

HOW TO HANDLE PROBLEMS WITH YOUR HOMEOWNERS ASSOCIATION

Members of homeowners associations who are unhappy with how their association is acting (or not acting) often do not know what they can do. This paper is designed to tell such homeowners about some of their rights¹.

In most cases there is no government agency that can help unhappy owners who are having problems with their homeowners association (HOA). The Attorney General's office regulates only the offer and sale of real estate securities (which includes interests in HOAs). It generally does not become involved in owners' problems with boards of directors after the sponsor is no longer in control of the board. However, this office may be able to help you if the sponsor of the HOA is not keeping the commitments which it made in the offering plan. If this is the case, owners may contact the Attorney General by sending a letter to:

Real Estate Finance Bureau,
New York State Department of Law,
120 Broadway (23rd Floor),
New York, N.Y. 10271.

As you may know, a homeowners association is an organization established to govern a private community. Typically it owns and manages some common property for owners of private houses or condominium units. By buying a lot and/or home, an owner automatically becomes a member of the HOA of which it is a part. Before offering to sell memberships, a sponsor must file an offering plan with the Attorney General if sales of individual homes, lots or condo units are involved, unless it is exempted by law or regulation.

Most HOAs are corporations established under the Not-for-Profit Corporation Law. An HOA is similar to other corporations -- it is governed by a board of directors elected by the members and a set of rules called by-laws. Books and records of financial transactions must be kept, taxes paid, and certain services provided to members. Usually the board has an annual budget prepared to estimate expenses, and then assesses each member a share of the costs.

¹ The Real Estate Finance Bureau has published brochures for condo unit owners and co-op owners, both of which are available on request.

HOAs vary greatly in the services which they provide. The developer establishes the scope of the association initially by setting out the services and expenses in the association's budget. The declaration provides the means by which the association can enforce the members' obligations and the by-laws set forth the procedures for running the association. Generally, the developer controls the association at first and relinquishes control to the individual owners some years later.

The primary purpose of the association is to protect and preserve the value of the privately and commonly used property. In furtherance of that goal there may be restrictions concerning pets; requirements as to fence height; or limitations on the number of cars allowed in the driveways. These rules often conflict with the desires of an individual owner but exist for the general good of the entire community. In addition, the association may have the responsibility to repair and maintain portions of the community, such as roads, roofs, and recreation facilities.

The individual owner in a homeowners association has the opportunity to become involved and participate in the on-going affairs of the community, and the responsibility to assure that the association's actions conform to the by-laws and declaration.

Typical Problems

Perhaps your HOA seems dormant -- you never receive notice of meetings, nor are you given financial statements which explain how the assessments you pay are being spent. Perhaps repairs are neglected and snow not removed as quickly as you expect. Or a nuisance created by your neighbor is allowed to continue. Maybe one owner is allowed to build a deck and another is refused permission to do the same thing.

These problems may arise while the association is still under the developer's control. Be aware that the HOA is an independent body whose functions must not be merged with the corporate functions of the developer. The developer creates and controls the association initially, but has a duty to protect the investment of the members and to respond to the needs of the association with a sense of fairness and good faith. From the time of the first closing with a member, the developer must abide by the terms of the offering plan, the by-laws of the association and the declaration in the same way that a later independent board must.

Get the Facts

The way to begin dealing with your problems with the board is to understand what rights you have. There are two kinds of research to do.

A. Check the documents for your HOA -- the declaration, certificate of incorporation, and by-laws. Copies of these document should be available from the board of directors or developer; a copy of the declaration and by-laws is in your offering plan.

These documents should include information on:

- . what the HOA is responsible for
- . how the declaration can be amended (including percentage required)
- . how members of the board of directors are elected
- . how members of the board can be removed
- . the powers and duties of the board of directors
- . how annual owner meetings are called
- . how special meetings are called
- . what remedies exist when a homeowner defaults on his or her obligations including maintenance charges.

