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Community Associations Newsletter

Covenant Enforcement: An Overview

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As the weather grows warmer and closer attention is paid to the exterior maintenance of properties within a community, boards of directors and managers will often begin to focus more on how to enforce an association's covenants and what procedures are involved in doing so. Every community association has certain covenants or rules that must be followed, and these covenants are found in the association's declaration and bylaws. If a covenant is violated, a board of directors can enforce the covenant to compel an owner's compliance and require the owner to correct the violation.

Some common focal points for covenant enforcement relate to the maintenance of the exterior of a lot or condominium unit. Yard maintenance, deck and fence maintenance, and exterior siding and paint maintenance are covenants that tend to be enforced with greater frequency. Covenants related to parking, pets, noise and home businesses are just some of the other issues where enforcement may be necessary regardless of the time of year.

In addition to the covenants found in the association's declaration and bylaws, we recommend that our clients implement a policy resolution detailing the association's procedures

for covenant enforcement. The policy must be published and distributed to the association's members so that each member is put on notice as to how covenant violations will be handled and enforced, and the resolution should describe the procedures that will be followed in the event a violation occurs. These resolutions must be included in an association's resale disclosure packet and, for Maryland homeowner associations, the resolution must be filed with the HOA depository in Maryland.

When a covenant appears to have been violated, the board, the association's managing agent or the designated committee should contact the owner in writing about the violation and advise the owner as to when and how the violation must be corrected. In general, many associations issue a series of notices and warnings to non-compliant owners before initiating the sanction procedures discussed in more detail below. These citations and notices can be useful in gaining compliance and may be helpful later on if an owner challenges the reasonableness of the board's decision to impose sanctions as a result of the owner's violation of the covenants.

If the owner fails to correct the violation as requested, the board of directors should act promptly to enforce the covenant on the

association's behalf. When enforcing the covenant, a board must be cognizant of various requirements imposed by the law which impact the procedures that are to be followed. The procedural requirements differ between Virginia, Maryland and the District of Columbia.

In Virginia, the Virginia Property Owners' Association Act (specifically, Section 55-513 of the Code of Virginia) and the Virginia Condominium Act (specifically, Section 55-79.80:2 of the Code of Virginia) establish minimum procedures that must be used when enforcing an alleged violation of the covenants. Likewise, the Maryland Condominium Act (specifically, Sections 11-109(d)(16) and (20) of the Maryland Code) sets minimum procedures that need to be followed. These laws allow boards to sanction a non-compliant owner and/or restrict the owner's membership privileges, so long as the owner is first provided with notice of the alleged violation and an opportunity to be heard before the board or other governing body of the association.

In Virginia, a non-compliant owner must be provided with notice of the nature of the violations and the action necessary to remedy the violation. Virginia law requires that the owner be afforded an opportunity to attend a hearing before the board of directors in order to address the issue of the violation. The notice must also inform the owner of the procedures for requesting such a hearing and must advise the owner of the possible sanctions that may be imposed if the owner is found to be at fault. The notice must be hand-delivered or sent via certified mail, return receipt requested, to the owner's most recent mailing address of record in

the association's files. If a hearing is requested, or if a hearing is provided regardless of whether one is requested, then the notice of the hearing must be sent at least fourteen days prior to the hearing date. The notice must also describe the alleged violation and the sanctions that can be imposed, and must inform the owner that he or she is permitted to be represented by counsel at the hearing. If an owner does not request such a hearing, or if the hearing is scheduled but the owner fails to attend, then the owner is deemed to have waived his or her right to a hearing and sanctions may be imposed by the board.

When a hearing is held, the purpose of the hearing is to address the violation and provide the owner with an opportunity to explain the violation or defend against the allegation of the violation. After providing the owner with a reasonable amount of time to present his or her case, the board can deliberate on the alleged violation in a closed executive session; however, the board's vote, ruling and imposition of any sanctions must be issued during the open session of the meeting. The board's ruling must then be provided to the owner in writing and must be sent by hand-delivery or certified mail, return receipt requested, within seven days of the hearing date.

