



Luis Hernandez
B.A., J.D.
Associate
Shibley Righton LLP

Compliance

Enforcing a Condo's Governing Documents

When a Resident or His/Her Guests Do Not Follow the Rules, What Can a Condominium Corporation Do?

Living in a condo usually means living in close proximity to your neighbours. In many Toronto condos, this means having neighbours above, below, and on both sides. This can often result in conflicts arising for any number of reasons, usually as a result of someone not complying with the governing documents of his or her condominium corporation.

In Ontario, a condominium is governed by its declaration, by-laws, and rules. Of course, all are subject to the overriding authority of the Condominium Act, 1998 (the "Act") and its regulations. Together, these documents dictate, among many other things, what can and cannot be done within the units and the common elements.

The nature of a condo is that, in return for the advantages gained through common ownership of the common elements, some degree of control over what can be done is given up. Regrettably, not everyone is great at giving up control and following rules.

Though we see all sorts of conflicts arise in condos, the most common issues are related to noise, odours, pets, and parking. I'm sure you can already think of that time your neighbour was partying at 2:00 am on a weekday, or when you saw a resident walking their giant dog with no leash, or when you visited a friend and their hallway reeked of cigarette smoke.

So what can a condominium corporation do in those situations when a resident or his/her guests do not follow the rules?

Pursuant to the Act, a condominium corporation can require that individuals comply with its governing documents. Section 119(1) of the Act provides that all owners and occupiers of units must comply with the condominium corporation's declaration, by-laws, and rules. Section 17(3) requires that a condominium corporation enforce its governing documents by taking all reasonable steps. Section 119(2) requires a unit owner to take all reasonable steps to ensure that a tenant, or

any other unit occupant, complies as well.

But what should a condominium corporation actually do to enforce its declaration, by-laws, and rules?

The answer to this question can be oversimplified in four basic steps: investigate, communicate, escalate, and, if necessary, litigate.

Below each step is discussed in more detail. To make things easier, a hypothetical situation is used to illustrate each step.

Imagine that Kyle and Norm own a unit on the floor below where Serge lives. Serge is a tenant and the unit is owned by Pascal. Serge is a young, successful guy who likes to have his friends over later in the evenings to make them food and hang out. Sometimes Serge has more people over, alcohol becomes involved, and these hangouts occasionally turn into late-night parties.

Kyle and Norm bear the brunt of these

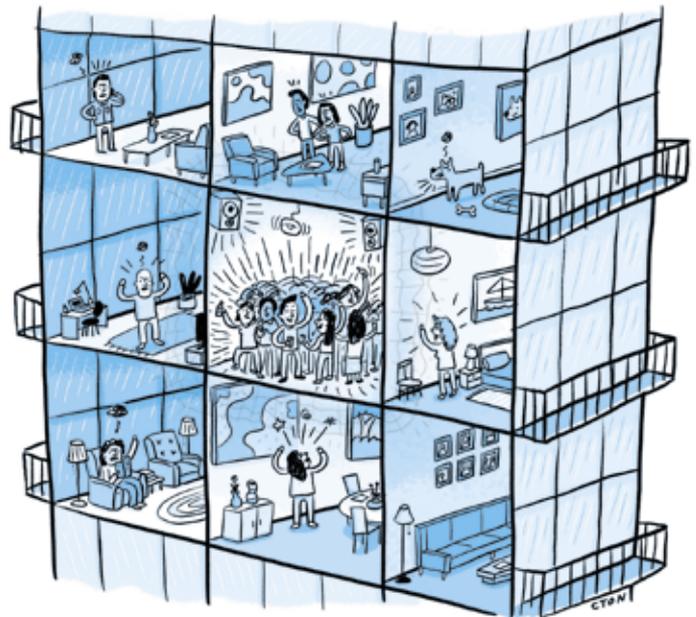


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hangouts/parties. In other words, they often hear loud music and people talking and laughing when they're trying to sleep. This goes on for months and Kyle and Norm finally get fed up with Serge's constant partying. They email the property manager, Nick, telling him that this has been going on for quite some time and angrily demand that he do something to make Serge stop making noise.

How should Nick approach this situation?

Investigate

First, Nick needs to investigate whether

the noise is actually happening. It's important for a corporation to properly investigate whether complaints are legitimate and need to be addressed. A corporation should not have a knee-jerk reaction to a complaint and begin enforcement proceedings with no evidence that there is in fact a problem.

