

REES BROOME, PC

COMMUNITY ASSOCIATIONS NEWSLETTER

“If You Obey All The Rules, You Miss All The Fun” - Katharine Hepburn

Enforcement of Covenants and Rules and Regulations

By: Ruhi F. Mirza, Patrick J. Roche and Gabriela Chambi

Breaking the rules can be fun, but those tasked with enforcing those rules probably don't share the same outlook. When it comes to enforcing HOA or condominium covenants and rules and regulations, bringing an owner or their lot or unit into compliance can be a difficult task, as some owners, to paraphrase Clark Gable, simply don't give a damn. In addition to facing confrontational or non-responsive owners, the law imposes several “hurdles” that a board and management must navigate with precision. This article will touch on each of these hurdles, with respect to due process and enforcement in the District of Columbia, Maryland, and Virginia.

What is Due Process?

Due process can be broken down into two categories: (1) providing notice and (2) giving the owner an opportunity to be heard. This essential element of the law is designed to give an owner the right to know what claim is being brought against them and an opportunity to request a hearing before the Board of Directors (or perhaps a covenants committee depending on association procedures) in order to rebut that claim. Sounds simple, right? Well, there are a handful of other obligations imbedded within these two general requirements that a community association must follow. Here's what's required in each jurisdiction.

District of Columbia. D.C., much like Maryland and Virginia, requires that a board of directors ensure “fairness” in enforcement procedures, which includes giving owners notice and an opportunity for a hearing before taking remedial action. Of the three states, D.C.'s requirements are the most vague, compared to the stricter requirements in Maryland and Virginia.

Additionally, what sets D.C. apart is that Condominiums can rely on both the governing documents and written instruments, and statute. Under the D.C. Condominium Act Section 42-1903.08(11), Condominiums are required to provide notice and opportunity to be heard, and after that has occurred can impose reasonable fines for violation of the condominium instruments or regulations. This statutory relief is only applicable to Condominiums, there is no statutory relief or requirement for D.C.'s co-ops or homeowners associations. D.C.'s co-ops or homeowners associations have to rely on the governing documents and written instruments for the requirements on enforcement of covenants and due process procedures, if any.

1900 Gallows Road • Suite 700 • Tysons Corner, Virginia 22182 • (703) 790-1911 • Fax: (703) 848-2530
7101 Wisconsin Avenue • Suite 1201 • Bethesda, Maryland 20814 • (301) 222-0152 • Fax: (240) 802-2109
1602 Village Market Blvd SE Suite 385 Leesburg, Virginia 20175 • (703) 790-1911 • Fax: (703) 848-2530
www.reesbroome.com

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Maryland. If an Association's Declaration and Bylaws do not contain a specific procedure that must be followed prior to engaging with any enforcement action against an owner for violation of the covenants, we defer to Section 11-113 of the Maryland Condominium Act and Section 11B-111.10 of the Maryland Homeowners Association Act for such procedural requirements.

The Initial Notice. The Maryland Condominium Act and the Homeowners Association Act each require that the association provide an owner with notice and at least fifteen (15) days to correct the alleged violation. The association must issue this initial violation notice to provide an opportunity the owner to correct the violation before taking the second step for enforcement. before giving the owner an opportunity for a hearing.

Notice to Owner to Request a Hearing. If the violation is not corrected by the deadline provided in the initial notice, a second notice must be sent to the owner informing the owner of the right to request a hearing to be held by the Board (or covenants committee, if any) in executive session. The notice will reiterate the alleged violation and the procedures for the owner to follow to request a hearing, including the right to produce statements, evidence, or witnesses on behalf of the owner. The notice must provide a deadline for the owner to request a hearing which cannot be less than ten (10) days from giving of the notice.

If the owner does not request a hearing within the period of time specified in the notice, the Board, at the next meeting, must deliberate as to whether the violation occurred and decide whether any sanctions will be assessed against the owner.

Hearing. If the owner requests a hearing, the Board must provide the owner with another notice with the time and place of the hearing which time cannot be less than ten (10) days after the date the request for hearing was provided. Proof of notice must be recorded in the meeting minutes prior to entering into executive session to hold the hearing. If the owner appears at the hearing, the notice requirement is deemed to be satisfied. After the hearing is held, the Board will exit executive session and record the results of the hearing in the meeting minutes.

