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## HOA Board: "We Don't Follow Our Own Rules. Sue Us!"

An [HOAleader.com](#) reader has a bone to pick with one of our experts, [Nancy Polomis](#).

In [HOA Boards' Biggest Mistakes: Have You Made These Nine Blunders?](#), Polomis said it's a mistake for a board to knowingly violate its own rules.

"One of the biggest problems I see is boards not following their own governing documents on really simple stuff," says the partner at Hellmuth & Johnson PLLC in Edina, Minn., who advises associations. "There are some associations where the bylaws say the meeting has to be on the third Tuesday in November, and for whatever reason, they just say, 'We don't really want to do it then. We've never done it that way before.' I really don't like to hear that. I say, 'You're going to do it now because that's what your bylaws require. 'Inevitably someone who's a stickler for procedure will call the board out on that."

Our reader agrees it's a good idea for an HOA board to follow its own rules. But he adds, "My objection is that for many rule violations, there is unlikely to ever be any adverse outcome even if a member ever challenged the board. For example, our annual meeting is required to be in October. We hold it at the beginning for the next year so that by then we can address our budget, know how we fared financially (so informing members before our election), and maximize attendance by allowing our snow-birds to attend. So what if we broke the meeting date rule? If a member ever complained and expended money to go to court, would a judge really admonish a board when the election was otherwise held according to the rules and there were good reasons for the delay? I doubt it.

"If the board violated some material rule that disenfranchised members, e.g., not holding the election at all, I agree the result would be otherwise.... It's not enough to say you should follow the rules 'just because,' when there's no real penalty for bending them a bit for a better result. (Yes, we could try to amend the bylaws, which would be nice except we can't get two-thirds vote for anything, no matter how hard we tried.)" ([Read the original discussion forum post and responses.](#))

Here, Polomis and other HOA experts respond on our reader's "no harm, no foul" argument when it comes to boards and their own rules.

### Polomis Agrees But Disagrees

Polomis feels our reader's pain. "I read his comments and was chuckling at some points," she says. "I agree that it's frustrating that statutes or documents impose all these mandates with no stated consequence for not following them. The Minnesota Common Interest Ownership Act has many, many mandates for what the builders and the association must do, but at the end of the day, there are very few, 'This is what happens if you don't do them' provisions. That leaves the aggrieved party nothing but to sue."

That's also the case in Florida. "There are certain things in Florida that there are no penalties for," says Dennis J. Eisinger, a partner at Eisinger, Brown, Lewis & Frankel PA in Hollywood, Fla., who represents more than 500 condo and HOA associations. "A good example may be failing to hold an election when you're supposed to. Under the Florida HOA statute, there's no remedy if you violate it. In the condo statute, there's no remedy per se.

However, if the board doesn't do what it's supposed to do, it's subject to a fine. But that probably wouldn't happen. So the reader is correct that the penalties are nil."

### But Owners Like Boards to Follow Rules

That said, Polomis has seen owners get bent out of shape for seemingly minor board deviations from governing documents. "I can say from personal experience that I've seen people in associations I represent retain counsel because the HOA wasn't meeting on the date set forth in the bylaws," she explains. "Did the owner sue? No, but the association incurred attorneys' fees to address those issues."

The board also took a hit to its credibility. "One overarching concern is that if the board can't hold the meeting on the day it's supposed to be held, what else is the board doing wrong?" explains Polomis. "So trust becomes an issue. The trust level goes down, and the association ends up being on the defensive. The board ends up having to prove that not having its meeting on that day is an anomaly; it's doing everything else right."

"So I'd respectfully disagree that there's no penalty for bending the rules for a more convenient result," says Polomis. "It's more convenient for whom? Those kinds of questions become problematic. A member may not take the step to go to court, but there's a lot outside of court that has real cost to the association."

### **Can you still enforce rules if you're not following them?**

Another concern is that your board may have a harder time enforcing rules against owners if it's not itself following provisions in the governing documents.

"This one's kind of tough," explains James R. McCormick Jr., a partner at Peters & Freedman LLP in Encinitas, Calif., who represents associations. "Boards are supposed to be following the rules because they're enforcing the rules. So owners could make the argument that you don't have the authority to enforce the rules against them."

McCormick says the success of that argument is an open issue in California. "In California, the 1977 case of *Beehan v Lido Isle* stands for the proposition that the board isn't obligated to go to court on every violation," he explains. "I guess you could liken the situation here, where the board says, 'We can exercise our discretion to not go after home owners, so we're exercising the same discretion by not going to go after ourselves.'" Would that argument win? Hard to say.

Eisinger says that's also a possible argument against Florida boards. "There are rules that have penalties for home owners who don't follow them," says Eisinger. "An example is having a dog. If the association doesn't enforce its pet requirements, it's subject to a waiver or selective enforcement argument in the future. There's no black and white answer on this question other than the association has to be careful not to create a waiver argument."

### **Can't Change Your Documents? Maybe That Tells You Something**

One more point. McCormick takes issue with the reader's comment that the board can't get a change approved. "The technical answer to this problem is to modify the bylaws," he says. "If you're not enforcing a rule or a governing document provision, work to change the provision. That way, if you're ever sued, you could argue, 'We've made a valiant effort in trying to resolve this issue; we tried to get the votes and couldn't because of apathy.' You're in a better position then. On the other hand, if you can't change the provision, maybe you should be following it because it indicates the owners want it to be followed."

Does McCormick ever tell a board it shouldn't worry about violating its own rules? "Not on the record," he says. "I can't. I'll say, 'I'm not going to advise you to violate your documents. That's malpractice on my part. But the practical effect of doing it is X, Y, and Z and if you understand the risks and want to continue, that's your call.'"

Which brings up another caveat. "The problem with approaching your counsel on this issue is that board members can rely on experts' advice to avoid personal liability for their actions," adds

McCormick. "But if the board ignores the expert's advice, owners may have a potential argument for holding the owner-board member personally responsible for his action. If there are no damages, it is what it is. The only potential damage may be attorneys' fees."