

## **Legal issues associated with serving as a professional consultant to a planned community ARB.**

This session follows a detailed review of sample planned community Covenants and Architectural Guidelines. Please consult your applicable community documents which will likely be different to some degree.

### **Introduction:**

Legal challenges to the decisions by an ARB come typically from owners or builders who perceive an unfair treatment. They are successful in litigation when it can be shown that the ARB has acted irregularly. That being where the ARB has not been consistent in its interpretation of the Guidelines, or when portions of the Guidelines have been regularly ignored.

Some builders and owners are quick to state that they are considering getting a lawyer when their designs have been turned down. An effective response is to discuss the specific issue with them, advising that you must enforce the Guidelines as written, and even if not written, in accordance with the authority of the committee to make decisions. Ensure they understand how the committee's decision specifically relates to their situation. Once you are both in agreement in understanding their grievance and you both have the same understanding of the position of the ARB, if they are still insistent on contacting an attorney, recommend that they do so. It often helps for an attorney to explain the rights of the ARB to a disgruntled owner or builder.

A vast majority of problems are of course resolved without threats of legal action, or any party going to an attorney. But as a preventive measure, ensure you enforce all of the Guidelines consistently, and keep good records. Lastly, ensure your personal liability is minimized by constructing a contract with the Home Owners Association where the maximum protection is afforded you, the agent for the HOA's ARB.

Most difficulties come from the owner or builder who has not read their community documents, or has read them, filtered the information in some manner and drawn erroneous conclusions. So the architect's clear understanding of the Covenants, Guidelines and other related documents is paramount.

### **I. Establishing the architectural committee:**

1. The authority of the architectural committee, whether it be called an architectural control committee, ACC; an architectural review committee, ARC: or an architectural review board, ARB (Called ARB or committee hereinafter), is virtually the same in most communities.

2. The authority stems from the Covenants, Conditions and Restrictions or CCR's established by the developer for the community. It is therefore important for the architect to fully understand the authority given the committee by the CCR's.
3. The committee in most all cases is appointed by the Board of Directors. In some communities the Board will appoint itself as the committee. This is often the case in very small communities. In some cases the committee will have one member who is a Board member who may also serve as chair of the committee. And in some communities, the committee is made up of non-Board members solely, and who may be a consultant.
4. The CCR's often include very strong language with respect to the authority of the committee. It gives the committee the right to promulgate guidelines which may be modified from time to time, and may even be modified to have different requirements in different areas of a community.
5. The CCR's will also state the remedy for noncompliance. In some cases it gives the committee the right to enter the property and make corrections or remove noncompliant items.
6. The CCR's typically permit the committee to enter a property at any time while work it has approved is being performed.

## **II. The role of the architect as consultant:**

1. The architect best serves as a non-voting member of the architectural committee. This ensures that all decisions of the committee are made by those appointed by the Board of directors to serve on the committee.
2. The architect typically provides an evaluation of each proposal for an improvement on the HOA property. This includes even those items which are planned by the community itself for its own properties.
3. The evaluation by the architect is presented to the committee, whose members should also at the same time be exchanging comments concerning the proposed improvement.
4. The architect will compile in a letter a list of items the owner needs to address in order to have their improvement approved for construction.
5. The architect should in all cases obtain the written approval of the Chair of the architectural committee prior to issuing any letter of determination. This approval is typically communicated with an email and retained by the architect for record purposes.
6. The committee should make its decision based on a majority vote. However, the architect should rely on the Chair of the committee to poll the committee and then to advise the architect of its decision. The architect is not required to back check the Chair.

7. If placed on the architect's stationery, it should be stated that the determination or decision is being sent on behalf of the committee or at the direction of the Board. This serves to advise the recipient that you are acting solely on behalf of your client and not the person who made the decision.

8. The architect serving in this capacity is not responsible for the compliance of the structure with respect to the building code. Any comment to an owner or builder with regard to these issues should be stated as being unofficial. It is proper and ethical to bring a safety issue to the attention of the contractor. But as in the regular practice of architecture, intervening in any other way may raise liability issues for yourself and the community you represent.

### **III. The greatest difficulties in serving as the architect on behalf of the planned community:**

1. The architect must understand that the home is being designed by someone other than themselves. It is often tempting to want to sketch a solution to assist the owner's architect or designer in completing the home or making it acceptable for the community. The proven strategy is to provide a written comment stating a possible direction that the design could take in order to make it acceptable. This leaves the final solution up to the owner and their architect or designer.

