



November 13, 2014

To: Columbia Association Board of Directors  
Advisory Committee Chairpersons  
Village Board Chairs  
Village Managers  
Members of the Press  
CA Management

From: Russ Swatek, Board Chair

**The Columbia Association Board of Directors Meeting will hold a Work Session on Thursday, November 20, 2014 at 7:30 p.m. at the Columbia Association Building, 10221 Wincopin Circle, Columbia, MD 21044.**

#### **BOARD WORK SESSION AGENDA**

- |   |                  |
|---|------------------|
| 1. Call to Order (Announce Directors/Staff in Attendance) | 1 min.           |
| 2. Approval of Agenda                                     | 1 min.           |
| 3. Resident Speakout                                      |                  |
| 4. Work Session on Covenants                              | <b>120 min.</b>  |
| (a) Residential Covenants                                 | <i>(60 min.)</i> |
| (b) Commercial Covenants                                  | <i>(60 min.)</i> |
| 5. Adjournment – Approximately 9:45 p.m.                  |                  |

**Next Board Meeting: Thursday, December 11, 2014**

**ARRANGEMENTS FOR AN INTERPRETER FOR THE HEARING IMPAIRED CAN BE MADE BY CALLING 410-715-3111 AT LEAST THREE DAYS IN ADVANCE OF THE MEETING.**

#### **CA Mission Statement**

Working every day in hundreds of ways to make Columbia an even better place to live, work, and play.

#### **CA Vision Statement**

Making Columbia the community of choice today and for generations to come.

## COLUMBIA COVENANTS

### A. Definition

- Covenants are private agreements with respect to land
- May include provisions regarding:
  - Use of land
  - Architectural design
  - Maintenance of property
  - Payment of assessments
- Separate from zoning restrictions, although may often have provision requiring compliance with zoning, and covenants may impose more (but not less) restrictive requirements than zoning
- Filed in county land records - - form part of chain of title, binding on subsequent property owners

### B. Covenants in Columbia

Multiple covenants may be applicable to Columbia properties

#### 1. CA - Deed, Agreement and Declaration of Covenants, Easements, Charges and Liens

- December 13, 1966
- Imposes annual charge, describes method of calculation and makes it a lien against property with priority over all other liens (including mortgages) with exception of taxes
- Prescribes uses of annual charge funds
- Declares rights of enjoyment of CA facilities for property owners and renters
- Allows CA to charge fees for use of facilities
- Does NOT contain any architectural, land use or maintenance covenants

#### 2. Villages

Each village community association, which is a non-profit corporation separate from CA and from other villages, has a Deed, Agreement and Declaration of covenants, executed between

Howard Research and Development Corporation ("HRD") and CA at the time of formation of the village. Those covenants address:

- Membership in village community association and voting rights in village election for village board members and Columbia Council Representative
- Right of village to impose assessments
- Maintenance covenants
- Architectural controls over new construction and exterior alterations of existing structures
- General restrictions including ones regarding subdivision of lots, above ground utilities, removal of trees, signs
- Residential restrictions including ones on in-home businesses

Each village conducts its own review and approval of architectural plans for construction and exterior alterations on properties subject to village's covenants and investigates and handles complaints of maintenance violations

Upon village's request, CA may assist village in bringing suit to enforce covenants

### 3. Commercial Properties Not Annexed to a Village

Numerous separate covenant agreements executed by HRD and property owners cover commercial properties throughout Columbia that are not annexed to a village

### 4. Individual Townhouse/Condominium Covenants

- Many residences in Columbia are part of a townhouse or homeowners association which may have its own set of covenants with respect to homes in that development
- These may be more restrictive than the villages' covenants
- CA and Villages do not enforce these covenants - must be enforced by individual townhouse or homeowners association

## RESIDENTIAL COVENANT REVIEW AND ENFORCEMENT

### I. COVENANT REVIEW PROCESS

#### Covenants vs. Guidelines – Enforceability/Adherence To Guidelines

- Covenants in land records – contract with each owner, use and appearance of property
  - Court order to enforce
- Guidelines – 7.05 – helpful guideposts/not necessarily absolute (7.03 – assist and advise)
  - Townhouse Association Covenants/Zoning
  - Most restrictive rule

