



CCOC Communicator

ENFORCING COVENANTS AND RULES

By Ron Bolt, Esq.

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One of the many benefits of a community association is local governance. An association's covenants and "house rules" secure for owners and residents the reasonable use and enjoyment of property according to regulations tailored for the community. Covenants impose architectural standards to preserve the character of the community and other restrictions concerning maintenance, parking, pets, noise, and even home-based businesses. Enforcing the rules is not always easy and often fraught with obstacles. This article briefly summarizes the process and important considerations for enforcement, including conducting violation hearings.



Enforcement Procedure to Follow. The enforcement process that a community association must follow varies based on what the governing documents require and what enforcement powers have been granted to the association. The procedure is generally as follows: (i) a complaint is reviewed and investigated; (ii) a notice of violation is issued; (iii) if the owner/resident contests the violation or otherwise fails to abate the infraction, they are given an opportunity to be heard; and (iv) if the circumstances warrant, the board or committee imposes a

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CCOC to Host Training Seminar June 21

The CCOC will host a repeat of the popular training seminar on "The Essentials of Community Association Volunteer Leadership" on Saturday, June 21, 2014.



The seminar is produced in cooperation with the D.C. Chapter of the Community Associations Institute and will be led by Ursula Burgess (left) and Craig Wilson (right). Ms. Burgess is an



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“Essentials of Community Association Volunteer Leadership” Seminar Set for June 21 in Bethesda

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attorney with the law firm of Rees, Broome PC, which specializes in community association practice, and she is a volunteer panel chair for the CCOC. Mr. Wilson is the president of Vanguard Management, which serves many Montgomery County associations, and a former CCOC commissioner.

The day-long seminar will include discussions of the roles and functions of community associations, finances and budgets, legal aspects of community associations, maintenance and repair of common elements, insurance, and problem solving.

The seminar will run from 10am to 4pm on Saturday, June 21, 2014, in Room D of the Bethesda-Chevy Chase Regional Community Center on 4805 Edgemoor Lane in Bethesda, near the Bethesda Metro. Directions are available at: <http://montgomerycountymd.gov/bcc/directions.html>

Enrollment is limited to the first 50 people to apply, and there is a \$10 enrollment fee. The fee includes a light lunch.

To enroll, mail or deliver your check for \$10 made out to “Montgomery County, MD”, along with your name, address and telephone number, to: **CCOC, 100 Maryland Avenue, Room 330, Rockville, Maryland 20850.**

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fine or other sanction. In drastic circumstances, where non-compliance continues after all of these steps have not compelled compliance, it may be necessary to file a court action seeking payment of the fines or an injunction to make the necessary changes.

There are some notable variations imposed by the law. If no specific procedure is contained in the governing documents of a condominium, the Maryland Condominium Act establishes a default procedure which must be followed (Md. Code Ann., Real Property § 11-113). Under this default procedure, a fine or other sanction, such as suspending voting rights or restricting access to facilities or services, may not be imposed until a written demand to cease and desist is served upon the alleged violator that specifies: (i) the alleged violation; (ii) the action required to abate the violation; and (iii) a time period of at least 10 days during which an ongoing violation may be abated without further sanction, if the violation is a continuing one. If the violation is not a continuing one, the notice should state that any further violation of the



same rule may result in the imposition of a sanction (such as a fine) after notice and hearing.

If a violation continues beyond the abatement deadline set forth in the notice, or if the same rule is subsequently violated within a 1-year period, the alleged violator must be served with written notice of a hearing. The notice must be sent to the violator at least 10 days in advance of the hearing and contain a description of

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the alleged violation and proposed sanction. Also, it must inform the owner of the opportunity to produce any statement, evidence, and witnesses on the owner's behalf, and to cross-examine other witnesses at the hearing. Proof of the notice must be placed in the minutes of the meeting at which the hearing takes place. The notice requirement is deemed satisfied if the alleged violator appears at the hearing. Unlike other jurisdictions, the hearing must be held in "executive" or closed session. The community is apprised of the outcome of the hearing by the meeting minutes, which must contain the results of the hearing and the details of any sanction imposed.



At this time, no specific procedure for enforcement is mandated for homeowners associations by the Maryland Homeowners Association Act (Md. Code Ann., Real Property § 11B-101, *et seq.*). In past legislative sessions, bills have been introduced that would have made the default procedure discussed above mandatory to all Maryland condominium and homeowners associations, regardless of the procedures set forth in the association's governing documents, but such legislation has yet to pass (See, *e.g.*, Senate Bill 266 and House Bill 984, Regular Session 2011). Accordingly, a homeowners association must apply the procedure, if any, in its governing documents. If it has none, it should consider adoption of a dispute resolution policy. The CCOC has held that HOA violation hearings must be open meetings.

