

# MERCETRIGIANI

## **RULES AND COVENANTS ENFORCEMENT FOR COMMUNITY ASSOCIATIONS**

### **I. GENERAL AUTHORITY**

Rule and Covenant enforcement is based on both statutory authority and authority found in the governing documents for a community association.

#### **A. Statutory Authority**

1. Condominium Act – Section 55.1-1940 of the Act requires the bylaws to contain provisions concerning the authority of the board of directors, such as the authority to adopt rules. Section 55.1-1959 establishes certain rights to enforce rules and regulations.
2. Property Owners’ Association Act – Section 55.1-1819 of the Act authorizes a board of directors to establish, adopt and enforce rules.

#### **B. Governing Documents**

1. Rule Making - The board of directors typically has authority to adopt rules and regulations for the use of the property. This authority is established in the declaration for a property owners association and in the bylaws for a condominium unit owners association.
2. Enforcement - The board of directors typically has authority to enforce the governing documents. This authority may be established in the declaration for a property owners association and in the bylaws of a condominium unit owners association.

### **II. THE ENFORCEMENT PROCESS**

#### **A. Detection of Violations**

There are a number of ways to identify rule and covenant violations. The Board must be careful to assure that the process produces factual information.

1. Periodic Physical Inspections
  - a. The Board, management agent or appropriate committees should periodically inspect the property.
  - b. Inspections should include routine inspections of approved architectural applications.

2. Owner Complaints
  - a. All complaints should be in writing.
  - b. The complaint should contain an accurate description and specific of the details of the time and place of the alleged violation.
  - c. To the extent possible, confirmation of the violation from one or more additional parties (including management and association leaders) should accompany the complaint.
3. Observance by Staff, Management or Association Leaders
  - a. Observations should be noted in writing.
  - b. Photographs, noting dates and times, if appropriate, should be made.

B. Processing of Violations

Due Process is the key to successful enforcement of rule and covenant violations. Due process has several elements. Notice and opportunity for a hearing are essential. The basic approach is to mete out fairness.

1. Notice of Alleged Violation - Notice of the violation is an essential ingredient to due process. It must contain certain information:
  - a. The notice should restate the rule, the violation, the possible penalty and request specific action by the owner by a specific date.
  - b. The notice should encourage voluntary compliance.
  - c. The notice should set forth action that may be taken if the violation is not corrected within the time established in the notice.
  - d. The notice should provide the owner with the opportunity to appear before the appropriate authority to offer a defense against the charge.
2. Hearing on the Violation

The Board or appropriate committee should conduct a hearing to consider “evidence” of a violation and to offer the owner the opportunity to offer a defense against the charge. A hearing is prerequisite prior to the imposition of a penalty.

**III. FACTORS IN SUCCESSFUL ENFORCEMENT**

It is important to remember that the reason for rule enforcement is not to punish; rather, it is to gain compliance with the rule or covenant.

A. Voluntary Compliance

1. Give ample notice of the existence of the rule.
2. Build community consensus in support of the rule.
3. Amend the rule when situations and circumstances change.

B. Timely Enforcement

1. Failure to act promptly upon notice or evidence of violation results in a loss of confidence and breeds an air of permissiveness.
2. Failure to enforce against some violations or permitting a violation to exist for too long a period of time, may result in losing the right to enforce in subsequent situations.

C. Reasonable Rules and Reasonable Penalties

The rule itself and the penalty for violation must be viewed as reasonable, both within the community and by the courts.

D. Provide Clear Information and Guidelines on the Rule

The rule must clearly state, in terms understandable to the owner, the behavior that is expected.

E. Consistence and Uniformity of Enforcement

The rule must be uniform and consistent.

F. Provide a Mechanism for Due Process

1. Provide notice of alleged violation to the owner before taking action to impose penalties.
2. Provide an opportunity for the owner involved to present his or her side of the case and to be heard.
3. Provide an opportunity for the alleged violator to appeal from an adverse decision.

G. Clearly Establish Who Enforces

1. The Board Role - As a general rule, the Board has both the power and the duty to enforce all restrictions and rules.

2. Committee and Management Role - The Board may delegate all or some of its authority to act with respect to enforcement to an association committee, such as the covenants committee or architectural review board. The Board can also delegate certain authority to management, but such delegation must be done with great care.
3. Local Government Role - Some community association rules and covenants reflect municipal ordinances and standards or in some cases, proffer conditions agreed to by the developer, and thus may be enforceable by that municipality upon appropriate notice, etc.