#### Resident Architectural Committee (“RAC”) vs. Architectural Committee (“AC”) – Overview Of Jobs/Roles/Responsibilities

- AC – Provided for in Covenants (Art. VII)
  - 7.03 – Basis for Disapproval of Application - Right to disapprove plans submitted (failure to comply with Covenants, not enough information, objection to exterior design, incompatibility of structure or use with other lots, location, grading and landscaping, color/finish/style/height, or any other matter which renders structure or use inharmonious with general plans of improvement or other structures or uses on other lots)
  - 7.03 – Reasonable Efforts Assist - AC must make reasonable efforts to assist and advise an applicant in order that acceptable proposal can be prepared and submitted for approval
  - 7.01 – each member of AC can approve

- 7.04 – Approvals are Saved - permanent record with AC and copy returned to applicant
- 7.05 – 60 Days - failure to approve or disapprove within 60 days means approval
- **RAC** - created by ACs (7.01)
  - Purpose
    - Assist and advise AC
    - Assist and advise applicant
  - Recommend to AC
    - AC not bound
  - **Can RAC approve?** -yes, if AC member approves

### **Discussions With Applications**

- 7.03 – reasonable efforts to assist and advise
  - No affirmative representations as to whether application will be approved or disapproved
    - Guidelines promulgated to assist
  - Each property is unique, AC's decision

### **RAC Site Visit – Meeting?**

- Meeting - if members gather for purpose of business

## **Standard – Arbitrary And Capricious – High Handed or Whimsical**

- 7.03 – judgment of AC
  - Discretion is ok
- Must be “reasonable”

## **Approval Levels**

- Approved vs. approved with condition/approved as amended
  - 7.03 – Disapprove or approve with condition - shall be accompanied by a statement of grounds upon which the action was based

## **II. COVENANT ENFORCEMENT PROCESS (GENERALLY – NOT MANDATED)**

### **A. VILLAGE**

1. Covenant advisor receives complaint regarding possible covenant violations at a given property.
2. Complaint form completed by covenant advisor.
3. Covenant advisor makes site visit 1 – 14 days following receipt of complaint to check for covenant violations.
4. If violations found, covenant advisor sends sequence of at least 2 and possibly 3 letters notifying property owner of violations.
  - First letter sent within 1 - 14 days of verifying complaint, requesting that violations be corrected by certain date.
  - If owner does not contact covenant advisor or fails to correct violations, second letter sent after deadline stated in first letter.
  - If there’s still no response, third letter may be sent after deadline stated in second letter.

- At any time in this process, property owner may contact covenant advisor to discuss covenant issues and work out arrangements. Covenant advisors also will provide contact information about potential sources of financial and other assistance.
- 5. If process detailed in item 4 does not resolve matter, covenant advisor, within 10 –15 days of deadline stated in last letter, asks Village Board to issue a 15-day notice to property owner to correct violations. Property owner again has opportunity to speak with covenant advisor and/or village board members.
- 6. If property owner fails to respond to 15-day notice or correct violations, Village Board votes whether to approve submission of case to CA’s Architectural Resource Committee (“ARC”).

**B. ARC**

- Village submission to ARC usually occurs three months to one year after village's receipt of original complaint.
- ARC meets 2nd Monday of each month.
- Members of ARC:
  - Two village covenant advisors (which villages represented rotate on set schedule)
  - CA’s Division Director of Community Services
  - Director from CA’s Open Space Management division
  - At-large Columbia resident.
- Cases submitted at next regularly scheduled ARC meeting following Village Board’s approval of submission. Photographs part of submission. Prior to meeting, ARC members visit and inspect each property on agenda. ARC discusses each case and votes whether to accept it for referral to CA President, who then decides whether to take the action recommended by ARC.
- Village may request that CA:
  - take legal action against property owner,
  - “flag” lot file to record property has covenant violations
  - “flag” membership file if property owner a CA member to deny access to CA facilities until violations corrected,
  - Place property under abandoned/vacant house policy if applicable (CA will mow lawn and/or perform other very basic maintenance required for safety reasons on exterior of property, and bill property owner)
  - Some combination of the above.
- CA’s President approves or disapproves requested action(s) within approximately one week of receipt of ARC’s recommendation.

