

DEFENSES OF ENFORCEMENT OF COVENANTS

- **Unclean Hands**

- Plaintiff asserts that defendant has breached a restrictive covenant
- Defendant in return asserts that the plaintiff has likewise breached the same restrictive covenant.
- However, if the Plaintiff's breach occurred in the past and the plaintiff has ceased the conduct that breached the covenant, the plaintiff may be considered to have been purged of his or her clean hands.

- **Selective Enforcement**

- Is characterized as a failure to object to prior or existing violations.
- The Association has failed to enforce a restriction against other violations and later seeks to enforce the same type of restriction against the defendant.
- Non-uniform enforcement exists in many cases because the membership of boards changes, different board members may have different perspectives on whether and how to enforce.

- **Laches**

- Is a doctrine by which a court will no longer hear your case if you have waited too long to enforce your covenants.
- This defense has been typically abolished and is contemplated by other defenses that may be waived. Nevertheless it is still "on the books" and is a potential defense if you have waited too long to assert your rights against an owner.

- **Estoppel**

- Similar to laches in as much as you had the right to enforce but it would now be unfair to enforce because of the passage of time or change in circumstances such as allowing other people to maintain the same violation without enforcing against them.

- **Change in Circumstances**

- Typically occurs when the community as a whole has changed.
- For example, if you have a "no wood fence" requirement and after time people have replaced their fences with wood fences to save money, a court may hold that community character has changed such that wood fences are the prevalent feature that you can no longer enforce your vinyl fence only covenant.

- **Relative Hardship to the Parties**

- Balancing of equities. i.e., the harm resulting from enforcement against the benefits gained.

- **An Amended Covenant**

- A covenant can be “amended” to such an extent that it is for all practical purposes a new and different covenant.
- Court may find the amended covenant is invalid because it is in effect a new and different covenant than was contemplated under the original CC&Rs.

- **Waiver**

- Is similar to laches and estoppel where you have failed to enforce in the past and you should not be able to enforce in the future. Fortunately most governing documents provide a clause that if fail to enforce in the past that serves as no waiver to enforce in the future. Please make sure that all of your governing documents have a no waiver clause so that subsequent boards once they decide to enforce have not lost their right due to past board inaction.

- **Statute of Limitations**

- Always a concern. Again if you wait too long to enforce your provisions in the CC&Rs you may be time barred.
- CC&Rs are contracts and will either be bound to a 4 or 6 year statute of limitation. Please be mindful however that arguments of waiver, laches, estoppel and change of circumstances could have emerged even though a statute of limitations has not run.

- **Abandonment**

- Similar to change in circumstance, if the association has not insisted that a certain covenant not be adhered to such as no asphalt shingle roofs and, as a result, owners have put up other types of roofing materials, at some point the court will determine that there is no longer a requirement with respect to roofing materials. In order for a successful defense of abandonment to be shown the court must determine that there is no useful application whatsoever of the covenants on a go forward basis. In other words abandonment is a hard defense to raise.

- **No Notice**

- If an owner does not have notice of a rule and regulation it cannot be enforced against them. Arguably the recording of CC&Rs is sufficient notice of the terms contained in the CC&Rs. The real issue concerns fines, and whether notice was given by letter, certified or other means and that an opportunity for the defending owner to explain their violations the board whether that was given or not.

Title/Chapter/Section:

Utah Code
Title 57 Real Estate
Chapter 8 Condominium Ownership Act
Section 37 Fines.

57-8-37. Fines.

(1) (a) If authorized in the declaration, bylaws, or association rules, the management committee of a residential condominium project may assess a fine against a unit owner after the requirements of Subsection (2) have been met for a violation of the rules and regulations of the association of unit owners which have been promulgated in accordance with this chapter and the declaration and bylaws.

(b) The management committee of a nonresidential condominium project may not assess a fine against a unit owner.

(2) Before assessing a fine under Subsection (1), the management committee shall give notice to the unit owner of the violation and inform the owner that a fine will be imposed if the violation is not cured within the time provided in the declaration, bylaws, or association rules, which shall be at least 48 hours.

(3) (a) A fine assessed under Subsection (1) shall:

(i) be made only for a violation of a rule or regulation which is specifically listed in the declaration, bylaws, or association rules as an offense which is subject to a fine;

(ii) be in the amount specifically provided for in the declaration, bylaws, or association rules for that specific type of violation, not to exceed \$500; and

(iii) accrue interest and late fees as provided in the declaration, bylaws, or association rules.

(b) Cumulative fines for a continuing violation may not exceed \$500 per month.

(4) A unit owner who is assessed a fine under Subsection (1) may request an informal hearing to protest or dispute the fine within 30 days from the date the fine is assessed. The hearing shall be conducted in accordance with the standards provided in the declaration, bylaws, or association rules. No interest or late fees may accrue until after the hearing has been conducted and a final decision has been rendered.

(5) A unit owner may appeal a fine issued under Subsection (1) by initiating a civil action within 180 days after:

(a) a hearing has been held and a final decision has been rendered by the management committee under Subsection (4); or

(b) the time to request an informal hearing under Subsection (4) has expired without the unit owner making such a request.

(6) A fine assessed under Subsection (1) which remains unpaid after the time for appeal under Subsection (5) has expired becomes a lien against the unit owner's interest in the property in accordance with the same standards as a lien for the nonpayment of common expenses under Section **57-8-20**.

Enacted by Chapter 317, 2001 General Session

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Title/Chapter/Section:

Utah Code
Title 57 Real Estate
Chapter 8a Community Association Act
Section 208 Fines.

57-8a-208. Fines.

(1) Unless otherwise provided in the association's governing documents, the board of a homeowner association may assess a fine against a lot owner for a violation of the association's governing documents after the requirements of Subsection (2) are met.

(2) Before assessing a fine under Subsection (1), the board shall:

(a) notify the lot owner of the violation; and

(b) inform the owner that a fine will be imposed if the violation is not remedied within the time provided in the association's governing documents, which shall be at least 48 hours.

(3) (a) A fine assessed under Subsection (1) shall:

(i) be made only for a violation of a rule, covenant, condition, or restriction that is specifically listed in the association's governing documents;

(ii) be in the amount specifically provided for in the association's governing documents for that specific type of violation or in an amount commensurate with the nature of the violation; and

(iii) accrue interest and late fees as provided in the association's governing documents.

(b) Unpaid fines may be collected as an unpaid assessment as set forth in the association's governing documents or in this chapter.

(4) (a) A lot owner who is assessed a fine under Subsection (1) may request an informal hearing to protest or dispute the fine within 14 days from the date the fine is assessed.

(b) A hearing requested under Subsection (4)(a) shall be conducted in accordance with standards provided in the association's governing documents.

(c) No interest or late fees may accrue until after the hearing has been conducted and a final decision has been rendered.

Enacted by Chapter 243, 2006 General Session
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