

Smart Strategies for Upholding Community Covenants
2012 Community Association Law Seminar & Expo

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1. Covenant Enforcement- Review

2. Types of Violations

- General Categories
 - i. Use Restrictions, Architectural Controls and Maintenance Obligations
- Litigation Categories
 - i. “Subjective” aesthetics, personal taste or preferences; matters of degree or application; reasonable people can disagree
 - ii. “Objective” not dependent upon by personal feelings, interpretations, or prejudice; based on measurable facts
 - iii. “Discretionary” power or right to make “subjective” decisions or act according to one's own judgment

3. “Subjective” Violations

- Example: Maintenance Violations
 - i. What do “Neat,” “Attractive,” “Unkempt,” “Unsightly” and “Unreasonable” mean ????. Whatever the **JURY** says they mean!
- **Patience Patience Patience:**
 - i. Be patient, be diplomatic and be persuasive
 - ii. Use other means of enforcement before bringing a lawsuit
 - iii. Notice and follow-up letters
 - iv. Meeting with owner and additional follow up
 - v. Alternative enforcement , if authorized [Fines, suspension, self help, notice in land records, liens
 - vi. Lawsuit (as a last resort)

4. “Objective” Violations

- All you really need are pictures and can *usually* be won on “Summary Judgment (i.e. the Judge Decides without a Trial)
- However, issues of waiver, laches and estoppel may still apply and complicate things
- Examples
 - i. Pet prohibitions, fence restrictions, setback violations, parking violations, leasing restrictions, modifications **without seeking** approval and modifications that **deviate** from approval
 - ii. **Caveat-Defined Terms:** The “violation” may not fall into the category of what the Declaration prohibits

5. **“Discretionary” Violations**

- When the Board/ACC has the *discretion* to approve or deny a modification (Architectural Discretion)
- When the Board has the “*discretion*” to “*determine*” that the property is not properly maintained or a dog is “dangerous” (Behavioral Discretion)
- Exercising Discretion
“Where, as here, the declaration delegates decision-making authority to a group and that group acts, the only judicial issues are whether the exercise of that authority was procedurally fair and reasonable, and whether the substantive decision was made in good faith, and is reasonable and not arbitrary and capricious.”
- **Violation/ACC Hearing “Procedurally fair and reasonable”**
 - i. Provide sufficient Notice
 - ii. Opportunity to be heard
 - iii. Let the Owner see the evidence against him/her
 - iv. Let the owner say his/her piece and present evidence
 - v. [ACC procedures usually satisfy due process]
- **The Board’s Decision “Not Arbitrary and Capricious”**
 - i. What is the Basis for the Decision?
 - ii. Witnesses, pictures, expert evaluation (architect, engineer etc.)
 - iii. What is the “Decision”
 - a. State it in a resolution or in the minutes
 - b. Keep all of the “evidence” with the minutes/resolution

6. **Insurance issues; Enforcement Begets Lawsuits**

- When served with a lawsuit or counterclaim, IMMEDIATELY!
 - i. Notify insurance, notify your attorney and start gathering information
- Make Sure the Association Has Insurance!
 - i. Property Manager, FHA and other “Discrimination” claims, non monetary relief, and committee members?
- Cover your Tail: When changing D&O companies, purchase tail

Smart Strategies for Upholding Community Covenants

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Weissman Nowack
Curry & Wilco 
ATTORNEYS AT LAW



MITCOMMIT.COM
SERVESERVE.SER
INJECTCONNECT.C

Pictures! Pictures! Pictures!

It is imperative that either the Board or management take pictures of the violation.







Covenant Enforcement- Review

The Essentials

- Declaration, By-Laws and Rules/Guidelines
- *****PICTURES, PICTURES, PICTURES*****
- All Correspondence, notices, applications, plans, specifications, approvals, denials, etc.
- Board or ACC minutes
- Witnesses



Types of Violations (common categories)

- Use Restrictions
- Architectural Controls
- Maintenance Obligations



Types of “Violations” (Litigation Categories)

- “Objective”
 - not dependent upon by personal feelings, interpretations, or prejudice; based on measurable facts
- “Subjective”
 - aesthetics, personal taste or preferences; matters of degree, quality or application; reasonable people can disagree.
- “Discretionary”
 - power or right to make “subjective” decisions or act according to one's own judgment



“Subjective” Violations

- Maintenance Violations
 - What do “Neat,” “Attractive,” “Unkempt,” “Unsightly” and “Unreasonable” mean ????

Whatever the **JURY** says they mean!



When The Jury Decides

Jury = ????????

Jury = \$\$\$\$\$\$

(Out of your pocket)



Patience Patience Patience

- When pursuing subjective violations, patience is a virtue.
- Be patient, be diplomatic and be persuasive.
- Use other means of enforcement before bringing a lawsuit.



