

Architectural Precedents:

How to Deal Rationally and Effectively with Your Community's Architectural Precedents



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Architectural precedents challenge even the most diligent boards of directors. Architectural precedents are architectural conditions that have been approved, either expressly or by default, by a community's developer or the board. In many cases, these precedents are binding on the association even when the conditions violate the association's covenants or are unwanted in the community. And boards face a serious dilemma when other owners want to create the same or similar conditions. When faced with such situations, boards must determine whether they are bound by their community's architectural precedents or whether they can chart a new architectural course for their community.



Development of Precedents

Architectural precedents usually come about in one of three ways:

1. Developer Approval:

A modification or condition approved by the developer before the homeowners take control of the association creates an architectural precedent for the community. For example, a community's declaration prohibited ancillary structures on lots; however, during the initial sell-out, the developer allowed two lot owners to construct detached garages as part of their sales agreement. After turnover of the association to the homeowners, a third owner asked permission to install a detached garage. The developer's approval of the first two garages may have set an architectural precedent for the entire community. [See Example One]

2. Board Approval:

A modification or condition approved by the current or prior board can also create a binding precedent. For example, a community's declaration required approval from the board for any exterior changes on a lot. A homeowner requested permission to install a pond in his front yard and the board approved the installation. Several years later, the owner's next door neighbor asked to install a pond in his front yard. The board's approval of the first pond may have set an architectural precedent for the entire community. [See Example Two]

3. Board Inaction:

Architectural precedents may also develop because of a board's failure to act on modifications. This usually happens in one of the following two ways:

- i. The board fails to sue on a modification within the two-year statute of limitations period.

In Georgia, an association has two years to file a lawsuit from the date a covenant violation begins. If a homeowner has an unapproved architectural condition on his or her lot for over two years and the board never sues to require the owner to remove the condition, then the association may be precluded from acting. For example, a homeowner installed a chain-link fence on his lot without seeking prior written approval of his association's architectural control committee as required by the declaration. Although the fence was prohibited by the declaration, the board failed to take any action against the owner for over two years and the association lost the right to sue to have the fence removed. The failure to enforce the covenant could create an architectural precedent for the entire community.

- ii. The board picks and chooses which violations of the same covenant it wants to enforce then loses the right to enforce future violations of the covenant.

A board may unwittingly establish architectural precedents by failing to enforce the covenants even when it seemed reasonable not to do so. For example, many association declarations prohibit advertising or political signs on lots without prior written approval of the architectural control committee. However, many boards turn a blind eye to small or occasional signs. In one such community where the board never enforced the sign provision, a homeowner who was angry with the association posted a large sign on her lot that read "Don't Buy a House in This Neighborhood!" Because the board had never enforced the sign prohibition, it was difficult to enforce the covenant against the angry owner. The owner claimed that the board was selectively enforcing the sign restriction against her and that its failure to enforce the sign restrictions in the past set a precedent for the entire community.

Acting Rationally

No matter how your community's architectural precedents arose or developed, the fact is that every community has them. The board's obligation is to deal rationally with its precedents when faced with homeowner requests for the same or similar modifications. Boards must be rational as they review and consider modification requests. While a board is not required to treat each homeowner equally, the board must have a rational basis for the manner in which it treats each homeowner. The board must have not acted in an arbitrary or a capricious manner when saying no to an identical/virtually identical request and also be rational in the manner in which it enforces (or chooses not to enforce) the covenants.

Here are two examples where the board wanted to change an architectural precedent in its community and found a rational basis to do so:

Example One: A developer approved installation of detached garages on two lots while the association was under developer control. The two homeowners negotiated a contract with the developer to allow them to install detached garages, despite a restriction in the association's declaration prohibiting ancillary structures on the lots. Once the developer turned over the association to the homeowners, a third owner asked for board approval to install a detached garage based on the precedent established by the developer. In this situation, the homeowner-controlled board should deny the third owner's request on the basis that the declaration prohibits ancillary structures. Even though the developer approved two such structures, now that the homeowners are in control, the board is still obligated to enforce the declaration and could rationally deny the third owner's request on this basis.

Example Two: A homeowner received express approval from the board to install a pond in his front yard and, several years later, his next door neighbor asked for permission to install an identical pond in his front yard. The current board did not want to approve the second pond because, although the declaration did not expressly prohibit ponds, the board had received numerous complaints from other owners about the first pond being dangerous for neighborhood children and detracting from the neighborhood's aesthetics. The board and many owners in the community felt that there should be no additional ponds on lots in the neighborhood for these reasons, thereby establishing a rational basis to deny the request for another pond.

Example Three: A decision to deny a request on the same/virtually the same request of an approved change subjects their decision to judicial scrutiny. Over time, Georgia courts have established a rebuttable presumption that architectural decisions are fair and reasonable. It is up to an owner to rebut that presumption by presenting facts that show a decision was arbitrary or capricious. In one case, a lot owner alleged the Board of Directors wrongfully did not approve his installation of a second driveway. The owner showed other lots had second driveways.

