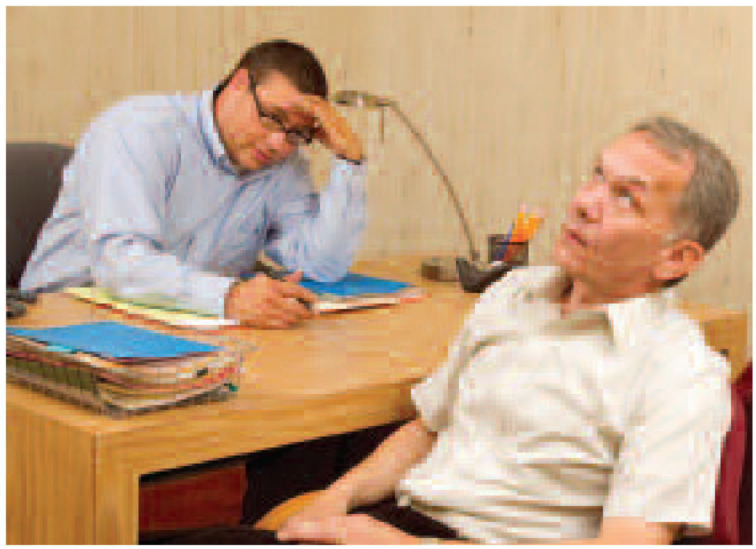
Enforcement:

The Path to Success

By Robert Mullin, B.A. (Hons.), LL.B.
SmithValeriote Law Firm LLP



Overview

Living in a residential condominium represents a compromise of choice. In exchange for relinquishing a measure of control, unit owners are freed of the many day-to-day chores, or outright headaches, of home ownership. This compromise only works, however, if everyone agrees to live by the rules. Although the vast majority of unit owners are nothing less than ideal 'condominium citizens', some condominiums are also home to the 'condo-commando', for whom the rules are merely optional. For the unbending unit owner unwilling to lower his stereo's volume or remove his biting dog, enforcement measures await. As it should be, for many volunteer directors bringing enforcement proceedings against a neighbour is an unsavoury job. Taking your neighbour to task, no matter how commendable, leaves little comfort during the next mutual elevator ride. Enforcement proceedings, no matter how black and white they may appear to the board, the property manager or condominium lawyer, come with no guarantee other than costs. Nonetheless, adopting a uniform enforcement strategy, and consistently 'controlling the controllables', may ensure a corporation's consistent path to success.

What is Enforcement?

In this article, enforcement is a generalized term, implying that the condominium corporation has exhausted all attempts at voluntary compliance. Despite the phone calls, letters and outright pleas, the unit owner demands to park her car in visitor parking every night, notwithstanding the outright prohibition in the condominium's declaration. The condominium must finally turn to the enforcement provisions of the *Condominium Act, 1998*, S.O. 1998, c.19*;* ("the Act"), invariably meaning referring the matter to a mediation/arbitration process, or directly to the courts via a compliance order application. Although different, they both represent the resolution of a dispute by an independent decision maker who has the legal authority to grant a binding decision. Every action and decision made by a board should be made with this final process in mind and the question, 'will this step ensure our corporation's success should a hearing be necessary?' Here, perhaps, are a few tips to ensure that the answer is a consistent yes.

Hypothetical

The remainder of this article will utilize the following hypothetical situation. The condominium corporation is a twenty-year-old high rise apartment styled building. With sixteen units per floor, it is considered high density living. Since creation, its declaration has maintained a blanket 'no dogs' clause. The condominium corporation has always had a property manager, and through the efforts of both the property manager and board, has historically been able to resolve any breaches with little more than a phone call. Recently,

a new unit owner was seen walking a dog through the common element foyer, in clear view of the prominently displayed 'no dogs please' sign. What is a board to do?

Know Thyself

First, knowledge is a powerful tool. As a result, every board member and property manager, despite their busy and competing schedules, should be well versed in exactly what the condominium's declaration, by-laws and rules demand, or prohibit. Often subtleties will exist in a declaration. Although it may be 'commonly understood' that no dogs are allowed, has anyone read the declaration recently? A careful reading of the declaration may uncover surprises contrary to commonly held assumptions. Are visiting dogs permitted? Was there a phase-in period to this prohibition? Are there weight exemptions, in effect permitting small dogs? Find out now. Deferring to either a generalized understanding of the declaration, by-laws or rules, or to one member of the board who has taken the time to familiarize himself with these documents is not enough.

