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# ENFORCEMENT OF COVENANTS, RULES, ARCHITECTURAL STANDARDS AND GUIDELINES

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## **ENFORCEMENT OF COVENANTS, RULES, ARCHITECTURAL STANDARDS AND GUIDELINES**

### **A. SIX ASSOCIATION ENFORCEMENT OPTIONS**

There are six enforcement options available to owner associations that govern, manage or operate common interest communities in Colorado:

1. Fines;
2. Internal resources;
3. External resources;
4. Alternative Dispute Resolution (ADR);
5. Lawsuit to obtain a Court Order; and
6. No action.

These options are discussed in more detail in the “discussion” following, along with various recommendations. Enforcement options of owners are not covered in this article.

### **B. GENERAL AND SPECIFIC RECOMMENDATIONS TO ASSOCIATIONS RELATED TO ENFORCEMENT**

1. **Voluntary Compliance is the Object.** Every effort should be made to achieve voluntary compliance with a rule in order to reduce the need for active enforcement and enforcement problems. Give ample notice of the existence of the covenant, rule or guideline and build community consensus in support. The Association should seek and encourage owners to voluntarily comply with covenants, rules, architectural standards and guidelines. If compliance is not obtained, consider the additional recommendations set forth below.
2. **Put the Community First.** The covenants, rules and guidelines should not overrule common sense and community values. There are instances where exceptions should be made, or variances given. Consult with the association's attorney on these possibilities.
3. **Pursue Community Values/Set Expectations.** Determine what is valued by association members and what is in the best interests of the community as a whole. Pursue enforcement that enhances, supports and preserves community values and best interests, including the property values of the properties of association members.
4. **Be Reasonable.** Enforcement options of the association and the odds of success are enhanced if the association, the board and the manager or managing agent are reasonable to the owner claimed to be in violation. Be reasonable throughout the process, from the start to the finish of an enforcement matter. And, be reasonable in governing and operating the community.
5. **Confirm the Violation.** Is the act of an owner or resident a violation of a covenant, rule or guideline? Check the association's governing documents. Only violations should be pursued.
6. **Establish How the Association Discovers Violations – Is the Association Proactive or Reactive?** How violations are discovered can be as controversial as how the association

enforces violations. Ideally, the approach is set forth in policies or procedures or the association's contract with its managing agent. Be cautious about over zealous or aggressive proactive approaches or responses to claimed violations.

7. **Respect Privacy.** The association should respect the privacy of owners and residents, without a "condo cop" or secret investigative approach.
8. **Reasonable Rules and Guidelines/Reasonable Penalties for Violations.** Community support is necessary for effective enforcement. To achieve this, the need for a rule or guideline, the rule or guideline itself and the penalty for violation, should all be viewed as reasonable – both within the community and by the courts.
9. **Consistency and Uniformity of Enforcement.** Once a covenant, rule or guideline has been adopted, the board must uniformly and consistently apply the covenant, rule, guideline and standard against all situations. For example, permitting one fence but not another, or acting against one owner but not another, is inconsistent and destroys the consensus upon which voluntary compliance is based. If the board adopts a rule, it should uniformly and consistently apply it against all violations.
10. **Considerations When There Are Numerous Violations.** If a covenant, rule or guideline is not being complied with voluntarily by owners and/or residents, reconsider it. If the covenant, rule or guideline is not valued by owners and/or residents, consider amending or revising it.
11. **Relevant Covenants, Rules or Guidelines/Amendments.** Make timely and reasonable amendments to covenants, rules and guidelines, if circumstances change. Keep covenants, rules and guidelines current and relevant.
12. **Listen to the Community/Legal Audit.** Is change desired or required by the owners? Have the existing covenants, rules or guidelines become outdated? Has the law changed? Have expectations of owners and residents changed? Listen to the community and consider a legal audit of the governing documents and a risk management plan to reduce risk.
13. **Timely Enforcement.** Failure to act promptly upon notice of a violation results in a loss of confidence and breeds an air of permissiveness. Past failures to enforce covenants, rules and/or guidelines do not foreclose the possibility of enforcement. However, there is a danger (primarily in the perception of owners – not as a matter of law) that failure to enforce against some violations or permitting a violation to exist for too long a period of time may result in losing the right to enforce in subsequent situations.
14. **Careful Case Evaluations.** Only take cases to court that the association has a reasonable probability of winning. If a case is weak, due to statutes of limitations or other problems, consider other enforcement options. Weak cases that are lost result in owners concluding (incorrectly!) that the covenant, rule or guideline is unenforceable. That then erodes voluntary compliance, which should be the primary object of the association.
15. **Document Violations.** The association should document violations with pictures, letters, reports or other written data. If a case goes to court, exhibits are very helpful.
16. **Read and Understand the Governing Documents and Colorado Law.** Association board members and the managing agent should read and thoroughly understand the governing documents. Consult the association's attorney, if there are ambiguities or doubts. Learn and understand how Colorado law applies to enforcement options of the association.

