

10 Common Defenses to Actions to Enforce Governing Documents

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HOA enforcing documents can become an issue between Owner and Association. Members of homeowners associations are frequently confronted with situations involving claims by the association that the member is not complying with certain provisions that are contained in the association's governing documents (Bylaws, CC&Rs, Rules, etc.). Typically, an association will attempt to resolve the alleged violations through the association's internal dispute resolution procedures such as informal meetings, hearings, and mediation. When the internal dispute resolution procedures have been exhausted, the norm in enforcement proceedings is for the association to file a court action for injunctive relief and/or declaratory relief, and/or damages for the alleged breaches of the governing HOA Enforcing Documents in question. How a homeowner responds to an association's action to enforce alleged violations of the association's governing documents depends on the facts and circumstances of the case. This article describes 10 defenses that might be raised by homeowners who are defending actions instituted by their homeowners association to enforce the association's governing documents. An understanding of each of these theories would be beneficial to both homeowners associations and their members.

1. Lack of Authority

If an association does not have specific authority to bring the action under the association's governing HOA enforcing documents, it may not have the right to take the action that is being taken without having first satisfied the requirements for obtaining the authority. Some association declarations contain language that requires the board of directors to obtain prior consent of members before filing certain lawsuits. Occasionally, associations improperly seek to enforce rules that were never properly adopted in the first place. An owner may defend the enforcement action based on irregularities in the procedure utilized to adopt the rule sought to be enforced. Additionally, the filing of a court action against a member should also be authorized by the association's board of directors. Frequently, the decision to file a lawsuit is made by one or two board members who have

not first obtained the proper authorization from the association's board of directors. Investigate minutes and resolutions adopted at board meetings to confirm that the action has been properly authorized

2. Unreasonableness

Generally, an association's governing documents are enforceable as equitable servitudes that are binding on owners of separate interests in the association unless they are found to be "unreasonable." Even if a restriction is deemed reasonable, the association's interpretation of the scope of the restriction may be unreasonable. Principles that are commonly applied to determine the reasonableness of a particular covenant include:

- a. The covenant violates public policy;
- b. The covenant bears no rational relationship to the protection, preservation, operation, or purpose of the land against which the declarations is recorded; or
- c. The covenant imposes burdens on the affected land that are so disproportionate to the covenant's beneficial effects that the restriction should not be enforced.

3. Unreasonable Restraint on Alienation

A "restraint on alienation" is a condition on the right to convey or otherwise dispose of an interest in property that is imposed in connection with a transfer of that property. In general, the law prohibits "unreasonable" restraints on the alienation of a person's property. Individual states may have their own specific laws that specify restraints that are unreasonable. Courts have applied a balancing test to determine reasonableness of a restraint on alienation, weighing the justification for the covenant against the magnitude of the restraint.

4. Bad Faith; Selective Enforcement

Associations have a duty to interpret and enforce their governing documents in good faith and in a manner that is neither arbitrary nor capricious.

Homeowners frequently defend an association's enforcement action by contending that the association is selectively enforcing the covenant against them in bad faith. A defense of selective enforcement is sometimes coupled with a contention that the selective enforcement is unlawful discrimination that interferes with a protected characteristic or right of the homeowner.

5. Lapse of Time

Homeowners frequently raise issues relating to the passage of time as defenses to an association's action to enforce governing documents. "Laches" is an appropriate defense when there has been an unreasonable delay in the filing of the action, and the association has either acquiesced in the homeowner's conduct that is now being challenged or has prejudiced the homeowner by the delay in bringing the action. A homeowner arguing a laches defense must establish that: (i) the association had knowledge of the fact that the homeowner was violating the covenant in question; (ii) the length of the delay was unreasonable; and (iii) the homeowner was prejudiced or damaged by the delay. An association's enforcement action may also be subject to a state law that imposes a specific time limit or statute of limitations for filing suit on the alleged violation.

6. Estoppel

If an association has misled a homeowner into believing that the association would not seek enforcement of a particular covenant, either verbally or through action or inaction, the association may be equitably "estopped" (prevented) from later enforcing it if the homeowner has relied on the association's conduct to his or her detriment. To invoke the defense of equitable estoppel, a homeowner should be able to prove:

- a. The association had knowledge of the facts;
- b. The association intended that its conduct would be acted on, or the association acted in such a manner, that the homeowner was entitled to believe that the association's conduct was intended to be acted upon;
- c. The homeowner was ignorant of the true facts; and
- d. The homeowner relied on the association's conduct to his or her detriment or injury

7. Waiver

In defense to an association's HOA enforcing documents action, a homeowner may contend that the association's board of directors is seeking to enforce a covenant or rule for which it has not taken action against similar violations. Thus, the homeowner may argue that the association has waived the right to pursue the violation against the homeowner because the association has tolerated other similar violations by others. The "waiver" defense is a contention that by failing to seek enforcement against similar violations by other parties, the association has induced the homeowner into believing that the particular covenant is no longer subject to enforcement.

8. Changed Circumstances

The enforcement of an association's covenants is an action in equity and courts will not enforce restrictive covenants when there have been changes in circumstances that result in an elimination of the purpose of the covenant and it would be inequitable to continue to enforce it. The degree of change required to show a change of circumstances is a question of fact to be determined on a case by case basis. To establish a defense based on change of circumstances, a homeowner must demonstrate that:

- a. There has been a change in surrounding circumstances that substantially frustrates the purpose of the covenant;
- b. The change was not caused by the homeowner;
- c. It would therefore be inequitable to enforce the covenant

9. Unclean Hands

Because the enforcement action is an action in equity, the party seeking enforcement must not have also been guilty of violating the covenant in question. A party that seeks to enjoin a violation of a covenant who has also violated the same covenant has "unclean hands" and a court of equity should not grant them relief.

10. Balancing of Equities

When considering equitable actions pertaining to the enforcement of an association's governing HOA enforcing documents, a court will evaluate all relevant factors establishing the relative harm to each party in order to determine whether the requested relief should be granted or denied. This process involves a "balancing of equities" between the parties and consideration of the relative conveniences, comparative injuries and hardships to them.