That said, it is appreciated that these documents, when piled up, may amount to the size of a small municipal phone book. To assist, have the board strike a committee to create a 'document précis' outlining in chart form the operative sections of the declaration, by-laws and rules. Although there is no substitute for a careful and complete reading of these documents, also having a short thumbnail sketch of these documents is powerful.

Be Consistent & Be Diligent

Second, with a firm understanding of what the declaration, by-laws and rules demand, be consistent in applying these documents across the condominium high-rise. The board in this hypothetical situation must ask itself, have we enforced this provision in the past, and with an even hand? To this hypothetical scenario the answer is yes, but for many boards, the answer might be a maybe. If the Declaration has an absolute 'no dogs' provision, and the board has historically cast a blind eye to small dogs, then the board may find itself unable to enforce the prohibition at all. An arbitrator or judge will ask these questions, and if evidence is found that 'cute dogs' were ignored by the board, then the prohibition may be in serious jeopardy. With consistency also comes diligence. Instruct your property manager to conduct scheduled walk-abouts, accompanied by a board member. If during a walk-about a barking dog is heard from behind a unit's door, it is not enough to ignore it. Only replying to a complaint from a unit owner is not enough. Be aware, and if a potential breach of a condominium provision has occurred, and follow-up.

Continued on page 22

Avoid the Confrontation

So, the board in this case knows its declaration cold, and it was during a walk-about that both the property manager and treasurer witnessed Ms. Jones walk into the foyer with her small, albeit cute, puppy. Always remember that the condominium represents someone's home, surrounded by their neighbours. Confrontation never works. In the public setting of a condominium's foyer, nothing more than a polite hello should be exchanged.

Document, Document, Document

The property manager should then immediately document the event in his or her log book. A written entry should be made, which will be invaluable evidence later. It does not have to be exhaustive, merely little more than, "December 7th, 2007 – Ms. Jones accompanied by dog, common element foyer, seen during walk-about with Ms. Jane Doe (Treasurer) Signed: Ms. Smith – Property Manager". Although it may not be applicable in this hypothetical scenario, 'preserving the evidence' at this time is also key. For such things as an unapproved satellite dish, the taking of immediate photographs removes the argument at a later hearing of "I have no idea what you are talking about." The opening of an active file is a wise consideration.

The Board

The next step should be an immediate reporting to the board of directors. A meeting should be swiftly called, to recount the event, and to seek a motion to appoint the property manager and/or board member with direct follow-up responsibility. Again, the discussion and resolution should be clearly added to the minutes, which will also be useful evidence. A board that waits for its duly scheduled monthly or quarterly meeting may lose valuable initiative. Delay can be fatal to an enforcement proceeding, and if six months go by before the board finally musters a letter, an arbitrator or judge may be very skeptical to demand enforcement.

The board should also be very clear with its directors and officers. Only the assigned property manager and/or director shall have direct follow-up responsibilities. One perennial defence heard in almost every enforcement hearing is, "I was in the workout room when I chatted with Mr. Johnson, a director. He said I could keep my dog." Never let a board member fall into this perpetual trap. Every director or officer should understand, beyond debate, that only the property manager and/or the assigned director may deal with the matter directly. All other board members must avoid the conversation, even if the unit owner eventually knocks on his front door.

The First Phone Call & Letter

The first contact with the unit owner is preferable by phone call. Again, it avoids the potential for a confrontation. The property manager is the ideal choice, because unlike the board, he or she goes home at night. The phone call should be pleasant, but to the point. “Unfortunately Ms. Jones, we saw you three days ago, specifically December 7th, 2007, with a dog. M.T.C.C. No. 1234 has a no dogs provision in its declaration. In fact it is Article V, section 4. Do you need a copy?” The conversation should be pleasant and short. Another recurrent defence is that, ‘the property manager called me and started screaming obscenities.’ An arbitrator or judge does not like heavy handed property managers or directors. So keep the conversation short, polite and to the point.

The entire conversation should then be reduced to another log sheet, articulating in abbreviated detail, what was discussed, and what Ms. Jones’ responses were. An immediate follow-up letter should then be written to Ms. Jones on the same date, signed by the property manager, in net effect stating, “Thank you for our conversation of today’s date. On December 7th, 2007, you were witnessed bringing your dog into the condominium corporation. This is a breach of the declaration, and we ask that you comply with this provision. Please find attached a copy of the declaration for your records, and for your convenience we have highlighted this section. In addition, (for satellite dishes, etc.) we have included recent photographs taken depicting this breach.” The letter’s tone should be firm and polite. Neither an arbitrator nor a judge expects any letter from the condominium to be aggressive. The tone should be informative, and seek immediate compliance with the declaration. The letter should also ask for a written response within fifteen (15) to thirty (30) days.

