner. Typically, this would be the board president, the property manager, or the association’s attorney.
- Fact finder – The person or persons who will hear and consider the evidence presented and either make or recommend a decision. Typically, the fact finder is a all or some of the board members. However, it could be a panel of owners, in whole or part, designated by the board to hear and consider the evidence and make a recommendation to the board. It is the board who must make the final determination.
- Witness – The person or persons who will present evidence.
- Unit owner – Whether the unit owner is the offender or the complaining victim, he or she has a right to attend and participate in the hearing (e.g. present evidence and argument, etc.).
- Offender, if not the unit owner – The person accused of committing the rules violation.
- Attorneys (optional) – The law does not require that attorneys be present at or involved in hearings conducted by associations on rules violations. Although not common, theoretically the declaration or bylaws could require an attorney’s participation. It is within the board’s discretion whether to have the association’s attorney present at or involved in a hearing. A unit owner may want his or her attorney at the hearing. If he or she does, then the association should also have its attorney present.
- Property manager – The property manager may serve as the chair or be a witness or provide general guidance to the board or act in some other capacity as the board desires.

### **2. Presenting evidence.**

In determining whether a violation occurred, upon which the board may levy a fine or take other remedial action, the board should have a credible witness or witnesses present evidence that the alleged violation occurred.

## **D. Do’s and Don’ts.**

- Do strictly follow provisions of any applicable statute and the association’s governing documents in both the adoption and enforcement of rules and regulations.
- Do levy a reasonable fine; the consequence should be commensurate with the offence.
- Do conduct hearings in a professional and evenhanded matter.

- Do act reasonably.
- Don't let your emotions drive or impact the proceedings.
- Don't use inflammatory language or engage in personal attacks.
- Don't levy (charge to an owner's account) any fine before notice and opportunity to be heard is given to the owner.

**V. Ok, but how does this work in the real world?**

**A. Types of disputes.**

**1. Association vs owner**

- If the Association is uniformly enforcing the rules and regulations, remember that it's about a remedy to the violation. It's not about money. It's not about being right. It's about finding an equitable solution, for each of the instances where there is a violation.
- The Association should always be acting "above board" and in everyone's interests.
- The Association should be seen as the enforcer for the community, as a whole; not an us versus them, but rather, finding a solution TOGETHER.

**2. Owner vs owner**

- Many subject matter experts will tell you – this isn't for you to get involved with. SOMETIMES, they're right. Many times, they are not. As a body in support of the community, it's nearly impossible to ignore two unit owners creating havoc with one another.
- Get the attorney involved, if you need to, but pull the parties together, find out what is going on, and try to mediate a solution. It's about facts – not personalities.
- Set parameters for what the Association will and will not accept, in terms of complaints.

**3. Owner vs vendor**

- If the vendor has been hired by the Association, mediating a solution is often the job of the Association.
- Find common ground for a win-win, but if the Association uses vendors that are familiar with community associations, they often are aware of the many ways they can create issues. Hire outside of the industry – this can get sticky.



- BE CLEAR up front, in the specifications and avoid any issue, right away.

**B. Examples/hypotheticals.**

**VI. Conclusion**

**A. Summary.**

- Be reasonable in both adoption and enforcement of rules and regulations.
- Comply with all procedural and substantive requirements when adopting rules.
- Don't forget to provide for basic due process rights.
- Remember what rules are REALLY all about – living in harmony, in close quarters, with different people, and doing what's best for the community. It is NOT about catching people making mistakes.

**B. Questions.**