

LJ QUICK FACTS

COVENANT ENFORCEMENT – COMMON DEFENSES

THE BASICS

KNOW YOUR DOCUMENTS: Effective enforcement of the covenants requires knowing the governing legal documents for the community. The governing legal documents will include the recorded declaration, the association bylaws, and all published design standards, rules and regulations. All directors should be familiar with these documents and the enforcement powers and procedures specified in these documents.

ACT PROMPTLY: Once a violation is detected or brought to the attention of the board of directors, address it promptly. Failure to act promptly may result in a valid defense to the enforcement of the violation. Violations addressed quickly are often easier to resolve.

ENFORCE IN ACCORDANCE WITH YOUR DOCUMENTS: The governing legal documents for most communities will specify the enforcement powers of the association. An association generally cannot exercise an enforcement power, such as fining or suspension of amenities, unless the governing documents allow. Also, community association governing legal documents commonly have specific procedural requirements, which must be followed in enforcement actions, such as notice of a right to request a hearing with the board prior to the imposition of fines. Failure to follow the procedures can invalidate any enforcement actions taken by the association.

CREATE AN ENFORCEMENT POLICY: Enforcement policies provide a guideline for the specific enforcement procedures the association will take in the event of a violation. This not only helps to ensure the procedural requirements of the governing legal documents are met, but it also helps provide an objective and uniform basis for enforcement, so all violators are treated fairly and equitably. Creating and following a covenant enforcement policy can help associations circumvent the common defenses to covenant enforcement.

WAIVER, ABANDONMENT AND ACQUIESCENCES: This defense may be asserted if an association has failed to enforce a particular covenant and so many violations of this covenant exist that the covenant is deemed to be abandoned.

Example: The declaration prohibits basketball goals. Over several years, multiple homeowners have installed goals without board objection or enforcement action. The board fines a new owner who installs a basketball goal. The new owner may have a defense of waiver.

STATUTE OF LIMITATIONS: The Georgia statute of limitations for a covenant enforcement action on a non-repeating violation is generally two years. This means an association has two years from the date a violation first occurs to bring suit, or it loses its enforcement authority. The defense may be asserted if the violation occurred more than two years before the lawsuit or enforcement action.

VAGUE AND INDEFINITE COVENANTS: This defense may be asserted if the language of the covenant or prohibition is so vague its unenforceable.

Example: In the case of Douglas vs. Wages, the Georgia Supreme Court found a covenant prohibiting “noxious or offensive activity” and “anything which may be or may become an annoyance or nuisance” was too vague to be enforceable.

LACHES: This defense may be asserted when an association is aware of a violation, allows the violation to be committed and does not act in timely manner to enforce against it.

Example: An owner begins constructing an addition to their house in violation of the declaration. The association is aware of the construction but waits until the owner had expended significant sums of money before commencing with enforcement. The owner may have a laches defense.

ESTOPPEL: This defense can be asserted when the violator relied on the representations or actions of the association in committing the violation.

Example: An owner begins building a new deck on their house in violation of the declaration and without ACC approval. The chairman of the ACC stops by to watch as the deck is constructed and tells the owner the deck looks great. The owner may have an estoppel defense.

SELECTIVE ENFORCEMENT: This defense can be asserted when an association enforces covenants differently from one owner to another with no objective reason. In some circumstances, it is okay for the board to treat violators differently, so long as the actions of the board are not arbitrary or capricious.

NON-CONSENTING HOMEOWNER: This defense may be asserted by homeowners who do not consent to certain declaration amendments. In *Charter Club vs. Walker*, the Georgia Court of Appeals held that an owner is a non-POAA homeowner association must consent to a new and more restrictive use restriction or the new provision will not be enforceable against a non-consenting owner.

AMENDMENT NOT PROPERLY PASSED: If an association does not get the required number of votes from the members, the provisions being amended or added may not be enforceable against any of the owners. The defense may be asserted by an owner if the association tries to enforce an amended or new covenant that was not adopted by the requisite number of members.

VIOLATION OF THE FAIR HOUSING ACT: This defense may be asserted by an owner who believes the association is taking enforcement action against them on the basis of the owner's race, color, religion, sex, national origin, familial status or handicap.