

Frequent Legal Questions and Answers **From Neighborhood Association Members**

Disclaimer: This document is for reference only. None of this information should or can be used to solve a legal situation within a neighborhood. An Attorney should always be used when necessary.

In some of the answers there are references to “Bob and/or Carrie”. The full names of these people are Carrie Hawk Gutman and Bob Eherenman, who are lawyers providing support to the Allen County Neighborhood Association.

Some of the questions and answers may seem vague or incomplete, but have been provided as best we can from the understanding assumed when being documented.

- **Covenants:**

Governs associations

How do we find our covenants?

Start with the Allen County Recorder

<http://www.allencountyrecorder.us/neighborhoods>

Covenants provide restrictions on property in an association with specific ways to enforce these restrictions. The covenants are a contract, but the first line of enforcement should be to try to talk to the persons involved. Generally this is your neighbor and a line of communications should be the first step in any dispute.

The association should tell the resident of the violation, verify in writing that the resident is aware of the violation and follow up with the resident for resolution. The best advice for the association is to try to think like a judge overseeing the matter.

If after the written notice of a violation is ignored, the next step would be to involve your association lawyer and have the lawyer draft and send a letter outlining the violation. The lawyer will detail the steps needed to correct the violation and what would happen for failure to comply. If after the lawyer sends the letter and nothing happens, a court would have to be involved.

One item associations should check their covenants for is an Attorney Payment Provision. If there is a provision for a prevailing party, the association could be liable for ALL legal fees for both sides if they lose the case. If the Association has an Attorney Payment Provision, only then they would not be liable for all the fees.

What if a resident puts an outbuilding on a lot without approval of the Architectural Control Committee?

If you want restriction on the land, make sure to put it in the covenants!! The judge will look at what is in the covenants and rule based on that.

How to change current covenants?

It will depend on what is spelled out in the covenants. Usually it states a certain percent of the residents must agree with the change in order for it to be allowed. If no percentage is stated, Indiana law then requires 100% agreement for a change! If you have an older association and need to make changes to the covenants and it isn't spelled out how to do so, you will need 100% of the residents to agree to the changes. How do you get 100%? You will need to get the deed of records to find out who the official owner of

the property is and have all documents regarding the changes notarized. You can usually get a fairly accurate list of deed owners from the Assessor's Office. It may be expensive to try to get the actual deeds or records. Hire an Attorney. Steps must be correctly taken or the changes are not valid.

Should you review your covenants?

Thoroughly review your covenants at least annually. Many items in the covenants can fall out of date over time.

Are daycare centers or home hobbies allowed per the covenants?

Usually these issues would be more of a zoning issue than a covenants issue.

How do you address multiple covenants with many different builders in a development?

The best course of action would be to try to get all of the builders to consolidate their covenants into one uniform document.

Are solar panels allowed to be restricted by covenants?

Solar panels are limited by the current State Statute. Covenants can't supersede the Statute. Satellite dishes fall under the same Statute. The covenants can't regulate satellite dishes under 1 meter in diameter.

Does the owner have to be the occupant?

Usually there is a no-rental provision in the covenants. The Supreme Court says it is legal, but it is very difficult to enforce.

If you have a member violating covenants, can you contact Code Enforcement to force compliance?

Code Enforcement will only come to your aid to enforce actual codes. Using a lawyer for Covenant violations should be a last resort. Talk to the people involved first. Keep on them about any violations, but talk to them. These are your neighbors and legal action should be a last resort.

When a resident refuses to abide by the covenants how can we get them enforced?

Check the Covenants and By-Laws. The new Statute states that steps must be spelled out, with detailed steps to file a grievance.

Your covenants will tell you your rights. Each Association's Covenants will have the policy spelled out. If the normal collection process does not work, a lawsuit may be filed. It is strongly recommended to consult an attorney if this is necessary. The case will normally be heard in Small Claims Court. As long as the Association is incorporated, the rules spelled out in the Covenants are fully enforceable. You may win the judgment for dues as well as any interest or attorney fees. If there is a non-waiver provision in the Covenants, they remain valid.

How do you enforce Covenants?

Hire a lawyer if needed to sue, asking the court for a judgment to enforce.

When changing our covenants by having the residents sign and approve the changes each signature needs to be notarized?