HOAs should also know that CCOC policy (described below), is to refuse to accept complaints by an association against a member unless the association has first given the member basic due process, meaning a notice of the alleged violation and the offer of a fair hearing to defend against the charges.

The 2014 General Assembly did, however, adopt a new law establishing a dispute resolution procedure for cooperative housing corporations. The law is similar to that in the Condominium Act and takes effect in October, 2014 (see Senate Bill 865/Chapter 567).

Before applying these formal steps to enforce a covenant, associations may consider starting with a less-formal contact. An initial "friendly reminder" advising the owner or resident of the violation and outlining what is required to correct it may achieve the desired result without unnecessary administrative burden and expense. In addition, community associations should consider adopting, and periodically reviewing, an enforcement policy for the levying of fines. It should outline the process for submitting and reviewing complaints, providing notice of alleged violations, the conduct of hearings, and the possible fines and other sanctions that may be imposed for defined infractions. Such a policy will help ensure the efficient and fair application of the rules and will serve to educate residents about the covenants and potential penalties. After all, the best enforcement is preventing violations before they occur.



"Receiving a notice of a violation can be a stressful event."

How a Resident Should Respond. Receiving notice of a violation can be a stressful event, but it is often easily remedied. Residents should act promptly to address the violation, while keeping in mind that the Board of Directors or Architectural Review Committee that issued the notice is comprised of their neighbors, who are volunteering their time to insure that uniform rules are enforced for the benefit of the community. Thus, neither the initial contact, nor the resident's response, need be unduly adversarial. If a resident contests that a violation exists, the resident should promptly seek to discuss the issue and seek clarification, if necessary. If informal communications are not successful, residents should request a hearing. In many instances, principles of due process require a hearing.

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How to Hold a Violation Hearing. As noted above, the governing documents of the association must be consulted to discern whether any specific requirements must be followed. If the documents are silent, a condominium must follow the default process set forth in the Maryland Condominium Act (Md. Code Ann., Real Property § 11-113). Generally, when conducting a hearing, the association should strive to satisfy the requirements of due process of law. In a nutshell, due process requires (1) notice, and (2) the opportunity to be heard and defend the alleged violation. “At the core of the procedural due process right is the guarantee of an opportunity to be heard and its instrumental corollary, a promise of prior notice.” Golden Sands Club Condominium, Inc. v. Waller, 313 Md. 484 (1987) (quoting L. Tribe, *American Constitutional Law* § 10-15 at 732 (2d ed. 1988)).



“Due process requires (1) notice, and (2) the opportunity to be heard.”

Unlike a court proceeding, there are generally no specific procedural rules or evidentiary standards to be applied. An association hearing is an informal proceeding, and the hearing body should generally err on the side of due process. Reasonable notice of the hearing must be provided. What is reasonable depends on the circumstances. Generally, some effort should be expended to schedule a mutually convenient time. Once the notice has been issued, the hearing authority should be provided a complete copy of the “record” of the alleged violation, which may include e-mails, memos of telephone calls, photographs, and written complaints. It should also include a copy of the hearing notice, so that the notice is properly documented.

The hearing should begin with a summary of the alleged violation and presentation of the evidence indicating that a violation exists. Next, the alleged violator should be given the opportunity to respond, and offer what rebutting evidence and witness testimony he or she would like considered. The opportunity to have other witnesses address the hearing authority should be provided. In this regard, the hearing authority may also need to hear from the complaining party, if any. This may be necessary if, for example, the complaint concerns an asserted nuisance, such as noise. Generally, due process requires providing an opportunity for the violator to confront and ask questions of (*i.e.*, “cross examine”) his or her accuser, and any witnesses. To avoid allowing the hearing to turn into a shouting match, it may be advisable to impose some procedure. For example, the hearing authority may dictate the order of the hearing, such as the following: (1) reading of the violation notice; (2) complaining party’s case; (3) questioning of complaining party by hearing authority; (4) questioning of complaining party by alleged violator; (5) alleged violator’s case; (6) questioning of alleged violator by hearing authority; (7) deliberation by hearing authority; (8) hearing authority’s vote.



During the hearing, it is important for the secretary or other designated individual to take notes and to ensure that the vote is recorded in the minutes. Once a decision has been made, it may be appropriate to issue a written decision, based on the nature of the violation and the required remediation, rather than relying upon verbal instructions and a brief summary in the minutes. What detail is required depends on the circumstances. The covenants and rules must be consistently and fairly enforced. Thus, it may also be helpful for the hearing authority to compile a list of precedent, if possible. Associations should also confer with legal counsel before undertaking enforcement. Legal counsel can confirm the authority to impose certain sanctions and offer guidance on whether rules and their application are reasonable and likely to be upheld by reviewing courts.