**C. CA Pre-Litigation (GENERALLY – NOT MANDATED)**

- Warning Letter

CA Legal Department sends letter advising property owner has 15 days to respond before CA and village take legal action.

- Flagging of lot file

CA assessment file is flagged to note covenant violation. (Property owner informed of this in letter from CA.) To have flag removed so owner can provide potential purchaser or lender with certificate of compliance on sale or refinance, owner must cure violation.

- Flagging of membership file

If property owner has Sport & Fitness Membership, membership file is flagged and member denied access to all CA facilities. Denial of access notification sent to member instructing him/her to contact village regarding covenant violations and advising that he/she has 30-day window to correct covenant violations prior to membership termination.

- Dialogue between CA, property owner and village covenant advisor

Property owner sometimes contacts CA legal department in response to letter. Covenant enforcement process is explained to property owner, as well as need to resolve issues with village covenant advisor. Plan may then be developed between advisor and owner.

- Pre-litigation preparation

If above steps do not resolve covenant violations, CA legal department compiles necessary information to file suit, including:

1. Related correspondence
2. Photographs
3. Certified copy of property deed
4. Certified copy of village deed



CA legal department sends second warning letter advising property owner that litigation is imminent and offering final opportunity to resolve matter prior to litigation.

**D. MAINTENANCE UNDER VACANT/ABANDONED HOUSE POLICY**

1. If property vacant/abandoned, Village Board may request in writing that CA Open Space Management clean up property (e.g., correct lawn maintenance violations, board up unsecured entry points, etc.).
2. Open Space performs maintenance within 15 days of request.
3. Maintenance invoice is recorded for payment.

**E. LITIGATION IN CIRCUIT COURT FOR HOWARD COUNTY**

Last Resort

Any given covenant violation case will include at least some of following steps. For example, all cases require filing of complaint (step 1), but case will not include trial (step 12) if Motion for Summary Judgment (step 8) is granted.

1. Complaint filed
2. Clerk of Court issues summons
3. Service of Process (60 days)
4. Answer to Complaint, Cross Claims, Counter Claim (30 days)
5. Preliminary Motions
6. Amendment of Pleadings (any time prior to 15 days before trial)
7. Discovery may include:
  - a. Depositions
  - b. Interrogatories
  - c. Production of Documents
  - d. Request for Admissions
8. Motion for Summary Judgment
  - a. May be filed any time

b. Judgment entered if no genuine dispute as to any material fact and party entitled to judgment as a matter of law

9. Dismissal

Or if No Summary Judgment

8. Pre-trial Conference

9. Trial

a. By jury

Selection of jury

b. Bench Trial

10. Judgment

May include award of attorney's fees

11. Appeal (30 days)

If property owner contacts CA prior to award of judgment and is willing to commit to timeline for correction of violations, Motion to enter a Consent Order may be filed with Court. As part of Consent Order agreement, CA may offer to waive attorney's fees if property owner complies with agreed-upon deadline for correction of violations.

**F. CONTEMPT OF COURT**

If court enters judgment requiring property owner to correct violations and property owner does not comply within time allowed by court, CA may move for contempt. Court may enter contempt findings imposing fines for failure to comply with order or may issue arrest warrant.