**C. DISCUSSION OF ASSOCIATION ENFORCEMENT OPTIONS**

1. **Fines.** The Colorado Common Interest Ownership Act (CCIOA) allows associations to impose and collect fines in the same manner as assessments, provided the violator is first given notice of the alleged violation and the opportunity to have a hearing to determine whether the violation occurred. The association can lien the violator's property and ultimately foreclose its lien, if payment is not received. Or, the association can file suit to obtain a money judgment for the amount owed. In addition, the association can also seek and collect its reasonable attorney fees and costs associated with any of these actions.

a) **Due Process is Required.** Before a fine can be imposed for a violation, CCIOA requires due process requirements must be complied with. The violator must receive notice of the violation and be given an opportunity to have a hearing. Without this notice and opportunity for a hearing, fines are subject to challenge as unenforceable. Note: New statutes considered in 2008 may require strict due process by "impartial decision makers."

b) **Recommended Due Process Steps/Required Policies and Procedures.** The recommended steps in a due process procedure and compliance with state law requiring the association to have a policy and procedure for enforcement (required under Senate Bill 2005-100) are as follows:

- First, compliance with enforcement policy and procedure. Senate Bill 2005-00 requires all owner associations subject to CCIOA to have and maintain an enforcement policy, as of January 1, 2006. This requirement was being considered to be strengthened in 2008. The Association should have this policy and should review and comply with its adopted enforcement policy throughout the process.
- Second, send the owner a "cease and desist" warning letter. This letter should contain:
  - ✓ Notice of the alleged violation;
  - ✓ The action required to end the violation;
  - ✓ A specific time within which the violation must be corrected; and
  - ✓ The fine or penalty (sanction) which will be imposed after a hearing if the violation does not end within the stated time.

This first letter typically is a friendly letter, to educate the owner on the behavior expected and warning of future consequences if compliance is not obtained.

- Third, send the owner a notice of the right to a hearing. If the violation does not end within the stated time, a written notice should be sent to an alleged violator again informing him or her of the alleged violation and that a hearing has been scheduled to consider his or her alleged violation. A hearing is only required if you are imposing a fine. The first "cease and desist" notice can be combined with this second notice, for one notice.
- Fourth, hold the scheduled hearing. This is a fact-finding hearing to determine if a violation has occurred and what fine may be "imposed." It is recommended that the hearing procedure be kept informal. The following are suggested procedures to be followed:
  - ✓ State the covenant, rule or guideline allegedly violated;
  - ✓ State the possible penalty (e.g., fine); and
  - ✓ Explain the procedure and the following rules to be followed:

- All remarks are to be addressed to the chair;
- Complaining witness(es) speak first and/ or presents evidence, if any;
- Hearing panel may then ask that person questions;
- Alleged violator speaks next and/ or presents evidence, if any;
- Hearing panel may then ask that person questions;
- Chair asks if anyone else has anything to say;
- Panel will then adjourn and deliberate in public or, if preferred, in private; and
- Written decision will be issued by [date].