It is often best to take the initial viewpoint that a violation hearing is an opportunity to abate a violation, and not to punish a neighbor.

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Despite the presence of a violation, the result that is often the best for the association is the violator's promise to undertake prompt action, rather than the imposition of a sanction which then must be separately enforced.



Available Sanctions. A community association's governing documents dictate what sanctions may be imposed for covenant and rule violations. Such sanctions may include fines, liens, and revocation of privileges, including voting and the use of facilities. Generally, an association cannot grant itself a power to sanction by the adoption of a rule or policy, which it does not have the authority to exercise under its articles of incorporation or declaration of covenants. See, e.g., *Kirkley v. Seipelt*, 212 Md 127 (1956).

However, certain powers to sanction are included in Maryland law. The Maryland Condominium Act provides that a condominium may "impose charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, and rules and regulations of the council of unit owners..." (Md. Code, Real Property, Section 11-109(d)(16)). The same right is not granted by statute to a homeowners association, but it is possible that such a power is implied by the inherent authority of a corporation to do all things necessary to carry out its stated legal purposes, unless those actions are otherwise prohibited. For a detailed study of Maryland case law on this issue, see *Do Homeowner Associations Have the Right to Impose Fines?*, John F. McCabe, Esq., CCOC Communicator (Winter 2012) (online at the CCOC website).

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Recent CCOC Rulings

Is a special meeting required to vote on amending the governing documents? In *Kalin v. Normandy Farm HOA*, CCOC #24-13, the members of an HOA circulated a petition to amend the declaration of covenants in order to permit the installation of fire-resistant asphalt shingles in a community where only cedar shakes were allowed. The petition was signed by 75% of the members, and the change was duly filed in the land records. A member claimed the amendment was invalid because it was not voted upon at a special meeting. The CCOC hearing panel disagreed, noting that there was no requirement in the governing documents for calling a special meeting to consider amendments. On the contrary, the documents said that the declaration of covenants could be amended by "an instrument" signed by 75% of the members. The petition used in this case was a suitable "instrument" and the amendment was valid.

When is an association liable for the erosion of a member's private lot? In Maryland, the common law as defined by the courts states that a landowner is not liable for damage caused to a lot downhill from him due to the ordinary flow of groundwater or storm water so long as he does not alter the natural flow of that water. However, there is an exception, and the CCOC applied it in the case of *Siefken v. Tivoli Community Association*, CCOC #75-12. Tivoli had been built on two levels which were separated from each other by a forested hillside. At the top of the hill, between the lots and the forest, the developer had created a swale to trap the storm water. The swale had an opening above the Siefkens' downhill lot, which channeled storm water down the slope and into their lot, causing serious erosion. The HOA, however, had not made any changes to the drainage system that it inherited from the developer. The HOA claimed that under the Maryland common law, it was not liable for the damage to the Siefken lot. The panel disagreed, noting that the courts have held that if the drainage from the upper lot creates a significant hardship to the lower lot, then the uphill owner must moderate the flow. The panel found that the Siefkens could not deal with the drainage problem without also affecting their neighbors' lots; in addition, the swale opening was beginning to cause the erosion of the forested area, which was common property, and it was the HOA's duty to maintain the common property in good condition. The panel ordered the HOA to obtain an engineering study to find a solution to the drainage problem, and to implement the engineer's recommendations on the common property.

What is a “Meeting?”

Can Members of the Board be Prevented from Attending Board Meetings?

Many associations members know that Maryland law creates an “open meetings” requirement that the boards of directors of community associations must follow. The laws generally state that all board meetings must be open to the membership of the association, with certain very limited exceptions.

But what kinds of meetings come under the law?



If three directors run into each other at the local Starbucks, is that a “meeting?” If the members of the board decide to take a training class offered by the Community Associations Institute, is that a “meeting?” If some directors exchange emails about some association issue, is that a “meeting?”

Unfortunately, the people who wrote the laws never defined the crucial word “meeting.”

However, a recent CCOC ruling attempts to resolve the ambiguity and provide clarity for those who wish to comply with the law.

