

## WHAT MAKES A RULE REASONABLE OR UNREASONABLE? I KNOW IT WHEN I SEE IT!

By: David C. Swedelson, Esq. / Swedelson & Gottlieb

Boards and association managers often ask for a definition of what a reasonable rule is. While everyone knows that a community association's rules must be reasonable, unfortunately, there is no easy definition that a board or manager can follow for guidance.

Note for example Civil Code Section 1357.110 that addresses when an operating rule is valid and/or enforceable:

An operating rule is valid and enforceable only if all of the following requirements are satisfied:

- (a) The rule is in writing;
- (b) The rule is within the authority of the board of directors of the association conferred by law or by the declaration, articles of incorporation or association, or bylaws of the association;
- (c) The rule is not inconsistent with governing law and the declaration, articles of incorporation or association, and bylaws of the association;
- (d) The rule is adopted, amended, or repealed in good faith and in substantial compliance with the requirements of this article; and
- (e) The rule is reasonable.

But there is no definition in the Civil Code as to what "reasonable" means in the context of an operating rule. In most cases, it is something that you know when you see it.<sup>1</sup>

But if an unreasonable rule were that obvious, how is it that boards did not see that it was unreasonable when they made the decision to adopt the rule in the first place? Good question.

The California Supreme Court has firmly held that restrictions contained in a homeowner's association's recorded CC&Rs are afforded a presumption of reasonableness (meaning that it is the duty of anyone who challenges such restrictions to prove that they are unreasonable, rather than the duty of the association to prove that they are reasonable). However, this principle does not extend to the analysis of rules and

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a colloquial expression by which the user attempts to categorize an observable fact or event, although the category is subjective or lacks clearly-defined parameters. This phrase is best known as a description of a threshold of obscenity, no longer used, which is not protected speech under the First Amendment of the United States Constitution. Exhibition of obscene material may be a criminal offense. The phrase notably appeared in *Jacobellis v. Ohio* (1964), decided by the United States Supreme Court. "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But **I know it when I see it**, and the motion picture involved in this case is not that." [Emphasis added.] Justice Potter Stewart, concurring opinion in *Jacobellis v. Ohio* 378 U.S. 184 (1964), regarding possible obscenity in *The Lovers*

### Branch Offices

**Orange County**  
5000 Birch Street  
Suite 3000, West Tower  
Newport Beach, CA 92660  
Telephone: 949/476-3789  
Facsimile: 949/752-2160

**Ventura County**  
1484 E. Main Street  
Suite 200  
Ventura, CA 93001  
Telephone: 805/650-7899  
Facsimile: 805/653-2518

**Inland Empire**  
3400 Inland Empire Boulevard  
Suite 101  
Ontario, CA 91764-5510  
Telephone: 909/476-3530  
Facsimile: 909/460-0018

<sup>1</sup> The phrase "I know it when I see it" is

regulations or other unrecorded guidelines that govern an association.

In both *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal. 4th 249 and *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal. 4th 361, the California Supreme Court established a deferential standard for restrictions contained in an association's CC&Rs, stating that such a holding protects the general expectations of condominium owners that restrictions in place at the time they purchase their units will be enforceable and can only be changed by following the formal amendment process.

In its holding in *Lamden*, the court referenced its decision in *Nahrstedt*, and stated that the factors justifying judicial deference in those cases, such as protecting the expectations of condominium owners, would not necessarily be present when a court considers subsequent, unrecorded decisions of the board of directors, which includes things like operating rules and architectural guidelines.

The issue of what standard to review when the restrictions were not recorded was not addressed until an appellate court heard two cases brought by against same homeowner by her association: *Rancho Santa Fe Assn. v. Dolan-King* (2000) 81 Cal. App. 4th 965 ("*Dolan-King I*") and *Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal. App. 4th 28 ("*Dolan-King II*").

In *Dolan-King I*, the homeowner disputed the reasonableness of unrecorded regulations that governed the association's art jury, and in *Dolan-King II*, the owner disputed the reasonableness of the association's unrecorded regulatory code. In *Dolan-King II*, the court held that "in either case, such unrecorded restrictions are not accorded a presumption of reasonableness but are

viewed under a straight reasonableness test so as to somewhat fetter the discretion of the board of directors. We understand this distinction to primarily impact the respective burdens of proof at trial." *Dolan-King II*, 115 Cal. App. 4th at 79 (internal citations omitted). While the question is still one of reasonableness, this case holds that the burden is no longer on the challenging homeowner to prove that the restriction was unreasonable.

Unfortunately, the Court in the *Dolan-King* cases did not define what makes a rule reasonable. What the Court did say is that a rule is reasonable if it is legitimate and fair. Like obscenity, you will be able to determine if the rule is legitimate and fair when you see it, based on the facts and circumstances.

Although the burden of proof is different when considering restrictions contained in the CC&Rs and those contained in unrecorded rules and guidelines, the inquiry is the same in that the court should consider whether the provisions are reasonable in light of the restriction's effect on the project as a whole, not from the perspective of the individual homeowner.

Note also the Court's ruling in *Ticor Title Ins. Co. v. Rancho Santa Fe Assn.* (1986) 177 Cal. App. 3d 726, that rules and restrictions cannot be more restrictive than the recorded CC&Rs, and that any such rules would be unenforceable without the court even addressing the question of their reasonableness.

Examples of questionable rules:

1. Sounds from radio, intercom, TV Stereo, Musical Instruments, loud talking, dogs barking, slamming of doors, loud automobiles, motorcycles, mopeds, motor bikes, power tools and other loud noises

must be of a level that will not annoy other members of the community.

2. The CC&Rs state:

Animal Regulations: No animals may be raised, bred or kept in any Residence except some small animals authorized in the Rules and Regulations may be kept as household pets within any Unit provided that they are not kept, bred or raised for commercial purposes, in unreasonable quantities or sizes or in violation of the restrictions. Any rules or regulation authorizing Owners to keep certain pets may not be modified to require an Owner to remove an animal from the Project if the animal was brought to the Project when the Rules and Regulations allowed the animal. As used in the Declaration, "Unreasonable quantities"

ordinarily means more than two (2) pets per unit; provided, however, that the Board may determine that a reasonable number in any instance may be more or less. The Board may limit the size of pets. Animals belonging to Owners within the property must be kept within the Unit.

The Rules state: A maximum of two small pets (other than dogs) which are totally and at all times contained inside the unit are accepted but not encouraged.

(These examples provided by Michael Huffman, AMS, CMCA, CCAM, PCAM, CEO  
*Management Professionals, Inc.*)

*This Article was prepared by David C. Swedelson, Senior Partner at Swedelson & Gottlieb, Community Association Attorneys. Special thanks to firm associate Stephanie M. Rohde for her assistance in researching and preparing this article. For more information regarding this subject, please visit [www.hoalawblog.com](http://www.hoalawblog.com) or contact David at [dcs@sghoalaw.com](mailto:dcs@sghoalaw.com).*