2. The architect must also have the ability to detach from the decisions by the committee that are perhaps in contrast to their own beliefs. A simple case in point is a community who did not believe the guidelines should strongly state that no ventless fireplaces were permitted in any home within the community. Even though life safety is the primary charge of an architect, the guidelines were changed to "strongly recommend" that an owner not provide a ventless fireplace, but not require that it not be permitted. Several paragraphs of explanation were added to the guidelines, and this has proven effective in educating homeowners on the matter.

3. It is sometimes the case where the committee has rejected some aspect of a design and the owners or their designers will disagree with the committee's decision. The architect must simply detach from this as being a personal matter, and simply advise the committee of the comments and recommend a course of action. This may be to simply reiterate the decision by the committee, but more often than not a further explanation will help the owner understand that the committee decision was not arbitrary or capricious. And respond on behalf of the committee.

### **IV. Looking at the rights of the local authority over the Planned community:**

1. Typically, the community was developed with an agreement with the local authorities as to what would be enforced as far as setbacks, road width, common areas and the like, and this agreement is most often recorded in the form of a plat and deed. This governs the community over most changes by the authority that is more restrictive.

2. When the county or municipality creates rules less restrictive, the rules of the community legally still remain. Case in point: Community RP was originally established under County rules with 15 foot side yard setback. This was codified on the plat and the Covenants. It was later annexed by a City which permits 12 foot side yard setbacks. The ARB now enforces 12 feet, but does so with language that states responsibility lies with each owner. However, legally it should be enforcing the 15 foot setback until the Covenants are changed to allow 12 foot side yard setbacks.
3. The local authority regulates all issues with the physical building and the site conditions during construction, such as erosion control.

**V. Making changes to the guidelines:**

1. The CCR's permit the committee to make modifications to the architectural guidelines. And as communities mature, it will be necessary to make adjustments to many of the standard provisions of the initial guidelines.
2. Changes to the guidelines only affect new work. This includes modifications to existing homes. For example, a change in the landscaping of the home built several years prior, would have to comply with the then current guidelines.
3. Guideline changes may be fairly extensive. The changes might also vary depending on location within the community that a home might be built. For example, homes backing onto a wetland or preserve might have less restrictions on the rear elevations as opposed to homes along a lake in the same community.
4. Care should be taken to not make the changes overly burdensome, or which abandon too many of the original requirements for the community, and in all cases ensure the changes are not in conflict with the CCR's.
5. The most important requirement in enforcing the guidelines is to be consistent in enforcing the "current" Guidelines. Liability is created when you do not enforce a provision for one owner and then attempt to enforce it on another. However, if each was completed under a different set of Guidelines, the ARB can still be shown to be consistent.
6. If an item was previously not enforced or was approved contrary to the Guidelines, the ARB has no rights to force the owner to become compliant at a later date.
7. While the developer still has control of the CCRs, it may make changes without approval of the persons who are already owners. They are often sensitive to the issues of litigation when making a change,

## **VI. Be aware of problematic statements in the architectural guidelines, or even in the CCR's:**

1. While the CCR's are considered absolute unless changed in accordance with rules for making the change, often there is language that opens the committee as well as the HOA to possible liability. For example, in one set of CCR's it permits the committee to enter the property and remove noncompliant items at the expense of the owner. While this may be proper legally, it does not represent the best means to build a community and could still result in a lawsuit claiming collateral damage, or some other such complaint.
2. In one set of CCR's, it was noted that the committee which in this case requires an architect to design the home, an architect to serve on the committee, follows this with the statement that after the construction is complete the committee may require the removal of an approved feature that it perceives to be aesthetically displeasing. While no one in this community has challenged this language, possibly because no one actually spent time reading their CCR's, it would be hard to envision the enforcement of this provision not ending up in litigation.

## **VII. The architect and the contract for services:**

While there is no absolute assurance that the consulting architect will not end up in litigation at one time or another, efforts should be made to limit liability as much as possible.

1. In the vast majority of cases, the architect appears on behalf of the Association. This is typically done on an hourly basis.
2. In cases where there is even the slightest indication that the architect is going to be named as a party to the litigation, the architect's attorney should be consulted. The cost of the attorney should be reimbursed to the architect by the Association and stated as such in the architect's contract with the Association.
3. Other considerations in the architect's contract with the Association should include limitation of liability, indemnification, a waiver holding the architect harmless for decisions it renders on behalf of the committee and a certificate of merit causing the Association to consult another professional prior to taking any legal action. Other provisions that prove helpful include the statement that payment of fees represents satisfaction with services, procedures for collection costs and a very carefully stated paragraph on the intent of the review services provided by the architect.
4. Finally, the contract should have provisions for the recovery of collection costs including attorney's fees. If this provision is not stated, the architect may well lose its right to collect.