



Q&A from CAMS November 2022 *Ask the Experts* Webinar

Answered by Attorney Chris Gelwicks with the McIntosh Law Firm

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Q: What is the statute of limitations for most violations?

A: It depends upon the state. In NC, the statute of limitations to enforce covenants is six years. In SC, it is unclear. It could be as few as three (the statute for contracts) or as many as ten or even twenty.

Q: What to do about the homeowner's issues with the developer – e.g., drainage between homes, grading not done properly.

A: A specific homeowner should continue to contact the developer to resolve issues on a lot. The HOA should not get involved unless there are problems with common areas/elements or areas the HOA is required to maintain.

Q: Can resolutions be successfully used to clarify covenants?

A: They can AS LONG AS the resolution is no more restrictive than the covenant. An example would be if the term "commercial vehicle" is restricted in the covenants but not defined. If the HOA tries to define the term "commercial vehicle" via the resolution, that could very likely be deemed more restrictive. In that situation, an amendment to the covenants adding the definition should be sought.

Q: What happens when town ordinances say something different than HOA covenants? For example, street parking is allowed per town ordinances, but HOA covenants say it's prohibited. The community is within town limits.

A: There is what is termed "concurrent jurisdiction". The HOA can, per the covenants, impose stricter standards than local ordinances. Such standards are enforceable. The town enforces its ordinances and the HOA its covenants.

Q: What should you do if a board collectively will not address clear violations that a board member brings up?

A: *There is no easy way to address it. If the violations are clear and the board takes no action, it could breach its fiduciary duty. The members or, depending on the language in the bylaws, the board member could then call a special meeting to remove board members who are not taking enforcement action. Another option would be to approach the board and indicate that if they will not enforce certain covenants, the board should propose an amendment to the declaration to remove those sections. Otherwise, they should be enforced.*

Q: Amendments – on what do you base the 2/3 requirement? On total responses or membership?

A: *Per NC statute, the requirement to approve an amendment is at least 2/3 of the entire membership. In SC, there is no statute; thus the language in the declaration is in control. This means it could require anything from the majority vote at a meeting after a quorum is present to unanimous consent and everything in between.*

Q: Should the board discuss reported violations during regular meetings or only in executive session? What information regarding reported violations should be shared with all homeowners?

A: *Violations should be treated as confidential in nature and should be addressed in closed/executive session. I do not recommend disclosing any information to all homeowners unless the offending homeowner chooses to disclose it to the membership.*

Q: Can HOA boards assess without membership approval to resolve common area issues?

A: *It depends upon whether approval is required in the declaration. If no approval is required, then yes, it may, as long as it has the authority to levy a special assessment. If it has no specific authority to levy a special assessment, it may not do so. If it has the authority to levy a special assessment, but approval is required, it must obtain the required approval before levying the assessment.*

Q: If a governmental unit approves a homeowner's request to build a swimming pool, tennis court, or sports court on their property, and the covenants don't specifically prohibit it, can the ARC still prohibit on the basis of aesthetics, nuisance, or other basis?

A: *As long as the ARC has authority to deny a request on the basis of aesthetics, it may do so, though it should document as much as possible why it is not aesthetically consistent with the community.*