In the combined cases of *McBeth and Muse v. Fountain Hills Community Association*, ##52-12 and 67-12 (May 1, 2014), a panel of the CCOC made the following rulings:

- a “meeting” under the open meetings statute is any gathering of the board of directors for the purpose of making decisions on the association’s business.
- a gathering of the board purely for the purpose of discussing, but not deciding, the association’s business is not a “meeting” governed by the open meetings laws.
- a “meeting” conducted by email, instant messenger or telephone, or otherwise not in person, is by definition a closed meeting since members cannot attend it, and it can only be held for one of the reasons permitted in the open meetings laws.
- If the board holds a “meeting” by email, etc., for one of the reasons permitted, it must still comply with the open meetings laws by in-

cluding in the minutes of its next open meeting the vote on closing the meeting and the reason for closing it. It must also report on all decisions made at that closed meeting.

The same panel also dealt with the question of when does the board have the right to prevent one of its own members from attending its meetings.

In this case, a member who filed a complaint with the CCOC against his association was later elected to the association’s board of directors. The new director insisted on attending board meetings called for the purpose of discussing the association’s response to the director’s own complaint, and for the purpose of conferring with its attorney on the case. The association complained to the hearing panel that the director was interfering with its ability to make a defense.

The hearing panel agreed. There is no law on this subject, and no court rulings. The hearing panel reasoned that the board had a legal duty to represent the association’s interests in any litigation against the association. The board’s ability to do so was handicapped if the opposing party could be present to learn of its discussions and strategy, as well as its confidential legal advice. This would give an unfair advantage to the opposing party, who did not have to disclose his strategy or legal position to the association. Moreover, the director had a major conflict of interest. The panel essentially concluded that the board had the inherent authority to exclude that director from its meetings in order properly to carry out its duties to the association.

Association boards are encouraged to consult with their attorneys in order to have a clear understanding of their duties to hold open meetings, and when and how they can properly close their meetings. A decision made at an improper closed meeting might be ruled invalid and the board required to reconsider it at an open meeting.

(The panel members were Dinah Stevens, Thomas Stone, and Ken Zajic.)

NOTICE
NO
ADMITTANCE

Useful County Phone Numbers for Common Ownership Communities

Most County Government agencies may now be reached by phone by dialing “311” during ordinary business hours. The operator will then refer the caller to the proper agency. This service includes non-emergency Police services such as reporting abandoned cars and community outreach, Libraries, the Circuit Court, Landlord-Tenant Affairs, Housing Code Enforcement, the Office of the County Executive, Cable TV regulation, the Department of Permitting Services and the Department of Transportation.

Some County agencies may be called directly or through 311, including:

Office of Consumer Protection	240-777-3636 (email: consumerprotection@montgomerycountymd.gov)
CCOC	240-777-3766 (email: ccoc@montgomerycountymd.gov) (email preferred)
County Council	240-777-7900
Parks & Planning Commission	
Planning Board	301-495-4605
Parks Headquarters	301-495-2595

City of Rockville: residents should still call their City agencies directly.

Emergency services: 911

For more information on the 311 system or to search for agencies by computer, go to:

<http://www3.montgomerycountymd.gov/331/Home.asp>

Sign up for our free “eSubscribe” emails by enrolling here: <http://www.montgomerycountymd.gov/mcg/esubscribe.html> (the CCOC is listed under Consumer Protection).

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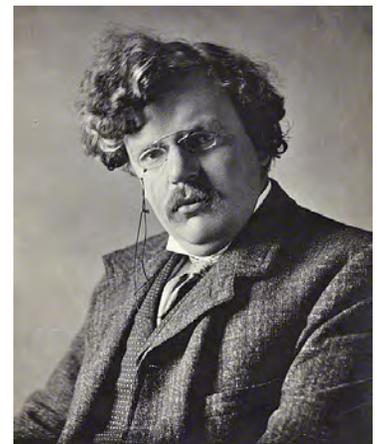
www.montgomerycountymd.gov/ccoc

Thought for the Day

If you are reading this newsletter, you are probably not only a resident of, or professional working with, community associations but a person interested in the welfare of these communities and the best interests of all of their members. But, perhaps, sometimes that commitment is sorely challenged by conflicts with some of the members—conflicts which can seem petty, unreasonable, or unnecessarily personal.

Take heart! Such problems are not new, and if 19th-Century England could survive them and flourish, then 21st-Century American communities can do so as well. Over 100 years ago, the English poet, G.K. Chesterton (lower right,) who appears to have been a more substantial version of the deputy assistant editor of this newsletter, described this tension between our goals and our realities in “The World State:”

*Oh, how I love Humanity with love so pure and pringlish,
And how I hate the horrid French, who never will be English!
The International Idea, the largest and the clearest,
Is embracing all the nations now, except the one that's nearest.
This compromise has long been known, this scheme of partial pardons,
In ethical societies and small suburban gardens—
The villas and the chapels where I learned with little labor
The way to love my fellow man
And hate my next-door neighbor.*



G. K. Chesterton