

COVENANT ENFORCEMENT

CREATING THE COMMUNITY YOU WANT

by Carey Gunn Helm



Covenant enforcement is one of the more thankless tasks of the board and/or the manager. The board is always walking a fine line. On the one hand, there are those owners who are adamant that every covenant be enforced all the time and to a tee. On the other end of the spectrum, there are those owners who get up in arms over even the friendliest reminder to comply. 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 simply choose to ignore them, while others drive around micro-managing the neighborhood.

Mr. Jones has decided to boycott fixing his fence, which is laying over on its side in his back yard. Mrs. White has decided to plant 3x5 signs all over her front yard with clever ironic sayings like, "It's good to be clever, just not to show it." Mr. Brown has two bloodhounds that bark at anything that moves. Mrs. Green has decided she has become an ultra-water conservationist and will not water her lawn, her trees or her shrubbery, so that everything in her yard has dried up and turned brown. The Smiths have been camping in their new RV camper for over a month... in their front yard. The community is incensed and is demanding action from the board. What is a board to do?

The question is always asked, "As a board, must we enforce the covenants?" If your governing documents require it, then the answer is, "yes, you do." Some governing documents expressly state that the board has the right - but not the duty - to enforce the restrictions, while some state exactly the opposite. However, if your governing documents require the board to enforce the restrictions, the board must discharge its duties in good faith, with ordinary care, and in a manner a director reasonably believes to be in the best interest of the association. Covenants and rules cannot be enforced in an arbitrary or capricious manner. In other words, a board 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).

Filing a lawsuit is not the solution to every problem (even if those sagging holiday decorations in July are really annoying). In making its determination what to do, the board should consider the evidence in each situation and decide whether or not, in its business judgment, it is worth pursuing an alleged violation. If the board's answer is yes, it needs to consider what action to take. A neighbor's complaint about a child's bicycle laying in their front lawn each afternoon in the summer during a play break would seem heavy-handed to pursue while it is a no brainer to pursue an enforcement action against an owner who has painted her house hot pink.

When considering the various options available, the first thing a board should do is consult the governing documents. Texas law provides a basic framework for instituting a lawsuit. However, the governing documents outline which options are available to enforce the covenants. Please note that unless your governing documents specifically mention fining, self-help or suspension of privileges, these remedies are, with limited exceptions, not available. In any event, once you have weighed the pros and cons and determine that a violation is worth pursuing; your options are as follows:

- **Send a Demand Letter.** Send a polite but firm demand letter to the owner, explaining the violation, the steps necessary to correct the matter and an opportunity to request a hearing in front of the board to address the issue. Often, this is all that is required to solve the problem.
- **Impose a Fine.** Depending on your governing documents, a board may have the ability to impose a fine against an owner after sending a notice and an opportunity to be heard before the fine is imposed. This method is typically effective, however, the fines must be reasonable and in proportion to the severity or frequency of the violation.
- **File a Lawsuit.** This is a very effective method for remedying the underlying violation, but it should not be entered into lightly. Although attorney fees may be awarded to the prevailing party, a lawsuit may get very expensive and the association more than likely will not recoup all of its attorney fees even if it wins the lawsuit. This may be a good avenue to pursue for a particularly egregious violation,

but usually should only be used as an option of last resort.

- **Exercise Self Help.** If provided for in the governing documents, a board may authorize someone (i.e., mower, etc.) to enter onto an owner's property and remedy a violation, charging the costs to the owner. Except for emergency situations, prior written notice of intent to cure should be delivered to the property owner. If this option is chosen, the association should take great care to document, by video or photograph, the actions it took, since this remedy potentially opens up the association to claims for trespass, damage to property or personal injury.
- **Suspend Privileges.** If provided for in the governing documents, an owner's membership privileges (such as use of the pool) may be suspended upon notice and an opportunity to be heard. Generally, this should not include the suspension of basic services necessary for the health and safety of an owner, such as water or heat. This remedy can be very effective unless there are no substantive privileges or an owner does not use the amenities which are being suspended.
- **Mediation/Arbitration.** Some governing documents suggest or require some form of alternative dispute resolution prior to pursuing a lawsuit. A third person makes a decision on the dispute 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 to do. Mediation is more neighborly and less confrontational than a lawsuit and it may be

effective if with a good mediator. Arbitration is more costly and resembles a lawsuit. However, non-binding alternative dispute resolution methods such as mediation are unlikely to be effective in situations where there is simply no middle ground, such as the pink house which must be repainted.

In sum, covenant enforcement is an often overlooked, but important function of a healthy, safe and attractive community. This article only provides an introduction to some options to consider when pursuing covenant violations so that you can create the community you want; it is not meant to be an exhaustive discussion of each remedy, and your association should contact legal counsel to discuss your options before moving forward with any enforcement action.

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