Knowing that he needs to investigate, Nick looks at the building's security logs and incident reports and finds that no one has made any complaints against Serge's unit. That means that Kyle and Norm's email complaint is the first time that the

corporation became has been notified about the noise issue with Serge's unit. When dealing with enforcement matters, a corporation should always think about the worst-case scenario, being that it has to go to court to enforce compliance. As such, it is essential that, throughout the enforcement process, it is "building its file" and creating a well-documented record that could eventually convince a court that a compliance order is warranted.

Ideally, complaints should be made in real-time which allows the corporation to investigate the complaint and prepare a con-

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temporaneous report setting out the result of the investigation. In this hypothetical scenario, a well-documented record would include numerous reports by security or management indicating:

(1) that a noise complaint was made by Kyle and Norm; (2) that it was verified that excessive noise was emanating from Serge's unit at the time the complaint was made; (3) who verified the noise; (4) that Serge was told to keep quiet, and (5) that Serge was warned that multiple incidents might result in enforcement proceedings being started.

Given what we know, it's safe to say that one email complaint is not sufficient to verify that the noise issue requires enforcement. So what should Nick do now?

Communicate

Communicate! A corporation needs to ensure that it is effectively communicating with all affected parties. With respect to complainants, the corporation needs to communicate that it is taking the complaint seriously, it will address them in due course, and, if necessary, asking the complainants to take additional steps to make enforcement easier. With respect to the party complained of, the corporation needs to communicate that an issue has been brought to its attention and it should describe how it will be dealt with going forward.

In our hypothetical scenario, Nick should first send a warning to both Serge (the tenant) and Pascal (the owner). This is best done in a formal warning letter advising that a complaint has been received, that going forward the corporation will investigate any future complaints, and that if the issues persist, the corporation's lawyers will become involved. When communicating with tenants about compliance matters, it is vital that owners are copied on those communications. This allows the owner to take any reasonable steps possible to ensure his or her tenants comply – reasonable steps could include taking action pursuant to the Residential Tenancies Act, 2006. After all, the owner is ultimately responsible for the tenant's behaviour. If it goes to court, both the owner and tenant are likely to be parties to the application.

After Nick has sent Serge and Pascal a let-



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ter, he should correspond with Kyle and Norm to let them know that the corporation is on it. This correspondence could note that the corporation takes the matter seriously, that it's taken active steps to address the noise issues, and request that going forward they immediately notify security or management of the noise so that it can be investigated/documentated in real time.

But what happens if the issues continue despite the communications?

Escalate

The reality is that some residents do not like complying with rules and, even after being notified by the corporation that there is a breach, the behaviour continues. In these situations, if more incidents occur, the corporation should continue corresponding with the tenants and the owner. We typically recommend that at least 2 or 3 letters be sent before escalating the situation. However, eventually the corporation needs to accept that its warnings are not working and it will need to escalate the matter to its lawyers.

In our scenario, imagine that Serge disregards the notices and continues hosting parties, which means that Kyle and Norm continue suffering. Of course, that's not fair! So now, Nick will need to get direction from the corporation's board of directors to escalate the matter and send the file over to the lawyers. Once the lawyers become

involved, letters are written to Serge and Pascal advising them of the breaches and warning that if the noise issue continues, then the corporation may take them to court. These letters are commonly known as enforcement or compliance letters.

You may be asking yourself, can the corporation chargeback the owner for the costs of these enforcement letters? Well, the answer is, it depends! It depends on the corporation's indemnity provisions, its rules, the number of warnings it gave the owner, and several other factors. There may also be new caselaw that changes a corporation's ability to chargeback enforcement letters (stay tuned for future editions "Decisions from the Court"). The easy answer is: ask your lawyers!

To conclude the scenario, imagine that somehow after everything the corporation has done to warn Serge and Pascal, the issues continue. What can the corporation do now?

Litigate (sort of)

Section 132 of the Act requires that "disagreements" between a condominium corporation and its unit owners go to mediation and arbitration. However, depending on the circumstances, it may be possible to bypass this requirement and go straight to litigation.

If mediation and arbitration are unsuccessful, section 134 of the Act permits the corporation to commence a court application to enforce compliance with any provision of the Act, declaration, by-laws, and rules.

In our hypothetical scenario, the noise issue is likely to require mediation and arbitration before commencing a court application. Nevertheless, if those efforts fail, then the corporation's last resort is to litigate.

Worry not, the bulk of compliance matters do not reach this final stage. Unfortunately, some residents leave their corporation little choice but to take these harsh steps to enforce compliance.

Hopefully your corporation does not have to experience this process but, if it does, make sure to follow the steps and, most importantly, build your file! **CV**