B. Look at the Not-for-Profit Corporation Law, the New York State law which governs the establishment of most homeowners associations. The decisions made by courts in cases involving the law are the case law which interprets the statute.

The Not-for-Profit Corporation Law (NPCL) is published as volume 37 of McKinney's Consolidated Laws of New York Annotated ("McKinney's") which can be found in law libraries, many lawyers' offices, and in certain public libraries. Included in volume 37 are brief descriptions of case decisions.

Important provisions of the NPCL and the sections in which they are found, include the following:

An HOA may have different classes of members. NPCL §601.

By-laws may be adopted, amended or repealed by the members with the appropriate vote, as provided in the by-laws. NPCL §602.

A meeting of the members is to be held annually. NPCL §603.

Members may call special meetings, as authorized in the certificate of incorporation or by-laws, or if at least 10 percent of the members wish to do so. NPCL §603.

Directors may be elected at a special meeting. NPCL §604.

Proxies (authorizing another member to vote for you) are permitted subject to provision in the by laws or certificate of incorporation. NPCL §609.

Members may request that elections be supervised by an inspector. NPCL §610.

The right to vote may be limited by the certificate of incorporation or by-laws. (For example, there may be no right to vote until the developer gives up control.) NPCL §612.

Action may be taken on written consent of members without a meeting. NPCL §614.

Members may demand to see the corporate books and records of accounts, minutes of meetings, and a list of members. NPCL §621.

A derivative action may be brought by five percent or more of the members of the corporation. NPCL §623.

Directors may be removed with or without cause, as determined by the certificate of incorporation and by-laws. NPCL §706.

Unless restricted by the certificate of incorporation or by-laws the board of directors may take action without holding a meeting if all members of the board consent in writing to the action. NPCL §708.

Certain actions by a director or officer constitute a conflict of interest, and may be void or voidable if no disclosure was made. NPCL §715.

Directors and officers must act in good faith and with reasonable diligence, care and skill. NPCL §717.

Directors and officers may be sued for misconduct. NPCL §720.

Resolving the Problem: First Approach

If the board of directors is not complying with its own certificate of incorporation, declaration or by-laws, you should point this out, in a tactful way, expressing the expectation that the matter will be corrected. Sometimes this is all that is needed to solve a problem. If a simple oral request to an officer of the board fails, you can write a letter. It should be factual, brief and not hostile. Keep copies of any letters that you send, and notes of telephone conversations (the date, time, who called whom, and the gist of the discussion) in case the matter is not quickly resolved.

An attempt to influence the board is always more persuasive if it is presented by a significant number of members. If your problem is one that others are affected by, it is worth organizing the other members. If you do, and the attempt to change the situation is not successful, the organized group can always seek to elect new directors at the next annual meeting.

Retaining a Lawyer

If your efforts to resolve your problems with the board fail, you may want to retain a private lawyer. The Attorney General's office cannot recommend private lawyers. However, a few points may be helpful.

- . It is a good idea to select someone with experience in handling HOA problems. You could begin looking for an attorney by talking with members in your or other HOAs and with attorneys in other specialty areas. If this fails, you may wish to contact a local Bar Association for referrals.
- . Some lawyers will not charge for a single initial consultation or will charge only a minimal fee.
- . Most lawyers will attempt to resolve any matter through negotiation before considering litigation, as litigation is costly and usually lengthy. Litigating against the board of an HOA, people with whom one lives, can also be very unpleasant.

In Conclusion

If serious problems arise, which the board is not addressing, such as a bank's threatening to foreclose on a mortgage on the Association's common property or a developer's failing to pay common charges on unsold houses or lots, it is important to act swiftly. Often such problems can be resolved, relatively simply, if members organize and act right away.

Remember that members of HOA boards are usually other owners who are serving without pay. They generally want to resolve problems and keep peace in the community.

Good luck!

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Attorney General of the
State of New York

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Office of the Attorney General
Real Estate Finance Section
120 Broadway, 23rd floor
New York, N.Y. 10271
(212) 416-8121**

<http://www.ag.ny.gov/realestate/realestate.html>