

Options in Covenant Enforcement

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The young man living at 101 Crazy Daisy Avenue hasn't mowed his lawn in over a month. The couple just down the street has two beagles that embark on a nightly duet with the moon. Another couple has been camping in their motor home for over a month...in their front yard. And don't forget the bank owned ranch sitting vacant on the corner. The rest of the community is up in arms and demands action. What is a conscientious Board to do?

Covenant enforcement is one of the more unpleasant tasks faced by homeowners associations. It is never easy to tell your neighbor they must mow their lawn or put a muzzle on their pets. Most owners realize that there are certain rules that they must abide by when moving into a covenant controlled community. However, some do not, and some choose simply to ignore them. In those situations it is up to the Board to exercise its authority to ensure compliance with the covenants. This article provides an introduction to some options for a Board to consider when pursuing covenant violations. Please keep in mind that this article is not meant to be an exhaustive discussion of each remedy, and an Association should contact legal counsel to discuss their options before moving forward with an enforcement action.

Some Basics First.

An initial question that we often receive is whether a Board must do anything to enforce the covenants? A simple answer to this question is YES. As a general matter, it is the Board's fiduciary duty to enforce the covenants in its community. However, this doesn't mean that they must file a lawsuit against every owner who hasn't taken down their holiday decorations yet. It does mean they should consider the evidence in each situation and decide whether or not, in

its business judgment, it is worth pursuing an alleged violation, and if so, what action they should take. An owner's complaint of a barking dog may not be worth pursuing if it's unclear who owns the dog in question. On the other hand, it is likely worthwhile to pursue an Owner who has painted her home hot pink in violation of architectural standards.

When considering the various options available to an Association, the first thing a Board should do is consult their governing documents. Typically the Association's Declaration will specifically state what options are available to enforce the covenants. If not, Colorado law provides basic rights for most Associations, such as imposing fines or instituting a lawsuit. Importantly, we do not suggest some remedies, such as self-help or filing a covenant violation lien, without specific authority in the Association's Declaration.

What can the Association do?

- **Impose a fine.** This is the most typical form of covenant enforcement. Most Associations have the power to impose reasonable fines for violations of the declaration, bylaws, or rules and regulations of the association. However, an owner must be given notice of an alleged violation and an opportunity to be heard regarding the violation before a fine can be imposed.

Pros: Inexpensive to the Association; typically effective if the fines are high enough (but they must be reasonable); quicker results than most other remedies.

Cons: Ineffective if the fines are too low (just a cost of doing business); does not remedy the underlying violation.

- **Small Claims Court.** An Association has the power to institute a lawsuit on behalf of its members. In small claims court the Association represents itself (typically a Board member or two) in an informal legal setting without an attorney. A small claims court can issue a money judgment or issue an injunction

requiring an Owner to remedy the violation (or allowing the Association to remedy the violation at the Owner's expense). Small claims courts can address violations that cost less than \$7,500 to remedy.

Pros: Inexpensive for the Association; effective at remedying the underlying violation.

Cons: Association must represent itself.

- **County Court.** Similar to small claims court, but the Association can (but doesn't have to be) presented by an attorney. County courts can address violations costing less than \$15,000 to remedy. Attorney fees may be awarded to the prevailing party, so this option should not be entered into lightly.

Pros: Very effective at remedying the underlying violation; attorney fees available if successful.

Cons: Can be costly to the Association if the lawsuit is not successful.

- **Liens.** If provided for in the declaration, an Association may file a lien with the County evidencing the violation. This gives everybody, including potential purchasers or mortgage companies, notice of the violation.

Pros: Inexpensive.

Cons: Typically does not remedy the underlying violation until the property is sold or refinanced.

- **Self Help.** If provided for in the declaration, an Association may enter onto an owner's property and remedy a violation, charging the costs to the owner. If this option is chosen, the Association should take great care to document, by video or photograph, the actions it took.

Pros: Quick and effective remedy for the underlying violation; inexpensive if the costs can be collected from the owner.

Cons: Can be expensive if the costs cannot be collected; opens the Association up to potential liability for trespass, damage to property, or personal injury.

- **Suspension of Services/Privileges.** If provided for in the Declaration, an Association, after notice and hearing, may suspend the membership privileges of an Owner. Generally, this should not include the suspension of basic services necessary for the health and safety of an owner, such as water or heat.

Pros: Inexpensive.

Cons: Ineffective if there are no substantive privileges (like use of a pool) or if an Owner does not utilize the privileges.

- **Mediation/ Arbitration.** Some Association's governing documents require mediation/ arbitration instead of pursuing a lawsuit. Generally this is in front of a third party mediator who makes a decision after both sides have had a chance to state their case. This can be non-binding or binding, depending on the documents and what the parties agree too. Non-binding mediation is typically informal, while a binding arbitration can resemble a complex lawsuit.

Pros: Mediation is more neighborly and less confrontational than a lawsuit; effective if you have a good mediator.

Cons: Can be expensive (for both attorney and mediator time); not effective in situations where there is no middle ground (the pink house must be repainted).

- **CALL THE POLICE or Code Enforcement.** Most counties, cities or towns have ordinances that address things such as on-street parking, storage of unsightly objects, or the construction of unauthorized improvements. Loud noises or threatening behavior may also be a criminal violation.

Pros: Inexpensive; can be effective in the right circumstances.

Cons: City code may not address the underlying violation; law enforcement may be unresponsive.

Hazards to Watch For:

- **STATUTE OF LIMITATIONS.** Colorado law provides a 1 year statute of limitations for improvements built in violation of the Association's governing documents. This generally means that an Association cannot require the removal of an unauthorized improvement after 1 year has passed, starting from when the Association knew or should have known of the violation. In addition, other statutes of limitations may apply, depending on the violation.

- **Arbitrary or capricious enforcement.** Covenants and rules cannot be enforced in an arbitrary or capricious manner. That is, an Association cannot choose to fine one owner for parking his RV in front of his house, but ignore a similar violation by another owner (unless the Association has a valid business reason for doing so).

- **Estoppel.** An Association may not be able to enforce a covenant if it has given an owner the OK to pursue the unlawful activity. This could occur when a member of an Association's architectural review committee formally gives an owner permission to paint his house electric blue. If the Owner then paints his house electric blue, the Association cannot make him repaint his house to a more acceptable color, as he relied on the past ACC approval.

Recap:

- Be Neighborly
- Check the Governing Documents
- Document Everything
- Beware the Statute of Limitations
- Treat Everyone Alike
- The Police are your Friend.

In sum, covenant enforcement is an often overlooked, but important, function of a healthy Association. It helps retain property values and creates a safe and pleasant community. Feel free to contact our firm if you have any questions regarding the enforcement of covenants in your community.