- **Articles of Incorporation:**

Article of Incorporation: Actually forms the Association. Make certain the association is on file in the Secretary of State Office
<http://www.in.gov/sos/business/index.htm>

How you can govern your Association is established in the Article of Incorporation. Information on your Association Articles is available from the Indiana Secretary of State website. Under the INBIZ tab, conduct a Business Entity Search. Your Association name should come up. If it does not, it is possible that your

Association is not incorporated. It is very important to be incorporated in order to have the Authority to enforce your Association rules. If the Bi-annual Report is not filled out, your Association's Corporation will be dissolved.

- **By-Laws:**

Bylaws: Governs corporations

Your By-Laws are not typically kept in any format accessible online. It is very important that you maintain your By-Laws for this reason. The By-Laws basically tell you how to govern your Association. They will tell you the number of Directors required for your Association. It will tell you what constitutes a quorum, a Director Quorum, Officer Titles, Responsibilities and steps required for dissolution of the By-Laws.

The By-Laws help you govern your annual meetings, Director Meetings, notices of meetings, etc. Association should review the By-Laws to know what is required for an official meeting to take place. By-Laws can tell you if multiple signatures are required for checking accounts. By-laws also contain indemnity clause that are very important as these clauses protect the Directors from liability in Association matters.

- **Insurance Requirements**

Do the officers who are responsible for the association funds need to be bonded?

Good idea to have a Fidelity Bond in place.

What type of insurance is required for associations and the officers/board members?

Associations need to carry liability insurance for property (street lights, signs, etc.) and injuries on property. It is a good idea to carry Officers/Directors insurance. Check your By-Laws to see what you are required to carry, but remember, anyone can sue anyone!

If our association has a pond(s), what type of insurance is required?

Ponds are normally water retention areas. Storm drains feed the ponds. Storm drain requirements are spelled out through the Allen County Storm Drainage Board. It is important to know if the Association actually owns the common area or if the developer owns it. Signs need to be posted on ponds for No Trespassing, No Swimming and any other rule you have in place. Your liability insurance policy should cover the Association responsibility.

If we have a management firm handle our association affairs do we still need insurance? If our association has a management firm should we still have elected officers?

Yes, you still need insurance for Officers. The Management Firm may be managing the day to day for the Association, but the Officers/Directors are responsible.

- **Officers and Board Members**

Is there a difference between Officers and Board Members?

Where should the responsibilities of the Officers or Board Members be located - Covenants or By-Laws?

Can we still have an association with only one officer?

If an officer neglects his/her responsibilities can that person, the remaining officers or the association be sued? Since we are incorporated can our officers be sued?

If derelict, they may be sued. Officers can be removed if not performing their duties.

- **Dues, liens, other Homeowner Expenses**

How do we get residents to pay their dues?

The Board needs to set the process for collecting dues. It is extremely important to maintain uniformity!!!! Set the rules and follow the rules.

In the event of a home foreclosure, does the bank have to pay the dues?

Carrie said that yes, if the house becomes bank-owned due to a foreclosure, the dues are still collectable. She suggested a lien be filed on the property to protect the Association and so the Association will be on the list of those owed money. This money would be recouped at the time of the sale of the house.

There is a new statute governing Liens. The Indiana Statute governing Liens is IC 32-28-14-1. Liens for past dues can be filed and are valid for a five year period. They are in place for one year from file date before any suit can be filed. If the house sells, both the seller and the buyer are responsible for past dues. It is best to consult an attorney prior to filing a lien to be certain that all steps are properly followed.

How to File Liens.

The Notice of Lien format and help can be obtained from the Records Office. It is not difficult to complete and then file with the Recorder but the document has to be prepared to their specifications to cut down the cost and rework. When and if the property is sold and the lien is satisfied, then Release of Lien has to be filed at the Records office

How have Lien laws been affected by recent statute changes?

Prior to the changes, if the Covenants didn't say you can place a lien for non-payment, then one couldn't do it. The new Statute allows the association the right to file liens on the homeowners. It used to be that the lien was valid for ten years; it changed to one year and had to be renewed yearly. The final version of the Homeowners Statute says that liens are valid for a 3-5 year period and must be renewed at the end of each cycle. This has not been tested in court as of yet. And, remember, the association is usually last on the list of creditors to be paid.

If a lien is filed, what is the responsibility of the Board?

Bring suit if no resolution or dismiss lien. Release lien once judgment satisfied.

Our association fiscal year is January 1 to December 31. We allow a 30 day grace period for our dues to be paid. What date can we start accruing late fees for unpaid dues? Is there a limit on the amount of penalty we charge annually for late dues?

