

SAND FLOWER COMMUNITY ASSOCIATION

Issue Brief Number 1

Date: August, 2004

Subject: PARKING

Purpose

The Board believes the parking provisions of the Declaration of Covenants, Restrictions, Reservations and Easements (CC&Rs) and the related Association Rules, past and present, must be reviewed to provide clarity to enforcement efforts. Parking enforcement is the most misunderstood issue confronting the community and accounts for the majority of violations. This *Issue Brief* is an attempt to identify the interrelated provisions of the governing documents affecting parking, and the several inconsistencies and ambiguities among these provisions, in order to provide a framework for decisions regarding enforcement.

Discussion

At the outset, it is important to affirm that the CC&Rs take precedence over any Association rules, and no rule may be inconsistent with the CC&Rs.

The CC&Rs

The parking provisions of the CC&Rs, at Section 4.1 (ac), state the following:

“Parking. Vehicles of all Owners, Lessees and Residents, and of their guests and invitees, are to be kept only in garages and carports and not upon the driveway of any Lot or the streets located within the Property or otherwise be Visible from Neighboring Property or visible from the Common Areas or the streets. Notwithstanding, the guests or invitees of an Owner, Lessee or Resident may park their vehicle upon the driveway located upon the Lot of such Owner, Lessee or Resident or the streets located within the Property provided such vehicles remain parked thereon for no more than three (3) consecutive twenty four (24) hour periods or a majority of such consecutive twenty four (24) hour periods; providing , however, this paragraph shall not be construed to permit the parking in the above described areas of any vehicle whose parking in Sand Flower is otherwise prohibited or the parking of any inoperable vehicle.”

The plain text of Section 4.1(ac) makes it clear that vehicles of homeowners may be parked in garages and carports. The text also makes it clear that vehicles of homeowners

may *not* be parked on driveways. It is not clear, however what is permitted or prohibited with respect to parking on the streets by homeowners because of several ambiguous provisions within the CC&Rs.

The streets in Sand Flower are public streets. While Section 4.1(ac) states that vehicles of Owners are not to be kept upon the streets “*located within the Property*”, the meaning of streets is ambiguous when other provisions are read. The CC&Rs apply to all portions of Sand Flower which are not “Exempt Property” (unless otherwise specifically indicated.) “Exempt Property “is defined in Article 1(q) to include public streets owned by or dedicated to and accepted by, the City of Scottsdale. “Property” is defined in Article 1(z) as the property legally described on Exhibit “A” attached to the CC&Rs which consists only of the lots and common areas and not public streets. Given the fact that Sand Flower only has public streets, the CC&R term “streets located within the Property” is nonsensical and appears to have been written originally for some other type of development. (There are communities, especially those that are gated, where streets are located within common areas owned by the Association, but such is not the case in Sand Flower.)

Notwithstanding these ambiguous provisions, an argument can be made that the Association may not prohibit parking on the streets by homeowners because public streets are regulated by the city. On the other hand, an argument also can be made that homeowners “waived” any “right” to park on city streets by accepting the contractually-binding terms of the CC&Rs. In no case, however, can the contractual argument be extended to cover guests, invitees, and others who are not signatories to the CC&Rs.

The 2000 Association Rules

Compounding the ambiguities and inconsistencies in the basic CC&Rs, are the uncertain effects of the Sand Flower Community Association Rules and Design Review Guidelines adopted October 19, 1998 and revised August 1, 2000 (“The 2000 Rules”). During this time, the Association Board of Directors was controlled by the developer. That Board issued the following Rules, effective August 1, 2000:

“Parking

Vehicles of homeowners and their guests are to be parked in the garage, carport, or driveway. Neither inoperable vehicle (sic) nor those with expired tags shall be parked in driveways or streets. No vehicle shall be parked on landscaped areas such as grass or granite.”