It is recommended that the procedures to be followed be in writing and provided to the alleged violator in advance of the hearing. Senate Bill 2005-100 required all associations subject to CCIOA to have enforcement policies and procedures, which policies and procedures should extend to the above procedures on hearings for fines.

- Fifth, issue a decision after the hearing is held. The hearing panel determines:
  - ✓ The facts;
  - ✓ Whether or not a rule, covenant or architectural standard/ guideline has been violated;
  - ✓ The penalty (e.g. fine) to be imposed, if any; and
  - ✓ The enforcement date of the penalty, if any.

The hearing panel should issue its decision, preferably in writing and consistent with adopted policies.

A hearing panel may or may not find an alleged violator in violation or may decide that not enough evidence was submitted to allow the panel to reach a clear decision.

Unlike in criminal actions, where the standard of proof is "beyond a reasonable doubt," the standard for this type of hearing is a "preponderance of the evidence" which means more evidence than not.

Thus, if there is more credible evidence than not that the owner violated a covenant, rule or guideline, the standard has been met.

Typically, the panel should not issue a decision at the conclusion of or during a hearing. This may help avoid claims that the hearing panel was predisposed to a particular point of view. The hearing panel should issue its written decision within a reasonable time after the hearing, and the time frame for the decision should be consistent with any adopted policies. If the board of directors is the hearing panel, its decision may be adopted as a resolution.

- Sixth, be reasonable in the amount of the fine. Fines must bear a reasonable relation to the violation involved. Courts will not allow an association to fine if the amount becomes unreasonable. Daily fines that continue to accrue, if challenged, may be found to be unreasonable.

2. **Internal Resources for Enforcing Covenants, Rules and Architectural Standards/Guidelines.** There are a number of internal resources the association and the community can use to encourage an owner or resident to conform to the association's covenants, rules and guidelines. Before using any of the internal resources for enforcing rules, verify that the association has the legal authority to take such action either by express grant or absence of a restriction on any of the following:

- a) **Record a Notice of Covenant Violation** – The association may consider recording a notice of covenant violation, similar to a record notice of lien. This gives third parties (potential buyers, re-financing lenders, etc.) notice of the claimed violation. If these parties have notice, the violation may be cured. And, these parties will be aware of the claimed violation, if they close on a purchase of the property or on a refinance; but, be cautious about timeframe and the statute of limitations (discussed below).
  - b) **Suspension of Owner's Voting Rights** – This may be the mildest action possible. The association should consider this a resource in encouraging violators to conform. Yet, the right of owners to vote should be suspended cautiously and not as a matter of course.
  - c) **Suspension of the Use of Recreational Facilities and Common Areas** - If the governing documents for the community do not contain broad authority allowing for the suspension of an owner's right to use recreational facilities and common areas, the association should only suspend privileges related to the violation (e.g., suspend pool privileges - not parking privileges - for a pool violation).
  - d) **Self Help** - Self help refers to those instances where the association takes action to correct the violation itself without a court order. Because of the potential for confrontation resulting in breach of the peace or damage to an owner's personal or real property, self help is generally not recommended. If an association decides to utilize self help, the association should develop very careful procedures before using self help to correct a violation. Self help should only be used if it is expressly authorized in the declaration and then only after consultation with legal counsel and after implementing and following careful procedures. Although the governing documents may specifically provide for self help, the courts may see it as a breach of the peace or trespass and look unfavorably on the association for utilizing this mechanism rather than the court system. This potentially dangerous alternative should not be considered without consulting with the association's attorney.
  - e) **Utility Shutoff** - Some governing documents allow utilities, particularly water service, to be shut off if an owner violates certain covenants. This resource, even if specifically provided for, should be used cautiously, if at all. Some municipalities and local governments prohibit this type of action because of health and safety concerns. Therefore this very aggressive alternative should not be considered without consulting further with your attorney.
  - f) **Towing or Booting** - The authority to tow or boot a vehicle is typically found in either the covenants or rules. If not provided for in the covenants, by rule, booting can also be considered, and, if it is to be used, should be specifically authorized. Either can be an effective means of resolving a vehicle violation, although the cautionary comments under "Self Help" are also applicable to towing. Reasonable notice prior to towing or booting should be provided unless the violation constitutes an immediate threat to the safety of individuals or the Community, such as a fire lane violation. Fire lane violations should not be sought to be remedied by booting.
3. **External Resources for Enforcing Covenants, Rules and Architectural Standards/Guidelines.** The association can also draw on resources within the greater community to help enforce covenants, rules and guidelines. Cities, counties and municipalities typically do not enforce covenants, rules, regulations or architectural standards. However, if the covenants, rules or guidelines are the same as or less restrictive than a county or city ordinance, the association may be able to get a county governmental agency or municipal department to enforce its ordinance instead of the association spending association time and resources on enforcement. However, the association must ask for help from the applicable agency or department. And, the association must take the time to build effective working relationships with governmental officials.

