

**RESOLUTION OF THE BOARD OF DIRECTORS  
COPPER CREEK HOMEOWNERS ASSOCIATION**

This resolution is adopted by the Board of Directors of COPPER CREEK HOMEOWNERS ASSOCIATION pursuant to Arizona Revised Statutes §33-1803, which provides that the Association's Board of Directors is entitled to impose fines for violation(s) of the Declaration of Covenants, Conditions and Restrictions (CC&R's) and any rules adopted by the Board of Directors. The procedure for imposing fines for such violation(s) is set forth below and supersedes any other such procedure previously adopted by the Board:

**Effective Date.** The effective date of this resolution is May 15th, 2004.

DATED this 28th day of April, 2004.

COPPER CREEK HOMEOWNERS ASSOCIATION

By: , President

Attest: , Secretary

## **Board Policy for Cooper Creek Enforcement Procedures**

- 1) **“Friendly Reminder”** In most cases, and when appropriate as determined by the Association Manager, the first notification to an Owner of their violation of the CC&Rs or a rule will be by means of a “friendly reminder” letter. The Association Manager will issue the letter via regular mail.
- 2) **“Notice of Violation”** - If within fourteen (14) days of the date of the **“Friendly Reminder”** compliance is not gained, a written **“Notice of Violation(s)”** together with a request to cease and desist from an alleged violation(s) shall be sent to the Owner of the Lot via regular mail and shall specify the relevant facts relating to the violation. If the Owner is leasing his/her home, the Association may provide a copy of the Notice of Violation(s) to the Owner's tenant. *At the Association Manager's discretion, the process may begin with the Notice of Violation, bypassing the Friendly Reminder.*
- 3) **Definition - Continuing Violation(s)**. Each day a violation(s) continues after notice to cease has been given by the Board to the Owner constitutes a separate violation(s) and can be subject to a fine.
- 4) **“Notice of Hearing”** - If the violation(s) continues past the period allowed in the **“Notice of Violation”** or if the same rule or provision of the Governing Documents is subsequently violated, the Association Manager may send additional **“Notice of Violation”** letters. In its discretion, the Board may decide to send the Owner a written **“Notice of Hearing”** via both regular and certified mail. The notice should contain:
  - a) The nature of the alleged violation(s);
  - b) The time and place of the hearing, which shall be not less than seven (7) days from the date of the notice;
  - c) An invitation to attend the hearing and produce any statement, evidence, and witnesses on his or her behalf; and
  - d) The proposed sanction to be imposed, which includes the imposition of a fine and the payment of any attorney fees incurred by the Association.
- 5) **Hearing**.

The meeting will be held in executive session pursuant to the Notice of Hearing and the Owner shall be afforded a reasonable opportunity to be heard. In cases in which a complaining homeowner initiated the process, the Board shall evaluate the proof according to the attached Policy on Evaluating the Proof.

  - a) Before any sanction becomes effective, the Association shall submit proof of the notice and the invitation to be heard.
  - b) Such proof shall be deemed adequate if a copy of the notice together with a statement of the date and manner of delivery is entered into the Owner's lot file.
  - c) The notice requirement is satisfied if the Owner appears at the meeting.
  - d) The minutes of the meeting shall contain a written statement of the results of the hearing and the sanctions, if any, to be recommended to the Board.

**6) Imposition of Fine and any other Sanctions.**

At the conclusion of the hearing, the Owner may be excused from the hearing and the Board of Directors shall deliberate on the amount of the fine to be imposed, if any, based on:

- a) The seriousness of the violation(s),
- b) Whether this is a first violation or a continuing violation(s)
- c) Whether the type of offense poses a danger to property or any person
- d) Any other extenuating circumstances and whether the Owner agrees in good faith to correct the violation(s) within the time specified by the Board of Directors.
- e) Whether the amount is sufficient to obtain compliance, based on the facts
- f) After the Board of Directors determines the amount of the fine, the Board of Directors shall send notice to the Owner of the amount of the fine and its due date.
- g) The Board of Directors is empowered to impose a fine for each day that the violation(s) continues. **SEE FINES GUIDELINES BELOW.**

**The Fines Guidelines are not binding. The Board of Directors may impose a fine in any reasonable amount, based on the application of the factors above**

**7) Request for Reconsideration to the Board of Directors (Appeal).**

The Owner may request reconsideration by the Board of Directors.

- a) In order to schedule an appearance before the Board, the Owner must submit a written request to the Association Manager within seven (7) days of receipt of notice of the sanctions.
- b) The meeting shall be scheduled and the Owner notified of the date, time and location via certified and regular mail.
- c) The meeting will be held in executive session pursuant to the Notice of Hearing and the Owner shall be afforded a reasonable opportunity to be heard.
- d) At the conclusion of the meeting, the Owner may be excused from the meeting and the Board shall issue a ruling on whether the sanction stands, is modified or is rescinded.
- e) The Board shall send a written notice to the Owner of its ruling.
- f) The ruling of the Board will be final.