#### **IV. ENFORCEMENT OF COVENANTS BY NON-JUDICIAL MEANS**

##### **A. Imposition of Monetary Charges**

A community association may impose monetary charges against an owner for violations of recorded covenants or adopted rules and regulations.

1. Legal Basis for Imposing Monetary Charges - Section 55.1-1824 of the Virginia Property Owners' Association Act.
2. Prerequisite to Imposition of Monetary Charges
  - a. The statute is not self-executing. That is to say, the law requires the association to establish a published procedure which enacts the power to impose monetary charges.
  - b. The statute also requires the association to provide owners with minimum standards of due process before monetary charges are imposed. The association must provide the owner with an opportunity to be heard and represented by counsel before the Board before monetary charges are imposed. When hearings are scheduled by the Board, the Board must provide written notice of the hearing by hand-delivery or certified mail 14 days in advance of the hearing.
3. Extent of Power
  - a. Monetary charges may not exceed \$50.00 for a single violation and \$10.00 per day for a continuing violation.
  - b. Monetary charges may be imposed for any violation of the covenants (Declaration) and rules (bylaws, rules & regulations, board resolutions and architectural guidelines) of the association.

##### **B. Suspension of Privileges**

Community associations may lawfully suspend an owner's right to use facilities or services, including utility services, offered by the association for non-payment of

assessments, as long as access to the property through the common property is not precluded and the suspension does not endanger the health, safety or property of any owner, tenant or occupant.

1. Legal Basis for Suspension of Privileges - Section 55.1-1819.B of the Virginia Property Owners' Association Act.
2. Limitations - The statute indicates that the association is only empowered to suspend privileges for non-payment of assessments. However, associations may be able to suspend privileges for other violations of the legal documents if the Board adopts a resolution specifically setting forth a procedure for such suspension.
3. Prerequisite to Suspension of Privileges
  - a. The association must adopt a Policy Resolution expressly enacting the power to suspend privileges.
  - b. The owner must be provided with minimum standards of due process before suspension is imposed. This includes giving the owner an opportunity to be heard and represented by counsel before the Board of Directors and providing the owner with at least 14 days written notice of a hearing on the pending suspension by hand-delivery or certified mail.
4. Extent of Power
  - a. Suspension may be imposed for as long as the assessment delinquency continues.
  - b. Privileges that may be suspended include parking, pool, tennis courts and voting.

## V. ENFORCEMENT OF COVENANTS BY JUDICIAL MEANS

### A. Temporary Restraining Order ("TRO")

If a covenant violation is of a critical nature such that it poses a threat to life or property or demands immediate action by the association, the association may file a request for a TRO with the Court.

1. General - A TRO is a temporary injunction/court order requiring the owner to cease the violation to preserve the status quo until a complete hearing can be conducted on the matter.
2. Bond Requirement - If the TRO is granted, the association typically has to post a monetary bond which may be attached by the defendant if the TRO

date is found without basis when the court fully hears the case at a later date.

3. Standard of Review - The court will not grant a TRO unless the association can show that it is likely to prevail on the merits and there is an immediate threat of irreparable harm to the association that cannot be remedied at law (i.e., monetary damages would not make the association whole).

B. Injunction Suit

Where circumstances do not warrant a TRO, the association can file a suit in Circuit Court seeking a court order that the owner cease violations of the governing documents or rules and regulations.

1. Prerequisite - The association must show that the violation cannot be remedied at law and that the violation threatens irreparable harm to association.
2. Standard of Review - The court will regard the covenant or rule being enforced with a presumption of validity and will review whether enforcement of the covenant or rule is reasonable. Factors the court will consider include whether the association has followed its own internal procedure for enforcement and whether the rule or covenant is based upon an implied or express fundamental association interest.
3. Recovery of Attorneys' Fees - Prevailing party is entitled to recover reasonable attorney's fees from the losing party.
4. Penalty for Violation of Injunction - If owner does not correct violations after the court awards an injunction, the owner can be found in contempt of court and fined or imprisoned.

**VI. SELF-HELP**

In some situations, the association may take direct action to correct a situation, such as the removal of an offending fence or structure from common property or removal of an improperly or illegally parked vehicle, correct a maintenance condition on a lot or the detention and removal of an animal illegally upon the common property. Self-help can be quite effective, but because of the potential for damage to a unit owner's personal or real property, the association must develop careful procedures before using self-help to correct a violation.