Patience Patience Patience

- Notice and follow-up letters
- Meeting with owner
- Additional Follow up
- Alternative Enforcement [Fines, suspension, self help (be careful), notice in land records, lien etc.]
- Lawsuit (as a last resort)



“Objective” Violations

- Pet prohibitions
- Fence Restrictions
- Setback Violations
- Parking Violations
- Leasing Restrictions
- Modifications *without seeking* Approval
- Modifications that *deviate* from approval



“Objective” Violations

- All you really need are pictures
- Can *usually* be won on “Summary Judgment” (i.e. the Judge Decides without a Trial)
- However, issues of waiver, laches and estoppel may still apply and complicate things



Caveat-Defined Terms

- The “violation” may not fall into the category of what the Declaration prohibits.
- “no house or portion thereof, garage, carport, playhouse, outbuilding *or other structure* shall be erected closer than twenty (20) feet . . .”
- **Wall ≠ Structure**
- i.e. the wall was *objectively not* a violation



“Discretionary” Violations

- When the Board/ACC has the *discretion* to approve or deny an application for a modification
- When the Board has the “*discretion*” to “*determine*” that the property is not properly maintained or a dog is “dangerous”



Architectural Discretion

- “No structure shall be erected . . . upon any lot until plans and specifications have been submitted to and approved in writing by the Association. Such review process shall consider the exterior design and general quality of the structure, including its nature, kind, shape, height, materials, location, size, topography and the aesthetic value of the proposed improvements and the harmony of such with their surroundings. The Association shall have the right to *approve or disapprove* any plans for any reason, including purely aesthetic reasons.”



Behavior Discretion

- “No pet shall be allowed to make an unreasonable amount of noise or become a nuisance. . . The Board of Directors of the Association may *conclusively determine* whether or not a particular pet or pets are permitted, constitute a nuisance, are reasonable in number, or are otherwise in violation of this Section, and shall have the right to require the owner of a particular pet or pets to remove such pet or pets from the Condominium if such pet or pets are *found* to be in violation of any such restrictions. . . .”



Exercising Discretion

“Where, as here, the declaration delegates decision-making authority to a group and that group acts, the only judicial issues are whether the exercise of that authority was procedurally fair and reasonable, and whether the substantive decision was made in good faith, and is reasonable and not arbitrary and capricious.”

- **Owner must prove** that the decision is *Arbitrary and Capricious* (i.e. lacks a rational basis), that the procedure was unfair or unreasonable or that the Board acted in bad faith.



Violation Hearing

“Procedurally fair and reasonable”

- Provide sufficient Notice
- Opportunity to be heard
- Let the Owner see the evidence against him/her
- Let the owner say his/her piece and present evidence

ACC procedures usually satisfy due process



The Board's Decision

“Not Arbitrary and Capricious”

- What is the Basis for the Decision?
 - Witnesses, pictures, expert evaluation (architect, engineer etc.)
- What is the “Decision”
 - State it in a resolution or in the minutes
 - Keep all of the “evidence” with the minutes/resolution



Pop Quiz 1 (a)

- Q: Owner receives approval to build a 400 sq. ft. pool house of red brick and a slate roof.
- Owner builds a 600 sq. ft. pool house made of Hardiplank with a terra cotta roof.

A: Objective violation.

What was built can be objectively measured against what was approved



Pop Quiz 1 (b)

Q: Same facts except the owners original (400 sq. ft.) plan is *denied* and the owner files suit to challenge that decision prior to construction.

A: **Discretionary.**

The question for the Court is whether the denial was arbitrary and capricious.



Pop Quiz 1 (c)

Q: 400 sq. ft approved, owner builds 600 sq. ft. and then submits an “as built” plan to the Association after the fact and it is denied.

A: still a “discretionary violation”

The question for the Court is whether the denial was arbitrary and capricious



Pop Quiz 2(a)

Q: Covenants state that all lawns should be
“*maintained in a neat and attractive condition
free of all unkempt and unsightly conditions*”
–The Owner’s lawn has a lot of weeds and bare
patches and is overgrown.

A: Subjective



Pop Quiz 2(b)

Q: Sam facts, but the Declaration also says that the board has the “*sole discretion to conclusively determine whether a lot fails to meet the maintenance standards set forth above.*”

A: Discretionary



Pop Quiz 3

Q: Covenants only allow fences to be constructed “within 10 feet of the side and rear property lines”

A: **Objective** (just get a measuring tape and a camera)



Enforcement Begets Lawsuits

- We say “take it down” they say “let it stay”
- We say “pay up” they say “pay back”
- Emotional distress, harassment, slander of title, legal fees, general damages
- We suspend rights. . . they hire a lawyer
- We tow/self help . . . they sue



Notify! Notify! Notify!

- Receipt of letter threatening suit
- When Served with a lawsuit or counterclaim, **IMMEDIATELY!**
 - Notify Insurance
 - Notify Your Attorney
 - Start gathering information
- Which Policy covers? When In Doubt Notify All Insurance Companies!
- Only **30 days** to answer the Lawsuit



Insurance

- **Make Sure the Association Has Insurance!**
- Are they Covered by D&O?
 - Property Manager?
 - FHA and other “Discrimination” Claims?
 - Non Monetary Relief?
 - Committee Members?
- Make sure all are covered
 - Be sure to ask, these may be a separate “rider”



Insurance Coverage

- Cover your Tail. . . Literally
- When Changing D&O companies, purchase tail insurance (a/k/a “extended reporting period”)



Thank You for Joining Us!

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