## COMMERCIAL COVENANT REVIEW AND ENFORCEMENT

Commercial properties on CA-assessed land are either subject to covenant agreements between property owner and HRD or are annexed to a village and subject to village covenants

### I. HRD'S COVENANT REVIEW AND ENFORCEMENT

#### A. Individual Commercial Covenant Agreements

40 or more different agreements executed by HRD cover particular commercial developments throughout Columbia

Also separate agreements for each of properties in Town Center. With a few exceptions, every Town Center property subject to same set of general covenants and a set of covenants specific to particular property

#### 1. Current Status of Agreements

- HRD's enforcement rights under one agreement terminated by amendment
- HRD's enforcement rights under three agreements expired
- Review and enforcement of two agreements transferred to property owners within those developments
- HRD still responsible for review of architectural plans and enforcement of covenants under remaining agreements

2. **Variations in form** - - Some attached as exhibits to property deeds, others are separate agreements in form of a Declaration executed only by HRD or by HRD and owner or in form of Construction, Operation and Reciprocal Easement Agreement

#### 3. Variations in provisions

- Parties - CA is a party to only a few agreements - as a party, CA agreed to and is bound by provisions of agreement. In most cases HRD and owner/developer are only parties to agreement, but all subsequent owners of property covered by recorded document also bound by its terms.
- Termination date - a few are perpetual, remainder have termination dates ranging from 2000 to 2055. Most of the latter provide for automatic renewals, but a few do not.

- Architectural Review - require submission of architectural plans for review and approval by HRD's Architectural Committee ("Committee"). Generally the same process but some variations indicated in section below on covenant review.
- Transfer of architectural review and enforcement authority - variations include:
  - Enforcement authority devolves to property owners when HRD relinquishes control
  - Assignable by HRD to property owners
  - Assignable to CA - this is specified in only 5 agreements
  - Assignable to the applicable village - this is specified in only 1 agreement
  - Freely assignable - this is specified in only a few agreements
  - Agreement silent as to allowable assignee
- Mechanism for modification or termination of covenant agreement - Required vote varies:
  - Vote of majority of property owners in development covered by agreement
  - Vote of 2/3 of property owners
  - Vote of 3/4 of property owners
  - Unanimous vote of property owners
  - Joint consent of HRD and majority or higher percentage of property owners
- In some agreements, HRD created a property owners association to which each owner pays an assessment and which has responsibility for maintenance of common areas and payment of taxes and insurance
- Specific Covenants - vary from agreement to agreement and may include some or all of following topics, among others:
  - Use restrictions
  - Height restrictions
  - Construction requirements
  - Parking requirements
  - Maintenance and repair obligations

- Signs
- Lighting
- Insurance requirements
- Utilities
- Trash
- Landscaping
- Sidewalks
- Discharge of noxious odors
- Noise
- Animals
- Loading
- Outside storage and operations
- Percentage of total acreage that may be developed
- Use of common areas
- Easements

## **B. HRD Guidelines**

### 1. Office and Commercial Design Guidelines

General guidelines issued by HRD applicable to all commercial properties under covenant agreements with HRD

Guidelines elaborate on covenants and apply to new construction and modifications. They describe:

- Committee review process
- Project submission requirements
- General site design requirements and requirements regarding fences, walls, parking areas, site lighting and temporary construction facilities

- General architectural design requirements and requirements regarding materials, awnings, lighting, cart corrals, communication equipment, flags and flag poles, height restrictions, mechanical equipment, parking decks, roofs, security cameras and service areas
- General landscape design requirements and requirements regarding trees, plant sizes and standards
- Sign requirements including requirements regarding free-standing signs, building-mounted signs, tenant signs, temporary signs and prohibited signs
- Process for issuance of certificates of compliance

## 2. Specific Guidelines

In many cases, guidelines issued by HRD specific to a particular development

### **C. Architectural Review Process by HRD**

Are some variations in process, as noted below. Generally, process is as follows:

AC (in some covenants and in Guidelines, referred to as Architectural Review Committee) is composed of 3 or more members appointed by HRD. At present, AC consists of 2 HRD employees and 3 architect consultants.

AC authorized by covenants to review and approve exterior design of all improvements. Any clearing, grading, excavation, construction, planting, removal of trees and landscaping, exterior addition, material alteration or improvement to any site, structure or building must be reviewed for compliance with covenants and guidelines and approved by AC before commencement of any work. Improvements include buildings, parking lots, fencing, signage, lighting, landscaping, communications equipment, security cameras and mechanical equipment.

