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HOA Codes of Conduct and Why They Are Unenforceable

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The Issue with HOA Codes of Conduct in Arizona

Codes of Conduct are all the rage in HOAs and condominium communities. Some associations are even attempting to insert these Codes of Conduct into their bylaws, declarations, and other governing documents.

There's just one major flaw with Codes of Conduct -- they are invalid and unenforceable.

Consider what appears to be a fairly innocuous Code of Conduct:

1. Board Members shall act in the best interests of the Association as a whole. Board Members serve for the benefit of the entire community, and shall, at all times strive to do what is best for the Association as a whole.
2. No Board member shall willingly misrepresent facts to advance a personal cause or influence the community to advance a personal cause.
3. Board members shall use their best efforts at all times to make reasonable decisions that are consistent with the Declaration, Bylaws, and other governing documents of the Association, and to be familiar with all such documents.
4. Board Members shall set high standards for themselves as Association representatives. Board Members shall hold themselves to the highest standards as members of the Association, and shall in all way comply with the provisions of the Association's governing documents and the relevant law.
5. Board members shall at all times work within the Association's framework, refrain from unilateral action, and abide by the system of management established by the Association's governing documents and the Board. The Board shall conduct business in accordance with relevant law and the Association's governing documents, and shall set upon decisions duly made, and no Board Member shall act unilaterally or contrary to such decisions.
6. Board Members shall behave professionally at meetings. Board members shall conduct themselves at all meetings, including Board meetings, annual meetings of the members and committee members, in a professional and businesslike manner. Personal attacks against other Board Members, Association member, residents, officers, management, or guests are not consistent with the best interests of the community and will not be tolerated. Language at meetings shall be kept professional. Though differences of opinion are inevitable, they must be expressed in a professional and businesslike manner.
7. Board Members shall not defame or disparage any other Board Member, Association member resident, vendor, Association agent or third-party.
8. Board members shall not harass, threaten or otherwise intimidate any other Board Member, Association member, resident, vendor, Association agent, or third-party.

So what's wrong with it?





Everything.

Literally, everything. Notably, **the Code of Conduct does not state who gets to decide what constitutes the “best interests of the Association,”** what is “best for the Association as a whole,” or what constitutes a “willing misrepresentation” or a “personal cause.” *Who gets to decide whether these standards are met?* If your answer is “the rest of the board,” then you’ve just identified one of the biggest problems with Codes of Conduct - they are subjectively and arbitrarily enforced by those who hold power to keep dissenting voices or the opposition from speaking up. Who decides what is disparaging? Truthful statements can be disparaging. Who decides whether someone is feeling harassed, threatened, or intimidated?

Also, keep in mind that board members owe fiduciary duties to the associations that they serve. And these fiduciary duties often require board members to review documents, conduct investigations, and ask hard questions. The above Code of Conduct, however, suggests *board members are prohibited from conducting such an investigation if they believe the “system of management” is not functioning properly or that they could violate the Code of Conduct by conducting an investigation if a majority of the board decides there’s nothing to investigate?*

When Codes of Conduct are included in bylaws, declarations, or other governing documents, they take on added problems. An association’s governing documents form a contract between the association as a whole and its members. Bylaws, like declarations and the other governing documents, also constitute part of this contract.

Basic rules of contract interpretation, therefore, apply when interpreting them. A fundamental rule of contract construction is that contract provisions cannot be enforced when the terms are too vague or uncertain. Codes of conduct that purport to require individuals to conform behavior to certain subjective standards, such as using “best efforts at all times to make reasonable decisions,” setting “high standards” and “hold themselves to the highest standards as members,” to name but two, are too vague and indefinite because they do not allow individuals, such as Plaintiff, to conform her conduct to the rule or know what conduct would constitute a violation.

Other terms that fall into the “too vague to be enforced” category include similar subjective terms that are “obscure and indefinite in meaning as a matter of law.” A contract provision is not enforceable “[i]f the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken.”

An objective standard is impossible to employ since the determination of such violations is, by their nature, subjective and impossible to calculate on an objective standard. How does an individual know whether she or he is meeting the standard or what behavior violates it? The fact that the majority apparently gets to make the decision unilaterally further underscores the invalidity and unenforceability of Bylaws disqualifying owners based on the subject determination of an individual’s conduct.

Put another way, how does a member possibly confirm his or her behavior to the code of conduct against what objective measure is it to be tested? How does a member know she or he is acting “in the best interests of the Association” or striving “to do what is best for the Association as a whole”? What if a majority of the board believes a board member is not pursuing the “best interests” of the Association because she or he believes that the Association’s best interests diverge with what the majority of the board believes or wants? Also, *what is the penalty for violating it and who gets to decide?*

Subjective rules might be great for kids on the playground but they have no place in a quasi-governmental association.

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