Virginia. As with D.C. and Maryland, Virginia law requires that a board of directors give owners notice and an opportunity for a hearing before taking remedial action to encourage compliance. While these "rights" are set forth in Section 55.1-1939(4) of the Virginia Condominium Act and Section 55.1-1807(4) of the Virginia Property Owners' Association Act, the most pertinent provisions of each law are found in Section 55.1-1959 of the Condominium Act and Section 55.1-1819 of the POA Act.

First Notice. The Condominium Act and the POA Act each require that the association provide an owner with notice and a "reasonable opportunity to correct the alleged violation." This is generally referred to as the "first violation notice". The association must issue this first violation notice before giving the owner an opportunity for a hearing. Additional notices may be sent as well, but are not required. The first violation notice need only be issued by regular mail to the owner's address on record with the association.

What a “reasonably opportunity” to cure the violation is depends on the facts. Requiring an owner to remove their garbage bin may permit a shorter timeframe, while requiring an owner to remove an unapproved fence will likely require an extended deadline. Generally, thirty (30) days is a reasonable timeframe in most instances.

Scheduling the Hearing and Providing Notice of the Hearing. Here is where things can get a bit tricky. Both statutes only require that the association give an owner an “opportunity” for a hearing. That said, it is best practice for a board of directors to always hold a hearing and provide the required notices – judges are certain to find less fault in this hearing approach.

The “notice of hearing” has very specific requirements that the association must follow to avoid a successful challenge from an owner. Notice of hearing must:

1. Be issued by certified mail, return receipt requested to the owner’s address on record with the association **at least 14 days** prior to the hearing.
2. Inform the owner of the date, place, and time of the hearing.
3. Identify what remedial action(s) the board could impose to encourage compliance. The remedial actions will generally be contingent on authority otherwise established in the association’s legal documents, which can include authority to impose monetary fines, suspend membership privileges, exercise self-help, and initiate legal action to abate or otherwise resolve the violation.
4. Advise the owner of their right to be represented by counsel.

If a notice of hearing lacks any of these features, the association may be unable to enforce the board’s decision in court.

Conducting the Hearing. Best practice is to always conduct a hearing, regardless of whether the owner appears. The hearing should be a formal process, but need not be conducted according to formal rules of evidence as in court. The board should lay out the facts – identify the violation, including the who, what, when and/or where. Tell the owner what remedial actions the board could take if the board does in fact find a violation to have occurred. The owner must also be given their opportunity to present their side of the story. After each side presents their “case”, the board should convene in executive to session to determine how to proceed. It’s critical, though, that the board re-convene in open session before voting on the matter.

Notice of Hearing Results. Following the hearing, the association must provide one final notice to the owner– this entails notifying the owner in writing of the board’s decision at the hearing, regardless of whether the owner appeared for the hearing. This “notice of hearing results” must:

1. Be issued by certified mail, return receipt requested to the owner’s address on record with the association not more than 7 days following the hearing. In other words, the association has a 7 day window from the hearing date to issue this notice. NOTE: 7-days’ notice is what

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- is required by statute. However, if your documents provide a shorter time frame for notice, comply with the shorter notice period of the documents.
2. Inform the owner of what remedial actions the board decided to impose at the hearing (fines, suspensions, etc.).

Enforcement

Whether your community is in D.C., Maryland, or Virginia, the association will in all likelihood still have some work to do after the providing due process in order to reach the ultimate goal of achieving compliance. And it is important to remember that failure to provide due process could render any fines or legal action unenforceable.

Next steps can include referring the matter to legal counsel for further enforcement. This could include issuing a demand for money owed and corrective action, followed by a lawsuit for a monetary award and injunctive relief. A successful lawsuit will result in a court order requiring the owner to come into compliance, in addition to a monetary award for attorneys' fees and violation charges, if applicable.

Even with all of this, an owner might still refuse to come into compliance. Depending on your jurisdiction, noncompliance, though, at this stage could have serious consequences for the owner – if an owner persists in their stance of “not giving a damn,” this could lead to contempt of court and possible jail time.