Owner must submit for review application form with 2 sets of plans and specifications. Covenant agreements permit HRD to charge fee for review, but HRD does not do so. (This is also true for villages.) Time period for review ranges from 30 to 60 days depending on applicable covenants. Frequently, there's dialogue between HRD and owner, and plans may be revised and reviewed multiple times before approval granted. If application disapproved, review form will state reasons for disapproval.

Approval by one AC member is final unless appealed by owner. If appealed, some agreements provide that decision of majority of AC is final and binding. Some agreements permit decisions of AC to be contested in arbitration proceedings.

Once plan approved, may not be any deviation from plan unless deviation is submitted to and approved by AC. HRD attempts to periodically inspect each project under construction so that deviations from plans may be corrected during construction. On completion of improvement, AC

will inspect property and issue Certificate of Compliance if project completed in accordance with approved plan.

#### **D. HRD's Covenant Enforcement Process**

If new structure or new use is other than in accordance with approved plans, AC may deem this a violation and give owner written notice of such violation. Owner must cure violation by removal or alteration of improvement or termination of impermissible use. If owner fails to take steps to cure violation, HRD may enter property and cure violation or take legal action to remedy violation. This is also process for existing structures that contain violations discovered through inspections or as result of third party complaint. Only HRD is authorized to approve plans or to determine that a violation has occurred. If HRD has given notice of a violation, the covenants generally also give other property owners in the relevant development authority to take action against violator to remedy violation. A few agreements also give this authority to CA.

HRD follows an escalation process with respect to violation notices. They're first sent by AC. If ignored, violation notices sent by HRD's in-house counsel. If still ignored, notices sent by outside counsel. In most cases, owner then capitulates or HRD and owner negotiate and reach solution. Occasionally, if this process fails, HRD asks CA to flag assessment file. As result of a flag, when owner wants to refinance or sell property, has no option but to correct violation because otherwise is unable to get certificate of compliance for lender or purchaser. In extreme cases, HRD prepared to pursue a suit for breach of contract or injunctive relief, as appropriate, but to date, HRD has not done so.

## **II. VILLAGE COVENANT REVIEW AND ENFORCEMENT**

Commercial properties in Harper's Choice, Oakland Mills, Wilde Lake (with exception of commercial strip on Little Patuxent Parkway), Long Reach, parts of Owen Brown Village Center and Kings Contrivance Restaurant property are annexed to their respective Villages. Consequently, Village's covenants, with exception of those specifically listed as residential covenants, apply to property.

Two villages, Wilde Lake and Oakland Mills, where commercial redevelopment in process, have issued Architectural Guidelines for Non-Residential Properties and Non-Residential Property Architectural Procedures, modeled on HRD's Office and Commercial Design Guidelines. These Village Guidelines apply to all properties annexed to the village that are not designated as residential land by New Town Zoning.

Villages have not brought any enforcement litigation against commercial properties.

## **III. ISSUES**

1. While there is no evidence that HRD is not enforcing covenants, if it were to fail to do so, can HRD be compelled to act?

Other parties to each covenant agreement could bring legal action to compel HRD to comply with its obligations under agreement. In most cases, other parties are the other property owners within applicable development. In a few cases CA also has that ability.

If HRD has determined there is a covenant violation, but does not take action, property owners and in limited number of agreements CA, could take action against the property owner violating the covenants.

2. Can HRD assign its covenant obligations to another party?

Yes, but with limitations described above as to whom it can make such an assignment. If HRD desired to assign all of its covenant review and enforcement obligations to a single authority, would require modification of many covenant agreements, which in turn would require consent of large percentage of property owners subject to those agreements.

3. If such an assignment were to be made, who should be the recipient of the assignment?

It has been suggested that CA might be the appropriate choice to take over commercial architectural review and enforcement. Considerations that must be deliberated include:

- Need for architectural and engineering expertise, allowing skilled review of plans and specifications and expert compliance inspections
- Need for adequate staffing
- Need for adequate funding
- Extended timeline
- Willingness to litigate commercial enforcement cases