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A Brief Outline of Covenant Enforcement Procedures

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As Spring approaches our thoughts turn to all things outdoors, and many of our clients commence their plans to conduct Spring walkthroughs of their community to examine the current exterior maintenance of their communities. One question we have been hearing with increasing frequency is, "What are the proper procedures for enforcing our Association's covenants?"

As you are aware, each Association's Declaration and Bylaws contain certain "covenants" or rules that must be followed by each owner. If the owner violates any of these covenants, the Association's Board of Directors has the authority to enforce the covenant to ensure that the owner's property or behavior complies with the Association's rules.

Generally, an Association's covenants regulate an owner's responsibility to properly maintain his or her home or unit. Typically, these maintenance covenants include items such as yard maintenance, deck maintenance, and outdoor siding and paint maintenance. In addition to maintenance responsibilities, most Associations have covenants regulating pets, noise, home businesses and parking.

Should an owner fail to follow the Association's covenants, the Board is obligated to act on behalf of the Association. In particular, the Virginia Property Owners' Act (specifically, Virginia Code §55-513) and the Virginia Condominium Act (specifically, Virginia Code §55-79.80:2) establish procedures that Boards of Directors

may utilize to enforce their Association's covenants. In particular, these laws permit Boards to sanction a non-compliant owner and/or restrict his or her membership privileges, after the non-compliant owner has been provided with notice of the covenant violation and an opportunity to attend a hearing before the Board of Directors.

Both the Virginia Property Owners Association Act and the Virginia Condominium Act require a Board to provide a non-compliant owner with notice regarding the nature of the owner's violation of the Association's covenants. In addition, before any sanctions can be imposed the Association must have an established policy outlining how a covenant violation will be enforced. In all cases, Virginia law requires that a non-compliant owner must be granted an opportunity to attend a hearing before the Board of Directors at which the owner's covenant violation or violations will be addressed. This notice of covenant violation that includes the procedures to request a hearing must be hand-delivered or sent via certified mail, return receipt requested, to the owner's mailing address most recently on file with the Association. The purpose of this hearing is to provide the non-compliant owner with the opportunity to provide an explanation of his or her actions (or lack thereof) to the Board. If a hearing is requested by the non-compliant owner, the Association's notice of the hearing must be sent at least fourteen (14) days in advance of the hearing date, and must describe the violation and state the amount of charges that will be imposed.

However, if an owner fails to request a hearing, or if they fail to attend the Board's hearing on the violation, the owner is deemed to have waived their right to a hearing, and the Board may proceed to impose a sanction for the owner's violation.

This hearing to address the owner's covenant violation must be held at meeting that is open to the other residents of the Association. While the Board may deliberate on the owner's violation in Executive Session, the Board's ruling on the violation and any sanctions to be imposed by the Association must be issued during the meeting's open session. Thereafter, the Board's ruling must also be provided in writing and must be hand-delivered or sent via certified mail, return receipt requested, to the owner within seven (7) days of the hearing date.

If a Board votes to impose sanctions against an owner for their failure to comply with the Association's covenants, Virginia law provides that the Association may not charge more than \$50.00 for a single offense, or more than \$10.00 a day for each violation of a continuing nature. In no event may continuing covenant violation sanctions accrue for more than ninety days for each continuing violation. These charges are treated as a continuing lien against the property, which the Association may secure by recording a memorandum of lien in the jurisdiction where the owner's property is located.

Of course, before an Association invokes the sanction procedures set forth in the Virginia Property Owners' Association Act and the Virginia Condominium Act, we recommend that the Board of Directors, the Association's managing agent or the Board's designated committee contact the violating homeowner in writing to advise them of the violation and to outline how and when the violation should be remedied. In particular, the majority of our Association clients send a series of violation notices and warnings to the non-compliant owner before initiating the sanction procedures outlined above. These prior warnings may prove useful in the rare event that an owner challenges the reasonableness of the Board's decision to sanction the non-compliant owner for their violation of the Association's covenants. Accordingly, we recommend that our

Association clients implement a Policy Resolution that clearly spells out the Association's violation and enforcement procedures. This enforcement policy must be distributed to the membership so that each owner is placed on notice as to how covenant violations will be dealt with and enforced. If your Association does not already have a covenant enforcement Policy Resolution in place, please consider contacting us to discuss preparing a Resolution to best meet the precise needs of your community.

Many of our clients ask us questions about specific covenant violations and ask us to review whether a particular activity constitutes a covenant violation. Understandably, many Boards are reluctant to "police" their community and seek our assistance in determining when to cite a homeowner with a violation. While we routinely advise our clients to be diligent in preparing covenant violation notices, the most important rule of thumb for a Board to keep in mind is that a Board must be careful to refrain from making arbitrary decisions. In particular, if an Association fails to uniformly enforce its covenants against all owners, the Board's decision to sanction a particular owner could be challenged and ruled unreasonable by the courts.

Another potential pitfall that our clients must be mindful of is that an Association's selective enforcement of a covenant may be considered arbitrary and may be subject to judicial challenge. For example, if an owner erects a fence around his or her property in a style that does not comply with the Association's architectural standards, and the Board or its agents fail to cite the owner, when another owner erects a similar, non-compliant fence, the Association may be precluded from citing the second owner with a violation. By failing to cite the owner who initially erected the non-compliant fence, the Board of Directors has exposed itself to complaints that its decision not to enforce the fence guidelines against the initial owner and to later attempt to enforce the fence guidelines against the second owner was arbitrary or even discriminatory.

Also, if a number of non-compliant fences have been erected throughout the community and they

have been permitted to exist for a period of time, then the Board may be prohibited from citing any owners who later erect similar non-compliant fences because the Board's failure to cite each owner of a non-compliant fence may be construed as acceptance of the non-compliant fence style.

If you have any questions about any of the covenant enforcement issues discussed in this memorandum, please do not hesitate to contact any of our Community Association attorneys.