

NOVEMBER 2008

A Brief Outline of Covenant Enforcement Procedures

By: Kimberley M. O'Halloran-Cordray, Esquire
and Winta Mengisteab, Esquire

During the winter months many of our clients initiate plans for spring walkthroughs of their communities 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 house 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 should act promptly to enforce the covenants on behalf of the association. In doing so, boards must be aware of

the Virginia Property Owners' Act (specifically, Virginia Code §55-513), the Virginia Condominium Act (specifically, Virginia Code §55-79.80:2), and in Maryland the Maryland Condominium Act (specifically, Maryland Code, Real Property, §11-109 (d) (16) and (20)), which establish minimum procedures that boards of directors must utilize when enforcing 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.

In Virginia, 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 covenant policy outlining how covenant violations 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 and possible sanctions 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 sanctions 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 his/her right to a hearing, and the board may proceed to impose sanctions for the owner's violation.

This hearing, to address the owner's covenant violation, must be held at a 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 his/her 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 90 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 him/her 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.

In Maryland, the Maryland Condominium Act is similar to the two Virginia Acts discussed above in terms of notice and hearing requirements, but they are otherwise very different. The Maryland Condominium Act states that a board may not impose a fine, suspend voting, or infringe upon any other rights of a unit owner or resident for violations of rules until written demand to cease and desist from the violation is sent to the violator. The notice must also specify (1) the alleged violation, (2) the action required to remedy the violation and a time period that is not less than ten days by which the violation may be remedied without further sanction, or (3) if the violation is not a continuing one, that any further violation of the same rule may result in the imposition of sanction after notice and hearing.

If within 12 months of the demand, a violation continues past the period allowed in the initial cease and desist letter, or if the same rule is violated subsequently, the board may send the violator a second written notice of a hearing to be held by the board, which hearing may not be less than ten days from the date the notice was given. This notice must specify (1) the alleged violation, (2) the time and place of the hearing, (3) the violator's right to attend the hearing and his/her right to produce any statement, evidence, and witnesses on his/her behalf, and to cross-examine witnesses at the hearing, and (4) the proposed sanction to be imposed. Unlike in Virginia, the hearing must be held in executive session, but the minutes of the meeting shall contain a written statement of the results of the hearing and the sanction imposed. Also, different from in Virginia, there are no restrictions on the sanctions to be imposed; instead, the available sanctions must be

authorized by the association's declaration and bylaws.

Please note that the Maryland Condominium Act's above procedures do not apply if the association's declaration or bylaws state otherwise. Accordingly, for those association's that want to revise the procedures outlined by the Maryland Condominium Act, they may do so but only by amendment to the bylaws. Whereas in Virginia, the procedures and restrictions outlined in the two Acts are required under Virginia law and cannot be modified.

Additionally, for those of our clients in Montgomery County, Maryland, the County has additional ordinances that govern how communities in the County may enforce their covenants.

For associations in the District of Columbia, covenants enforcement will be greatly dictated by the association's condominium instruments. This is because the only guidance provided in the D.C. Condominium Act is that notice and an opportunity to be heard must be provided before a monetary sanction is imposed (DC Code, Real Property, § 42-1903.08). Therefore, all else, from the enforcement procedures to the authorized sanctions, will have to be fleshed out by an association's declaration, bylaws, or rules and regulations.

In all cases, 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, and for homeowners' associations in Maryland the policy must be recorded in the respective county homeowners' association depository. If your association does not already have a covenant enforcement policy resolution in place, please consider contacting us to discuss preparing such 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 failure to always enforce a covenant or selective enforcement of a covenant may be considered arbitrary and prevent the association from enforcing the covenant. 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 to not 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. Or, for instance, 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.

As you can see, covenant enforcement can be a daunting task, but it is a critical task for associations to perform. If you have any questions about any of the covenant enforcement issues discussed in this memorandum or arising in your community, please do not hesitate to contact any of our Community Association attorneys.