A decision is not arbitrary or capricious when it is procedurally fair and reasonable and when the decision was made in good faith. The court held the lot owner's proof of those other driveways and the lack of any reasons for denying the driveway rebutted the presumption and shifted the burden of proof to the board to prove it had acted properly. It was unable to do that so the court ruled against the association.

Taking Stock

1. Current Covenant Violations and Unwanted Conditions

Taking stock of existing covenant violations and unwanted architectural conditions is an excellent way to assist your board to deal rationally with architectural precedents now and in the future. The board should catalog all existing covenant violations and unwanted architectural conditions and determine why those violations or unwanted conditions have been permitted to exist. For example, in the case of the developer-approved detached garages, the board should list the two approved garages and identify that the structures were approved by the developer as part of a negotiated sales contract. In the case of the pond, the board should identify the pond and that the pond was board-approved. In addition, the board should note in its records that, due to many owner complaints about the safety and aesthetics of the pond, the neighborhood does not want additional ponds on lots. The catalog of these conditions should also note the date that the violation started if known, or when the board first noticed it. This will help the board keep up with all violations for which the two-year statute of limitations has passed. Take a look at the sample list printed with this article to help get you started with a list for your community.

2. Requests for Modifications

Another way to keep tabs on architectural conditions in the neighborhood is to begin tracking all requests for modifications. If an application is denied, the board should list the reasons for denial. A sample tracking form is included with this article.

To ensure the accuracy of the board's records, the board should conduct regular inspections of the community. The board should look for existing or potential covenant violations. As the board learns about new violations, it should act promptly to notify the owner of the violation and what must be done to correct it. Making regular inspections and responding promptly to violations will allow the board to avoid losing its right to enforce the covenant because the two-year statute of limitations has passed. Also, these inspections and prompt responses will help the board avoid adding new covenant violations or unwanted architectural conditions to its stable of community precedents. Once the board collects and catalogs information about its existing architectural precedents and begins tracking all architectural applications, the board will be able to identify a rational basis for approving and denying new requests and for enforcing the covenants.

Each association's board of directors owes its members a duty to enforce the association's covenants. Knowing what conditions already exist in the neighborhood and keeping track of new applications will enable the board to make rational, logical choices when owners request changes on their lots or when owners violate the covenants. Your board can deal effectively with architectural precedents in your community as long as it keeps good records and acts rationally and promptly on covenant violations in the community.

CASE STUDY

Bryan v. MBC Partners, L.P., 246 Ga.App. 549, 541 S.E.2d 124 (2000).

There is good news in one Georgia case regarding a board's leeway with architectural precedents in the community. The case of Bryan v. MBC Partners, L.P., decided by the Georgia Court of Appeals in 2000, is a great example of a board's ability to enforce an egregious covenant violation despite architectural precedents violating the same covenant in the community. In the Bryan case, a developer sought to stop a homeowner, Mr. Bryan, from keeping a sign on his lot because the sign was in violation of the declaration. The declaration specifically prohibited the placement of any signs without the prior written approval of the architectural control committee ("ACC"), "except for directional signs, 'For Sale' signs, and other marketing activities deemed desirable by the developer." Apparently, Mr. Bryan was very upset with the manner in which the developer handled various repairs to his property. In response, he created a homemade sign that was seven feet by three feet and stated in white handwritten letters on a black background that "Before You Buy a Home in Here PLEASE See Us." Mr. Bryan placed the sign in his front yard, without prior approval of the ACC. The sign stayed up for a week, before Mr. Bryan removed it in compliance with a temporary restraining order granted by a superior court to the developer.

After Mr. Bryan removed the sign, he noticed seven or eight signs on houses and lots in the neighborhood that said "under contract" for which the owners did not have prior ACC approval. On the appeal of the superior court's order, Mr. Bryan defended his right to keep up his sign on the basis that, among other things, the developer waived its right to enforce the sign restriction against him because the developer was not enforcing the restriction against all homeowners uniformly. Mr. Bryan argued that the owners with "under contract" signs also should have had prior approval from the ACC and because they did not, the ACC and developer waived the right to enforce the sign restriction against him.

The Court of Appeals disagreed with Mr. Bryan and found that the developer did not waive the sign restriction by failing to object to the signs erected by other owners. Importantly, the Court found that the ACC promptly objected to Mr. Bryan's sign and asked him in writing to remove it. On the other hand, the Court found no evidence that anyone objected to the signs about which Mr. Bryan complained. The Court ruled that, because Mr. Bryan did not have the required prior written approval for his sign, and the ACC followed its procedures to have the sign removed, it was appropriate to reject Mr. Bryan's claims that the developer and ACC had waived the restriction.

The Court's ruling in the Bryan case means that just because an association has failed to enforce a covenant against one homeowner—for whatever the reason—does not automatically mean that the association is unable to enforce the same covenant in the future against other homeowners.