**8) Payment of the Fine and/or Penalties.** The Board shall advise the Owner that any fine, which is not paid within fifteen (15) days of its due date, is delinquent and subject to late fees and interest the same as any other assessment, subject to applicable Arizona law (ARS 33.1803.B limits to the greatest of \$15.00 or 10% of the amount due).

**9) Collection.** Collection of any fines and penalties may be enforced against any Owner in the same manner as the collection of delinquent assessments.

## **FINES GUIDELINES**

**The Fines Guidelines are not binding. The Board of Directors may impose a fine in any reasonable amount, based on the application of the factors above**

1. No fine shall be assessed until the Member who has committed a violation has been given due written notice.
2. Monetary fines for violation(s) of the governing documents and/or rules and regulations of the Association may be as follows:
  - a. First violation \$25
  - b. Second violation (of the same nature) \$50
  - c. Third violation (of the same nature) \$100
  - d. Each violation after the third (of the same nature) \$250
3. An additional fine that accrues each day may be assessed after the aforementioned fines have been assessed if the violation is a continuing one. (**Example:** A Homeowner installs an improvement without ARC approval. A First violation fine of \$25 is assessed. If the violation continues uncorrected, an additional fine in a reasonable amount would be assessed for each day until the violation ceases. The Member ultimately corrects the violation. The Member installs another improvement without ARC approval. A Second violation fine of \$50 is assessed. If the violation continues uncorrected, an additional daily fine would be imposed until the violation ceases)
4. It is the obligation of the Member to advise the Association in writing that the violation has ceased.

There are many instances where a violation occurs intermittently or at such time(s) that the project manager cannot observe it during routine drive-by inspections of the Copper Creek Association (CCA) premises. Furthermore, it is not economically or physically feasible for the CCA project manager to be available to observe every violation as it occurs. Many violations will be observed and consequently reported to the CCA project manager by individual members of CCA as "sole witnesses."

Examples of such violations (not a complete listing) are:

1. Garbage cans not being stored away in a timely manner.
2. Prohibited vehicles in driveways and streets, as stated in the CC&Rs.
3. Noise such as loud parties, wind chimes, dog barking.
4. Dog waste upon private property or common areas.
5. Floodlight spillage.
6. Feeding of wild animals.
7. Trespassing.

This policy articulates the Board's approach to the "he said, she said" or "he says I did it, but I didn't do it" dilemma or controversy that can evolve with regard to enforcement procedures when there is only one Member who is a "sole witness" to a violation that cannot be confirmed or corroborated by the project manager or other Members. The intent of this policy is to ensure fair and equitable enforcement of the CC&Rs for all Members as individuals and to prevent abusive, malicious or retaliatory "sole witness" reporting of alleged violations between feuding Members.

When the project manager receives a "sole witness" violation complaint that cannot be confirmed in person, he shall inform the Member complainant to submit a complaint to the Board in person. Upon notice seven days before the next scheduled Board meeting, all such "sole witness" complaints shall be heard by the Board during "Executive Session."

It shall not be the burden of any Member to personally contact or approach any other Member regarding the witnessing of a breach or violation of the CC&Rs or any other governing document of Copper Creek. A witnessing Member has every right to bring his grievance or complaint of a violation to the project manager or the CCA Board of Directors for enforcement. However, when he is the "sole witness," he will be required to bring his complaint to the Board in person to be heard.

The Member complainant shall have the burden of proving the violation by a preponderance of the facts. The Member complainant shall be required to prove to the Board that it is more probably true that the violation occurred. The proof of the violation must outweigh any proof offered by the alleged violator that the violation did not occur.

Physical evidence such as police reports, photographs, videos or sound recordings may further serve to prove credibility of oral testimony. Although no

Member shall be burdened with making personal contact with an alleged violator; a Member may initiate correspondence with an alleged violator as a matter of “self help” relief. Although not required, any documentation of such correspondence may be weighed as evidence supporting the credibility of testimony of a “sole witness” before the Board.

The standards of evidence set forth herein is not limited to a “sole witness” and shall also apply to multiple Members who join to come before the Board to give testimony regarding a violation that cannot be confirmed or corroborated by the property manager.

Upon the presentation of credible evidence by a “sole witness” or multiple Members, the Board may proceed with citing the violating party per the Cooper Creek Enforcement Procedures.

The standards of proof set forth herein shall also apply to any Member who comes before the Board to defend himself against a violation for which he has been cited.

All matters concerning the enforcement of the CC&Rs shall be heard in “Executive Session”.

