

Nuisances, Ambiguity & Common Use Restrictions: An HOA Attorney's Perspective

1. The general rule for restrictive covenants on real estate

- The courts and common law favor the free, unrestricted use of one's real estate.
- Covenants that restrict one's free use of real estate must be specific and found in the chain of title to the real estate – for condos and HOAs, these are found in the Declaration of Condominium or CCRs.

2. Courts frown on restrictive covenants that are vague or ambiguous

- "A grantee who accepts a deed containing covenants is bound by the covenants in the deed, and covenants that restrict the use of property are to be strictly construed. Such covenants will not be enforced unless they are clear and unambiguous."
- Where the language is ambiguous, courts will generally err on the side of the least-restrictive interpretation.
- "All ambiguities will be resolved in favor of the unrestrained use of land."

3. Violations of even the most well-worded nuisance provisions are difficult to establish because there is necessarily some level of subjectivity in most circumstances

- Generally, in order to establish a claim for nuisance in North Carolina, a plaintiff must show the existence of substantial and unreasonable interference with the use and enjoyment of its property.
- The North Carolina Supreme Court has interpreted substantial interference to mean a "substantial annoyance, some material physical discomfort . . . or injury to [the plaintiff's] health or property."

4. Local ordinances may prohibit activities that the Declaration/CCRs do not sufficiently address

- For example, Mecklenburg County prohibits sound amplification equipment greater than 50db between 9:00 p.m. and 9:00 a.m.

5. Harrison v. Lands End of Emerald Isle Ass'n., 692 S.E.2d 487 (2009-unpublished)

- A restrictive covenant requiring lots to be maintained in a "clean and sightly" manner and in a "compatible aesthetic appearance with other well-maintained lots" was void for vagueness.
- The court found that the covenant was "subject to individual subjective interpretation based on personal preference."
- "As there is no 'ascertainable standard' contained in the covenant by which this Court can 'objectively determine' whether the [owners'] conduct conforms with the covenant, our enforcement of the covenant would be arbitrary."
- "We conclude that the covenant at issue is void for vagueness. . ."

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6. The "Dwarf Goat Case"

Stenier v. Windrow Estates HOA, 213 N.C. App. 454; 713 S.E.2nd 518 (2011)

- This case essentially invalidated most nuisance restrictions in North Carolina.
- The issue was whether two Nigerian dwarf goats (Fred and Barney) kept by an owner were "household pets" or "livestock" or constituted a nuisance.
- "We do not think it necessary here to cite specific dictionary definitions of the operative words: embarrassment, discomfort, annoyance, nuisance, noxious, unsightly, and unpleasant; each of these words describes a subjective and personal experience or feeling. Just as beauty is in the eye of the beholder, each of these terms can be defined only from the perspective of the beholder."
- "Certain property owners in Windrow Estates consider Fred and Barney to be annoying, noxious, and unpleasant; plaintiffs consider them adorable and lovable. The Restrictive Covenants as written do not provide sufficient guidance or definitions to permit the Board, or a court, to make any sort of objective determination of who is right, and this is the essence of vagueness."

7. Leasing Restrictions

- Minimum initial lease terms of 6-12 months – combat short-term Airbnb-type leases.
- Deterring corporate investors buying homes for rentals.
- Prohibiting leasing for the first 12-24 months of ownership.
- Imposing caps on the number of homes that can be leased at any given time.

8. Architectural Restrictions

- ARC should have the authority to adopt guidelines, subject to board review.
- Use a good ARC application form that requires all details of the proposed project.
- Be uniform and consistent in the application of the guidelines – avoid accusations of arbitrary and capricious enforcement.
- Owners' right of access to ARC records on specific applications submitted by others.
- Train your Architectural Review Committee and make sure the Committee is in sync with the Board.
- Make sure your Architectural Review Committee members are insured

9. Home and Lot Maintenance Standards

- Best practice is to give the ARC or another committee the authority to adopt guidelines with specific maintenance standards.

10. Parking and Vehicles

- "Commercial Vehicles" – how is the term defined?
- On-street parking – can the restrictions legally prohibit parking on public streets?
- Trailers, boats, RVs, campers, ATVs, etc. – consider allowing screening as opposed to prohibiting them completely.

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11. Pets and Animals

- FHA anti-discrimination guidelines on service and support animals
- “Reasonable accommodations”
- False claims and fake certificates

12. Business vs. Residential Use

Restrictions Should Focus on:

- Activities that would impact other property owners: customer and employee traffic, deliveries, noise, odors, vibrations, and hazardous materials.
- The existence or operation of the business should not be apparent or detectable by sight, sound, or smell from outside the dwelling.
- Working from home/home office use should not be prohibited.

13. Sheds and Temporary Structures (PODS)

- Restrict the maximum size and height.
- Specify whether the sheds must be built on a concrete pad.
- Describe the approved materials, whether sheds must be shingled, and specify that colors must be consistent.
- PODS and temporary storage units should be allowed only for certain time periods without prior approval of the Board/Architectural Review Committee.

14. Flags and Signs

- Cannot prohibit political signs without specific language.
- Cannot prohibit the flag of the United States or the North Carolina state flag without specific language.

15. Solar Devices

- For declarations recorded in 2007 or later, prohibitions of solar devices is void as against public policy, except in “stacked” condos.
- Can restrict solar panels in the front and side yard, and on front- and side-sloping roofs, but only if the declaration explicitly restricts them.
- Belmont Ass’n v. Farwig (2022), said that ARC restrictions that “have the effect of prohibiting” solar panels are unenforceable.
- Townhomes: Consider amending the CCRs to require owners to enter into an agreement where owners agree to be responsible for removing solar panels if the HOA needs to perform roof maintenance.

16. Pools – Above-ground vs. In-Ground

- Consider the location of a pool relative to nearby homes (*i.e.* centrally located in the backyard).
- What about temporary “kiddie” pools? Implement restrictions that they must be removed overnight.

17. Security Cameras

- Cannot be aimed where residents have a reasonable expectation of privacy
- Post signs stating that cameras are in use
- Board should adopt a resolution on access to and use of camera footage

18. Remedies for Violations

- Fines
- Suspension of community privileges and services
- Suspension of voting rights
- Litigation (the last resort)

Note:

The presenters would like to acknowledge their reliance in part on “Common Interest Communities in North Carolina,” the definitive treatise on North Carolina HOA law written by Raleigh attorney Brian S. Edlin, in the preparation of this outline.

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About Kirk Palmer & Thigpen

For more than 30 years, Kirk Palmer & Thigpen has consistently served its clients with commitment and legal proficiency among diverse practices throughout the metropolitan Charlotte area and beyond.

While representing more than 700 community associations throughout the Carolinas, the KPT Community Association lawyers are uniquely positioned to provide guidance to our HOA clients, covering the entire spectrum of condominium and community association law.