Another perpetual defence is that the unit owner never received the letter, and doesn’t remember the phone call. Registered mail destroys this argument, at nominal cost, so always consider it.

Pull the Records

Another routine defence is that the unit owner never knew of the ‘no dogs’ prohibition. On its own, this argument rarely works, as both arbitrators and courts routinely recognize that you must take notice of declarations and by-laws registered on title. If the unit owner elects not to read them, that is at their peril, not at the condominium’s. That said, if the unit owner is a new purchaser, check the files to see if a Form 13 status certificate was requested prior to his or her purchase. If one was, forward it to the active file. Should the matter go to a hearing, this document will likely shatter this argument in outright fashion.

The Lawyer

Up to this point, the active participation of the condominium’s lawyer may not be warranted, but he or she should be copied on all of the correspondence, and kept in the loop. Likely only the briefest of phone calls from the property manager may be necessary. All too often though, the lawyer only hears of the matter when the final impasse has been delivered to his or her desk. By keeping the condominium’s lawyer informed at the outset, he or she may save unnecessary upset, time and energy, by helping the board to avoid the many pitfalls that await enforcement.

The Reply & Second Letter

Carefully diarize the response deadline. Ideally, the unit owner will remove the dog and send a confirming letter. Unfortunately in this case, the unit owner provides no reply and is seen routinely walking her dog through the foyer. The registered letter may even be returned with the notation, “Refused by Addressee”. The board should then instruct a second letter, again asking for a reply. This letter should raise the prospect that this matter will be referred to the condominium’s lawyer if not resolved within seven (7) days.

Enforcement Proceedings

If after the second letter’s timeline has elapsed, neither compliance nor a response has been provided, then the board should instruct the condominium’s solicitor to draft a letter. If the lawyer can resolve the matter, he or she would be wise to ask for a signed undertaking from the unit owner. In effect, it will be a document signed by the unit owner agreeing that there was a dog in her unit, but it has since been removed. Should the dog turn up later, the condominium has a very strong case to ask an arbitrator or judge for enforcement.

If the unit owner also ignores the lawyer’s letter, the board will have to consider bringing an enforcement proceeding against the unit owner. This decision should be made in concert with legal advice. In this scenario there is very little grey area. Many condominium corporations are appropriately

concerned about the cost. Either a mediation/arbitration process or compliance order proceeding can be costly, and the condominium corporation pays for these, upfront. One tool to moderate a lawyer's bill is to ask for a flat fee service.

With the lawyer's letter sent to no avail, and the lawyer instructed to proceed with enforcement, will come the million dollar question, to proceed with either mediation/arbitration or straight to court? Due to the vagaries of the Act, no two lawyers agree on when either option should be taken. The case law indicates that the prudent course is to proceed with mediation/arbitration. The effect, however, will be the same. If mediation fails, an arbitrator will conduct a hearing and render a decision. If a compliance order is sought, a judge will review the evidence and provide a ruling. Despite the brilliance of the lawyer, the attention of the arbitrator or judge will turn to the evidence. They will pore over the declaration, the letters, the photographs, the log book, the minutes, the status certificate, and the registered mail receipts. A clear and consistent chain of evidence is very difficult for the opposing side to overcome.

In addition, should the condominium corporation prevail, both the arbitrator or judge have the discretion to award costs, those monies spent to bring the matter before them. A careful, balanced and thorough process taken by the board will bode very well in their favour for costs. A costs order is then recoverable like common expenses, ultimately the subject of a lien.

Conclusion

For many, condominium living is an enriching and rewarding lifestyle choice. For the few, however, their choices come at the expense of others. Ensuring compliance with the declaration, by-laws and rules is as vital for a board as is collecting the monthly common element fees. Although the Act's enforcement procedures ultimately grant such duties to an independent party, through a careful and consistent series of steps, every board can ensure that they put their best foot forward towards their own path to success.

Robert Mullin, B.A. (Hons.), LL.B., is a lawyer at SmithValeriote Law Firm LLP in Guelph. Robert practices extensively in the area of condominium law and development, currently completing his Masters of Law at Osgoode Hall Law School. He acts in both the creation and management of condominiums. As a result, throughout Ontario, Robert regularly works with developers, property management firms and condominium boards to find creative, practical and cost-effective solutions for the unique challenges that condominiums face. Robert currently serves as a director for CCI's Golden Horseshoe Chapter. He can be reached at rmullin@smithvaleriote.com.