- a) **Local Health Department.** The county health department can be asked to enforce local health codes. For example, possible areas of violation include:
    - i) Number of occupants in a unit; and
    - ii) Internal use of a home or storage in a Unit or on a lot.
  - b) **Local Building/Zoning Department.** This local agency (whether of a county, city or town) can assist with enforcement of:
    - i) Fence or shed regulations;
    - ii) Setback restrictions;
    - iii) Restrictions on commercial use of dwellings;
    - iv) Removal of vehicles, boats, and trailers from lots or common areas; and
    - v) Other matters involving common areas and lots.
  - c) **Local Building/Code Enforcement Department.** These agencies issue building permits. In some areas, this office's responsibilities overlap with those of zoning and health. In some areas, this office requires the approval of a community's board of directors before it will issue a permit. That practice is preferred, but is not always the local practice. This local government office may be able to help you, if a home is in violation of an existing building, plumbing, fire, or electrical code.
  - d) **Local Law Enforcement.** In some jurisdictions, the police or sheriff's department will enforce traffic regulations or issue tickets and/ or tow violators of the community's parking rules.
  - e) **Local Fire Department.** The local fire department may help with enforcement of fire lanes and the removal of hazardous materials.
  - f) **Animal Control Department.** This agency may patrol the community for animals in violation of pet rules or local ordinances and respond to "at large" pets or barking dogs.
  - g) **Local Government Centers.** Several cities have established neighborhood resource departments to assist homeowners and homeowner associations with a variety of issues, including the resolution of neighbor to neighbor disputes. These departments also have excellent referral services available.
4. **Alternative Dispute Resolution (ADR).** Some associations consider Alternative Dispute Resolution (ADR) as a means of encouraging residents and owners to comply with covenants, rules and standards/guidelines. Alternative Dispute Resolution involves submitting a dispute to a trained, uninvolved third party for resolution (e.g., mediation or arbitration). The third party's decision may be non-binding, or binding on all the parties. This approach can be efficient and effective or can just add cost, expense and delay. The Association might propose ADR when confronted with a difficult rule enforcement situation or the possibility of prolonged litigation or disputes that involve difficult personalities. Effective January 1, 2007, associations must have a policy on disputes between the association and owners (which might be the enforcement policy, referred to above) and which policy can also include ADR options. As a part of the dispute policy required by statute, the association should also have a policy on how disputes of owners, with the association, are to be handled, including any required notices or ADR options.
5. **Lawsuit to Obtain a Court Order.** The ultimate recourse of the Association is a lawsuit against an owner in violation of a covenant, rule or guideline. In a lawsuit, the Association may seek a

restraining order to stop the offending action and an injunction to prevent any further violation. The association may also seek to have the court force the owner to restore the property to the condition that existed prior to the violation, and to reimburse the Association for any costs incurred in enforcing the restriction, including attorney fees.