If monetary sanctions are approved by the board, an association in Virginia may not charge more than \$50.00 for a single offense. If the violation is of a continuing nature, charges of no more than \$10.00 per day can be imposed for up to 90 days. These charges are to be treated as an assessment against the owner's lot or unit. Furthermore, under Virginia law, if the association files a lawsuit against the owner to

collect the violation charges or to obtain injunctive relief for correction of the violation, or if the owner files a lawsuit to challenge such charges, then no additional charges may accrue from that point forward.

In Maryland, the notice and hearing requirements are similar in some respects to those required in Virginia. However, a number of distinctions exist between the two jurisdictions. The Maryland Condominium Act (specifically, Section 11-113 of the Maryland Code) provides that a board may not impose a fine, suspend voting or infringe on any other rights of a unit owner or other occupant due to rule violations until written demand to cease and desist has been sent to the violating owner or resident. The notice must advise the non-complying party of the alleged violation, the corrective action necessary to remedy the violation, and a time period of at least ten days to correct the violation without further sanction. If the violation is not of a continuing nature, the notice must inform the unit owner that any further violation of the same covenant may result in the imposition of a sanction after notice and a hearing.

If within twelve months of the demand to cease and desist, the violation continues past the deadline that was given, or if the same covenant is subsequently violated, the board can issue a written notice of a hearing. The notice must specify the alleged violation, the time and place of the hearing (the hearing date must be at least 10 days from the date the notice was provided), the proposed sanctions to be imposed, and the non-compliant owner's or resident's right to attend the hearing and right to produce any

statement, evidence and witnesses on their behalf. The hearing must be held in executive session, but the meeting minutes must contain a written statement of the hearing results and the sanctions imposed.

Although the Maryland Condominium Act contains the aforementioned requirements, the Maryland Homeowners Association Act does not address such requirements for notices and hearings. Therefore, we typically advise Maryland homeowner associations to exercise caution and follow the notice and hearing requirements outlined in the Maryland Condominium Act.

In Maryland there are no restrictions on the monetary or other sanctions that can be imposed, so long as the available sanctions are authorized by the association's declaration and bylaws. Additionally, the procedures described above for Maryland condominiums do not apply if the association's declaration or bylaws provide otherwise. Thus, if the declaration or bylaws address procedures and available sanctions that differ from those described in the statute, then the declaration and bylaws provisions must be followed.

For those associations located in Montgomery County, Maryland, the County has additional ordinances that specify how a community association can enforce its covenants and notices are required prior to imposing any final board-approved sanctions. If your community is in Montgomery County and you have questions regarding any such ordinances, please feel free to contact us and we would be happy to assist.

In the District of Columbia, covenant enforcement is addressed for the most part in the association's declaration and bylaws. The D.C. Condominium Act provides limited guidance on covenant enforcement. Section 42-1903.08(a)(11) of the D.C. Code states that a condominium association is empowered to levy a reasonable fine for violation of the condominium instruments or rules and regulations, but only after notice and an opportunity to be heard has been provided. So, other than this minimal requirement, the condominium instruments and the rules and regulations are largely responsible for dictating the association's enforcement procedures.

While covenant enforcement will inevitably vary to some degree from community to community, in general boards should take care not to make arbitrary decisions or engage in selective enforcement of the covenants. Moreover, boards should attempt to enforce the association's covenants in a consistent manner so that the board's decisions do not appear discriminatory or intended to target some offenders but not others. If an association does not uniformly enforce its covenants against all owners, the decision to sanction a particular owner could be challenged and ruled unreasonable by a court of law.

Effective enforcement of the covenants can be a challenge to just about any community association, no matter its size. But understanding the legal requirements imposed by the jurisdiction and becoming familiar with the association's governing documents will help boards and managers alike perform this important duty. If you have any questions about the covenant enforcement issues discussed above or if you have questions regarding covenant enforcement in your particular community, please do not hesitate to contact any of our Community Association attorneys.