The language was unambiguous but the Rules were inconsistent with the CC&Rs by permitting homeowners to park on driveways. Section 5.3 of the CC&Rs specifically states “...Association Rules shall not be inconsistent with this Declaration, the Articles or the Bylaws.” On the other hand, however, homeowners were advised that the association rules “summarize some of the common provisions found in the CC&Rs as

well as rules established by the Board”, and were urged to cooperate in following these rules. Further, the CC&Rs also state in .Section 5.3 that “Upon adoption, the Association Rules shall have the same force and effect as if they were set forth in and were a part of this Declaration.” So it was not unreasonable for homeowners to rely on the 2000 Rules.

The previous Board obviously grappled with the problem presented by the 2000 Rules and asked the following specific question of attorney Beth Mulcahy:

“If a particular section of the CC&R’s, for example the parking section has not been enforced for a period of time, is that section unenforceable?”

In a formal Opinion Letter dated December 17, 2003, (attached) Ms. Mulcahy advised against pursuing violations that have been approved by the developer or the Association, or violations that were not approved but have existed for a couple of years. She advised that “recent” violations that have not been approved could be pursued. The previous Board decided to issue revised parking rules applicable to existing “violations” and “recent” violations alike.

The 2004 Association Rules

The current Association Rules, Architectural Design Standards and Landscape Guidelines provide the following with regard to parking:

Parking

Vehicles of all homeowners and lessees are to be kept only in the garage and not upon the driveway of any lot or streets or otherwise visible from neighboring property or visible from common areas or streets. The guests of homeowners and lessees may park their vehicle upon the driveway located on the lot of such owner or lessee provided such vehicles remain parked thereon for no more than three (3) consecutive twenty four (24) hour periods. Neither inoperable vehicles nor those with expired tags shall be parked in driveways or streets. No vehicle, camper, boat or trailer shall be parked on landscaped or natural granite areas.

The 2004 Rules are consistent with the CC&Rs in that they prohibit parking by homeowners on driveways, but they are inconsistent with the CC&Rs in some notable respects. First, these rules provide that Owners and Lessees may park only in garages and make no reference to carports which are specifically referenced in the CC&Rs as an area where homeowners are permitted to park their vehicles.

Second, the rules make no reference to the right of guests and invitees to park on Sand Flower streets as authorized in the CC&Rs. By this omission, these Rules go beyond the scope of the CC&Rs, and seek to impose a restriction on guests, invitees and others without any legal basis.

The 2004 Rules also make no reference to the fact that Sand Flower streets are public streets and consequently do not provide any clarification of the internal inconsistencies found within the CC&Rs with regard to on-street parking by homeowners.

Summary and Conclusions

There are no simple answers to resolving the parking issue. This Board has heard many suggestions. Those who say “simply enforce the CC&Rs as written” must acknowledge the express authorization in the CC&Rs for carports as a place where homeowners are permitted to park their vehicles, must acknowledge the ambiguities in several provisions of the CC&Rs with regard to parking by homeowners on city streets, and must acknowledge the reality that even if the CC&Rs are a contract which properly prohibits homeowners from parking on city streets, this prohibition cannot legally be extended to guests, invitees and others.

Homeowners who relied on the Association Rules adopted in August, 2000 must recognize that the specific authorization to park on driveways was inconsistent with the CC&Rs. Consequently, a court challenge may be the only definitive way to determine if the 2000 rules now make the CC&R parking provisions unenforceable.

Those who say “simply deny applications for carports” have to acknowledge the express authorization in the CC&Rs. Those who say “simply amend the CC&Rs to delete the carport provision” must recognize that an affirmative vote of 90% of eligible homeowners is required to amend the CC&Rs and homeowners who view carports as a viable fall-back option in lieu of violations are not likely to support such an amendment. Finally, those who say “simply use common sense and ignore the CC&Rs” must recognize that ignoring the CC&Rs is not a realistic option.

At the August 24, 2004 Board meeting, the Board will discuss how to manage parking enforcement in view of the ambiguities and inconsistencies in the governing documents and in past enforcement practices. Attention will be given to developing a parking policy that does not force homeowners into court to obtain a definitive decision regarding enforceability, nor require the expenditure of Association funds to defend the enforcement of dubious provisions.

The views of every homeowner are welcome!!