- a) **Key factors in determining whether to file a lawsuit** A number of factors go into the decision to pursue legal action. A decision to sue should be made in consultation with the association's attorney.

i) **Who may (or must) enforce documents?**

The right of or obligation of enforcement typically lies with the parties for whom the benefit of the covenant, rule or guideline was created. The benefited parties may depend upon whether owners are required to be members of the association. A voluntary association may not have enforcement rights. Many times the governing documents will expressly identify benefited parties or the persons who have an enforcement obligation or right. In addition, CCIOA also grants certain rights to associations to bring suit or intervene in suits. Typically, rules and guidelines are only enforceable by the association.

The typical plaintiff to start an enforcement lawsuit is one or more of the following:

- In a mandatory member association, the association would be the plaintiff, acting through its board of directors.
  - The association typically has the power or authority to enforce.
  - The association typically has a duty to enforce, subject to some qualifications.
- If a voluntary association, the architectural review committee or a homeowner may be the plaintiff.
  - No specific authority or duty to enforce may be expressly provided for the voluntary association, but authority may be implied (case law).
  - Power or authority to enforce may be granted to an architectural review committee.
  - Power or authority to enforce may be granted to homeowners.
- Homeowner as plaintiff.
  - No duty to enforce.
  - Usually right to enforce
- Architectural or Design Review Committee (DRC, ARC or ACC) may be a plaintiff.

ii) **Which court can an enforcement action be filed in?**

There are three primary courts in Colorado:

1. Small Claims Court;
2. County Court ; and

### 3. District Court.

Each of these courts can hear enforcement action cases involving residential restrictive covenants. There are advantages and disadvantages to each court which should be considered in evaluating where to file a case, including costs, discovery rights, the judges, trial process and jurisdictional limits. These factors should be discussed with the association's attorney, given the specifics of an individual case.

#### iii) Remedies in Court

The remedy for breach of a restrictive covenant, rule or guideline lies within the equitable jurisdiction or authority of the courts. The courts will not typically grant the prevailing plaintiff monetary relief, but instead require the defendant to strictly comply with the restrictive covenant or rule.

Courts have ordered the following remedies:

1. temporary injunctions;
2. permanent injunctions;
3. court orders directing the removal or modification of building and structures to conform with restrictions; and
4. all with, without, or with some of, the attorney's fees and costs of the prevailing party.

One other remedy is available in unusual circumstances. Monetary damages may be imposed on the defendant when the court can no longer strictly enforce the covenant or rule. However, to receive damages the plaintiff must prove that the violation of the restriction monetarily damaged the plaintiff in some way.

#### iv) Recovery of Attorney Fees

- Colorado law (C.R.S. § 38-33.3-123) authorizes the recovery of attorney fees by the prevailing party in any action brought to enforce a covenant or rule. Thus, as long as the association wins, it is entitled to recover from the losing party the attorney fees it spent. Likewise though, if the owner wins, the association will be required to pay the owner's legal fees.
- Most declarations also have a provision that authorizes the association to recover from the owner any legal fees the association incurs in enforcing its covenants.
- Even though the association may be entitled to recover its attorney fees, a court must still determine if the amount of attorney fees incurred or sought are "reasonable."

#### v) Defenses to Enforcement of Covenants and Rules.

**Defenses against restrictive covenants fall into three groups.** Defenses against rules and guidelines are different than defenses against covenants.

The first group of defenses includes:

- Change in character of neighborhood;
- Abandonment; and
- Acquiescence.

The defenses in this group relate to the magnitude of prior violations. The defenses in this group are closely intertwined and, at times, practically indistinguishable. Typically, three or four prior violations that have gone without enforcement are probably insufficient to make any of the defenses valid. Rather, the number of prior violations must be so great that a reasonable person would come to the conclusion that the particular covenant or rule has been abandoned or waived.

The second group of defenses includes:

- Estoppel;
- Laches;
- Waiver; and
- Statute of limitations.

The defenses in this group deal directly with the association's (or plaintiff's) actions or inactions prior to or during the time of the alleged violation. Those actions, if they can be reasonably interpreted to conclude that they lead an owner, acting in good faith, to believe what he or she is doing does not violate a rule or covenant may present a viable defense.