**COPPER CREEK HOMEOWNERS ASSOCIATION**

**DECLARATION OF FACT BY "SOLE WITNESS"**

I, \_\_\_\_\_ declare under penalty of perjury that the following facts are true and correct:

- 1) I have personal knowledge of the facts contained in this Declaration. I am competent to declare the facts contained in this Declaration.
- 2) If requested, I agree to appear and testify, in any adjudicatory proceeding, to the facts contained in this declaration. I further agree to appear and testify without being served with a subpoena.
- 3) List facts and attach other documentation as needed.

\_\_\_\_ Check here if attaching additional documents

\_\_\_\_\_  
Name

\_\_\_\_\_  
Signature

Executed on this \_\_\_\_ day of \_\_\_\_\_ 20\_\_

## **HOA Covenant Enforcement**

Enforcing use restrictions contained in Community Documents can cause destructive emotional conflicts in HOAs. Two legal undercurrents collide: 1) it is my land, and nobody can tell me how I can use it; and 2) the use of one's land affects the neighbor's rights, and the rights of subsequent purchasers. The violator can become emotional about the enforcement action taken. A neighbor can become emotional about a lack of enforcement action taken. In a recent case, a homeowner successfully sued an association for not enforcing the covenants against a neighbor. Johnson vs. The Pointe Community Association, Inc., 1 CA-CV 02-0160 (Court of Appeals, 07/31/03).

Effective covenant enforcement preserves property values. The first step is to identify the violation, and communicate the violation to the homeowner. Under Arizona law, a homeowner must receive notice and an opportunity for a hearing, before a HOA can fine the homeowner for a violation. However, proceeding directly to a fine letter will fuel the emotional content of the enforcement action. In order to cure the violation, the HOA must diminish the emotional content of the action.

The first communication should be a neighborly, friendly communication. It should use words such as "home", "community", "pleasing" and "neighbor". It should avoid words such as "dwelling unit" and "penalty". The first letter should invite the recipient to agree that preserving property values by maintaining the appearance of the homes is a goal shared in the community.

Violators can be lumped into three categories: 1) procrastinators; 2) hardship cases; and 3) defiant homeowners. Enforcing the covenants against the defiant homeowners is the most challenging. A threatening initial communication to a defiant homeowner will cause that homeowner to become defensive and aggressive. Only the neighborly initial communication has a hope of obtaining compliance by the defiant homeowner.

The neighborly initial communication has little chance of obtaining compliance by the procrastinator. It may open up communication with the hardship cases, and the defiant homeowners. If communications open, the HOA should obviously work with the homeowners to solve the problem. If not, continued enforcement is required.

I recommend that the second notice should not threaten a fine, unless the violation is egregious, or poses a danger to the community. The second notice should again be neighborly. It should assure the homeowner that the oversight was not intentional. These communications can become trial exhibits for a judge and jury to evaluate. The tone of the violation letters can sway the opinions of a judge or jury.

The third letter should threaten a fine, and invite the homeowner to a hearing before the Board. The term "hearing" is contained in ARS sections 33-1242(11) for condominiums, and 33-1803(B) for planned communities. "Hearing" was an unfortunate choice of words. The Board should try to negotiate a resolution at the hearing. HOAs should approach a hearing as an opportunity for a

discussion to obtain compliance, rather than only a procedure for weighing testimony and evidence.

Arizona law only provides that the amount of a fine must be “reasonable”. The HOA should calculate the amount as a sufficient incentive to obtain compliance. Fines should never be used as revenue enhancers. Factors to consider are: 1) the seriousness of the violation; 2) whether it is a first violation or a continuing violation; 3) whether the violation is a danger to person or property; and 4) whether the Board believes the homeowner will fulfill a promise to comply. In a recent case where a homeowner was operating a business from a home, the Board properly considered the amount of the profit, and calculated the fine in an amount sufficient to render the business unprofitable.

Boards should always consider waiving the fines, if the homeowner cures the violations. Boards may decide to waive the fines only after a period of compliance. For example, if a homeowner has repeated trash can violations, the Board may consider waiving the fines, but only after six months or one year of compliance. Resale’s are also an opportunity to obtain compliance. Under ARS sections 33-1260(A)(3)(e) for condominiums and 33-1806(A)(3)(e) for planned communities, a HOA must provide a statement to the buyer a statement whether the records of the HOA reflect any violations. Again, HOAs should use the resale as an opportunity to waive fines, in exchange for compliance. Waiving the fines in exchange for compliance will inform the buyer that compliance is required in the community, and that the HOA uses fines for compliance, rather than for revenue enhancement.

The opinion in the Johnson vs. The Pointe case has been interpreted as exposing a HOA to liability if it does not enforce the covenants. Now is an opportune moment for HOAs to review their covenant enforcement policies, to ensure the process is aimed at compliance.