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Is This Rule Fair? Making Architectural Controls Reasonable

An HOAleader.com reader asks, "We live in the Bay Area in a 17-unit condo building. We have exclusive use of a patio area off our unit. We recently purchased a small shed, which you can't see from the street at all. The only way you could see this thing is if you live in the two units above us. It's not built in at all; it's just a Rubbermaid closet that looks like a little house, essentially.

"The bylaws in our CC&Rs state, 'Nothing shall be stored, grown or displayed in the common area, including terraces, that is not approved in advance by the Architectural Control Committee. No articles other than porch and patio furniture and landscaping shall be allowed on terraces, porches and front steps of the building.'

"This shed is not in the common area at all and can't even be seen from a common area. Does my management company have the right to ask me to remove it?"

Here our experts answer that question and offer tips to boards on determining whether their architectural controls are reasonable.

Reader: Fold Like a Cheap Suit

In this case, sadly, our reader has no leg to stand on—the shed is a no-go.

"I firmly believe she's dead wrong on this," explains Nathaniel Abbate Jr., a partner at Makower Abbate & Associates PLLC in Farmington Hills, Mich., who represents associations. "In fact, I'm staking my own client's money on it because I have a case in a Michigan court of appeals on this very issue. A trial court judge said a shed could stay because the only person who could see it was a neighbor who hasn't complained.

"But it's a bedrock principle of community association law that if a restriction is unambiguous, it has to be enforced as written," explains Abbate. "The reader's bylaws say you can't have sheds. If you let somebody put up a Rubbermaid shed, the next person down will do something else that violates the governing documents, as happened in another one of my cases. In that situation, the owners set a rooftop on a collection of stacked bricks without any mortar and called it a shed. That obviously presented problems because it could fall and kill somebody.

"So the issue isn't just about whether neighbors are complaining," adds Abbate. "If the only people who can see it like it, that's all well and good. But if it's going to be used by other owners to argue the HOA has waived its right to enforce a rule because the HOA failed to stop this activity, it becomes problematic. The question then becomes whether the deviations permitted have so changed the nature and character of the association that to enforce this rule would now be unfair. I've prevailed in cases where that's an issue, but there's always that danger the association will lose that argument. There have been cases where associations have let a little too much go and then been barred from saying things like, 'You can't have a shed.'"

It's Not Just a Rule

There's an even greater reason for the HOA to enforce this provision, says Jed Frankel, a partner at Eisinger, Brown, Lewis, Frankel & Chaiet PA in Hollywood, Fla., who advises community associations. "There's one thing I picked up on that makes it even that much more compelling," he explains. "The restriction's in the bylaws, not the rules and regulations. They bylaws are higher in the hierarchy than a simple rule or regulation.

"When associations enact rules, there must be a reasonable basis for them," explains Frankel. "So the question of whether the shed can be seen might become important in a context like this if it were a rule. HOAs shouldn't create arbitrary situations where it ends up that board members making the rules simply like something and don't like other things. The reader's claim is, 'No harm, no foul. But even if nobody sees this, it's not just a rule; it's in your bylaws. That's even more reason that particular provision should be enforced."

And another thing, says Abbate, most associations also require owners to submit a request before making changes, a provision the reader also violated. "It's not just that you can't see this shed," says Abbate. "In most associations, before you change the exterior of your unit, you have to submit a request. The reader seems to be arguing that the fact that others can't see the shed means she should be able to get away from it. The reader might have been thinking, 'If I don't ask for permission, they're never going to know about it.' That's a risk owners run.

"That's the situation in the shed case I have," adds Abbate. "The judge said, 'Association, you didn't bring an action soon enough.' The association's response is that it didn't know about the violation because it couldn't see the shed. Board members aren't typically walking around with clipboards, and associations are usually reactive in these situations.

"I believe if restrictions say you have to ask for permission, it's wrong to go with the common saw that you should ask for forgiveness, not permission," says Abbate. "If you haven't asked for permission, you should be dead in the water right away.

"However, if you as a board think you would have ultimately approved the request, you should give owners the opportunity to submit a belated application after the fact," Abbate notes. "Then you can require modifications you could have reasonably included at the time. It's commonsense. They're your neighbors. You don't want to unduly punish them because they didn't say, 'Mother may I?'"

The Lesson of the Unseen Shed

As Frankel says, rules must be reasonable. So if this were a rule, rather than a bylaw, would the reader have a better case since the shed can't be seen?

Not necessarily, as long as the board's rationale for banning it is reasonable. "The association may say in this situation that it's not just an issue of seeing the shed," says Frankel. "This type of structure may interfere with water runoff and drainage. Or the plastic it's made of might attract a certain kind of bug. A similar example is not allowing dogs but owners arguing it's OK if they have quiet, litterbox-trained dogs because nobody sees or hears them. No. The whole point of these provisions is that the association doesn't want sheds or dogs. If this association wanted to prohibit sheds only if they can't be seen from a certain point, that should be the rule."

The key is making sure you don't abuse the discretion you're granted just because you can. "Most bylaws are usually pretty generous in terms of the discretion they allow to the board," says Abbate. "Many say the board 'in its sole discretion' passes on the application of rules. And we don't have judges sitting there as a super board of appeals substituting their judgment for the judgment of the board of the directors."