Statute of Limitations on Building Restrictions. Colorado law (C.R.S. § 38-33.3-123) imposes a one year statute of limitations on actions brought to enforce the terms of any building restriction or compel the removal of any building or improvement on land. The complete statute follows:

“Based on this statute, no lawsuit may be brought after one year from the date the Association knew or should have known of the building restriction violation. It is not sufficient to send a letter demanding removal or compliance, but rather an actual lawsuit must be filed within the one year window. However, the lawsuit does not necessarily need to be served on the defendant within the one year statute of limitations.”

Statute of limitations on use violations. Each day that a use violation occurs has been considered a new violation. Based on court rulings to this effect, the statute of limitations begins to run on the last day the use violation occurs. Yet, unlike covenant and rule violations involving buildings or improvements, there is no statute of limitations specific to common interest communities for enforcing a use violation, so the nature of the claim provides for guidance on the applicable statute of limitations. Covenants, and the rules passed through the authority of the covenants, are based on contract theory, meaning that, without a statute specific to common interest communities, the courts treat covenants similarly to contracts. Covenant enforcement actions which are analogous to breach of contract actions are held to the statute of limitations for contracts, which is three years. Covenants and rules may also result in a claim which is more analogous to a negligence action, which is two years.

The third group of additional defenses that are often asserted include:

- Covenant or rule is being applied in an arbitrary and capricious manner.
- Violation of a constitutional right, statute, covenant, or public policy.
- Board exceeded its authority.
- The covenant or rule was not properly enacted in accordance with governing documents.
- Enforcement procedures were not followed (i.e., procedure requires 30 days notice before lawsuit and only 10 days notice was given).
- Covenant or rule is vague or ambiguous (no recreational vehicles).

vi) **Judicial Perspective on Association Covenant/Rule/Architectural Lawsuits**

Unlike the defensive posture that associations often find themselves in on assessment collection lawsuits, covenant, rule or guidelines enforcement, lawsuits are generally well received by the courts. Yet, demands on the judicial system— very high, crowded dockets—may make it difficult or time-consuming to get to a day in court.

Generally the courts and the public have the perception that HOAs and boards are negative, unreasonable, arbitrary and controlling. This perception should be prepared for.

Courts have broad discretion to fashion an appropriate remedy.

Making your best case:

- Follow the recommendations reviewed in this article;
- Reasonable boards more frequently prevail;
- Procedures should be documented in writing and followed;
- Documents of the Community and Policies should be followed;
- Correspondence, records and exhibits are important; and
- Efforts to resolve the dispute prior to filing suit are important.

6. **No Action.** Board members often mistakenly believe they must enforce all violations either because they have a legal duty to do so or by failing to enforce a violation they will have waived their right to enforce against a future violation. This can lead to unnecessary lawsuits and expenses for the association.

While the association, through its board of directors, is charged with enforcing its covenants and rules overall, not every single violation must be enforced. Subject to the governing documents, the law permits the board to exercise its reasonable business judgment and make a case-by-case determination of whether (and what type of) enforcement is appropriate.

As long as the board acts reasonably, in good faith and in the best interests of the association, a court should not overrule the board's decision. For example, the board may determine that there is a strong statute of limitations defense likely to be asserted if the association was to bring suit for a violation. The board is within its rights to make a determination in this instance to not pursue legal action. Such a decision does not breach any duty owed to the association, nor does it establish a legal precedence whereby all future violations cannot be enforced or all future requests must be approved.

It is important for the board to consult with legal counsel prior to making any decision, either to take enforcement action, or to take no action. It is also important for the board to document in writing its decision not to take action.

D. **CONCLUSION**

When enforcing covenants, rules and architectural standards/guidelines, Associations have six options available—fines, internal resources, external resources, alternative dispute resolution, a lawsuit to obtain a court order, and no action. Which option to pursue, when and how, is dependent on factors reviewed in this article.