

**How Arizona Courts Decide HOA Enforcement Issues**  
**By Carolyn B. Goldschmidt, Esq.**  
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Enforcement of restrictions in CC&Rs and other community rules and regulations can be a troublesome issue with which Association Boards and their Managers must grapple. Whether seemingly simple or unexpectedly complex, most enforcement issues raise the same common questions: Is there a violation, and how should the enforcement proceed? As with many things in life, and especially the law, these questions lead to still more questions. This article will look at three common questions that often arise concerning HOA enforcement issues.

**Question 1: How can an Association begin a program of enforcement if there has been a long period of non-enforcement, or lackadaisical enforcement in the past?**

This issue arises many times upon the transition of control of the Association from the Developer to the Owners; however, it can happen anytime a newly-elected Board begins its term. A history of non-enforcement can undermine an Association's enforcement authority. Concurrently, Owners may object when existing violations that went unnoticed or unenforced for a period of time are now being pursued by the Association.

In Heritage Heights Home Owners Association v. Esser, control of the Association had just transitioned to the Owners. During the past several years, the Developer had not pursued correction of violations, and the owner-controlled Board began a program of enforcement to eliminate violations already existing, and to prevent further violations. This case particularly addressed "grape stake" fences, which were prohibited in the CC&Rs, but were used on a number of lots in the subdivision. The Board adopted a policy that required replacement of all grape stake fences within the ensuing five years. Mr. Esser installed such a fence after the policy was adopted and insisted he was entitled to keep it for five years.

The Court's opinion recognized that the Board's enforcement policy addressed not only grape stake fences, but also other violations that the Developer overlooked. The Board gave several notices to owners in its newsletter of its intention to enforce the restrictions for the good of the community and outlined a program for doing so. The evidence also showed that many existing violations were corrected; however, in some cases, the Board granted variances or an extended period of time for the removal of violations (as with the fence replacement program).

The Court accepted the Association's program as justifiable, reasonable, and fair. Further it concluded that there was nothing arbitrary or inequitable about providing reasonable accommodations for good faith violations, as described above. And, Mr. Esser was required to remove his fence since his violation occurred after the enforcement program was put into place.

The Court stated unequivocally that when an owner accepts a deed to a property that is restricted by CC&Rs, that the owner consents to and is bound by those restrictions, which amount to a contract between the owner and the Association. However, the Court also implicitly adopted an additional standard that enforcement of the restrictions must be reasonable and equitable.

**Question 2: How much discretion does an Association Board have in determining whether a particular violation should be enforced?**

In Johnson v. The Pointe Community Association, a Board of Directors chose not to enforce a violation of the CC&Rs that appeared to be minimal. Here, the Johnsons and their neighbors, the Boyles, were in a dispute over a trellis the Boyles had constructed in their backyard without first seeking approval from the Architectural Review Committee (ARC). However, after the ARC took notice of the trellis and other architectural violations, the Board failed to take further steps to ensure that the Boyles brought their lot into compliance. The Board took the position that it reasonably interpreted and enforced the CC&Rs, in an exercise of its discretion, and the Court was required to defer to the Board's decision.

The Court refused to defer to the Board and stated: "In the absence of declaration [CC&Rs] provisions providing alternative means of resolving disputes arising from the enforcement of [CC&Rs], both homeowners and their associations are entitled to bring their case before the courts without either party's position receiving deference. The civil courts afford a neutral interpretation of the development's declaration and "significant protection against overreaching" by either homeowners or their association. However, the broad reach of this decision has been limited by another, more recent case from the Arizona Court of Appeals.

In Tierra Ranchos Homeowners Association v. Kitchukov, the Court addressed its previous conclusion in Johnson, and narrowed its view significantly. At issue in this case is the placement of a garage on the Kitchukovs' Lot. After the ARC refused to approve the garage placement because it would be too close to the northern Lot line, the Kitchukovs challenged the ARC's discretionary decision as arbitrary and unjust.

The Court, looking at Johnson and other law, adopted the rule from the Restatement (Third) of Property, and concluded that in cases involving the interpretation of a CC&Rs provision [i.e., whether an action by an owner on his property constitutes a violation under the CC&Rs], the Court has the power to make an independent determination, but in a case involving an ARC's discretionary decision, made within the scope of its authority and upon reasonable investigation, a court should defer to the ARC's decision.

Taking both of these decisions together: although a Board is not permitted to interpret and enforce the CC&Rs in any manner that is wholly inconsistent with the actual provisions, it may reasonably exercise its discretion, when faced with a violation, as to how enforcement will proceed.

**Question 3: How should an Association enforce restrictions if the CC&Rs are unclear as to whether a violation exists?**

This may be the most important of the three questions, because it must be settled before either of the first two questions can be addressed. Many times, to abuse a familiar phrase, a possible violation may walk like a duck, and talk like a duck, but may not be described or listed under the "duck" provision in the CC&Rs. So is it a duck? In Arizona Biltmore Estates Association v. Tezak, the Tezaks parked a large customized bus on their property. The applicable restriction

stated that no trailer, camper or “similar equipment” shall be permitted on any property within Biltmore Estates. The Tezaks argued that the plain wording of the restriction did not include the word “bus” or any similar term that could adequately describe their customized bus, which was not used for living space or camping or any other purpose that would put it in the same category as the vehicles mentioned in the restriction.

At the time of this case, the law was settled that restrictive covenants (i.e., restrictions in CC&Rs) were to be strictly construed in favor of the free use and enjoyment of property. However, the Court instead applied the principle that the intention of the parties to the CC&Rs is paramount. Pursuant to this principle, the Court found that the intent behind the restriction was to prohibit bulky vehicles, such as the Tezaks’ bus, and concluded that the restriction did apply.

Since the Tezak case, the Arizona Supreme Court, in Powell v. Washburn, has shifted its view away from upholding the “free use” of property and adopted the intent principle in Tezak. The more modern focus, on upholding the intent of the parties to the restriction, establishes a clear standard for the interpretation of CC&Rs regarding enforcement provisions: if it walks and talks like a duck, and the terms evidence the intent for the provision to restrict ducks ... well, I’m sure you know the rest.

*Carolyn B. Goldschmidt has been practicing community association law for more than 20 years and is certified as a real estate specialist by the State Bar of Arizona. Carolyn owns the Goldschmidt Law Firm, which offers representation for all aspects of community association legal issues.*