Our covenants state that a late fee of \$5.00 per day can be charged for non-payment of dues. This can quickly lead to the late fees being more than the dues. Is this enforceable? Carrie replied that again, she would need more information to better answer the question. The courts usually allow up to an 18% late fee charge. In this case, it is a legal question and she would have to review it further to answer properly.

Can fees and penalties be collected if not spelled out in the By Laws?

Bob stated that "maybe" is the best answer he could give. It all depends on who wrote the By Laws and what exactly they say. If it is spelled out in the By Laws that the Board has the authority to collect, then generally the answer is yes. That is unless it specifically states that you can't. It is important to check your individual By Laws to be sure. In a For Profit Corporation, the power to decide usually goes to the Committee. In a non-profit, the power to decide usually rests with the Board.

Can you turn over dues collections to a Collection Agency?

One can, but the way these agencies work, a person may not even get any money if they collect. Collection agencies buy the bad debt and usually take at least 25% for any recovery.

- **Association Recordkeeping**

What types of records are necessary to be maintained by the association and for how long?

General rule is to follow what you would do at home. Papers include tax returns, By-Laws, Covenants, Insurance policies, minutes, lawn maintenance contracts, and any correspondence that do business with the Association.

Is there a recommended dollar amount before we should require two signatures on a check when paying a bill for the association?

Requiring two signatures on your check can help prevent thefts.

Who should have access to the association records and books?

What documents are required for a new association?

One should go to the Secretary of State Website and check to see if the association is incorporated. It will be necessary to file to become incorporated if it is not. You will then need a set of Covenants and By Laws. Bob suggested to wait until further in the evening's presentations for information from John McGauley on how to file Covenants with his office. The By Laws are needed as they are the rules by which the association board will operate. The Board of Directors of the association needs to control these.

- **Association Taxes, Auditing Books**

Should our association have our books audited, if so how often?

Association tax returns: Bob stated that he wasn't an accountant, but he knows that associations must file a tax return for Indiana non-profit corporations. A Google search for "Homeowner Association Tax Returns" would provide more information. It was also stated that associations must file Federal and State returns. Associations may not have to pay any taxes, but they still need to file. The question was then asked "What if there have not been previous years' tax returns filed?" Anyone can go to the State of Indiana Secretary of State website and search for Articles of Incorporation to see if your status is active or non-active. This will greatly affect any decisions on what to do next. Bob reiterated that he was not an accountant and for further information, the association should consult with one.

When we have our books audited, are we required to have a CPA do the auditing?

Do we need to file a tax return?

Check with an Accountant to see if you need one. Probably not required, but as a non-profit Corporation, it would be a good idea to talk to an accountant about an appropriate review.

You should have an accountant review your financials for any discrepancies.

Check your By-Laws for any statements directly pertaining to your Association.

- **Miscellaneous**

Should our association be incorporated and if so, how do we incorporate?

Is there an ordinance covering the snow removable from all sidewalks in a subdivision?

Not required unless spelled out in the Covenants. Liability will depend upon whether it is a public or private sidewalk. It is a good idea to keep them clear to help prevent slip and falls and potential liability.

How do you file for Tax Exempt status?

Best to have an Accountant handle the process.

There is one vacant lot remaining in our sub-division. There is no sidewalk, but our covenants require a sidewalk. The lot is such that it cannot be built upon. Can we force the developer to finish the sidewalk and grade the lot so it can have grass planted and mowed?

We have a twenty year old subdivision that has one lot that does not have a home on it. This lot is the only one in the subdivision that has no sidewalk. That presents safety issues for those walking along the street. The lot is owned by the resident who lives next to the vacant lot. What can the Association do to get a sidewalk put in?

Carrie responded that it all depends on what it says in the Covenants. She also stated that there is more than likely nothing in there about the sidewalk. Her best advice is to try to work with the lot owner to come to some agreement on having a sidewalk put in or to pay for it with Association funds.

Can we limit when private in-ground pools can be used?

How do we handle abandoned property for mowing, weed control and upkeep?

Check your Covenants to see what they say. There is very limited action that Associations can take unless it is specifically spelled out in the Covenants.

Places will perform the upkeep on abandoned property to keep the rest of property values up. You can try to recover the costs to maintain these properties from the bank or lending institution.

Can you explain the legal rights of homeowners who have neighbors with tree branches extending over the property lines along with all the leaves and falling twigs from these trees?

The bottom line is that falling leaves are a naturally occurring condition and the neighbor has the responsibility to clean up and take care of their own property and cannot dump the leaves on the person's property. If the person will not communicate or talk to the person, then they should see an attorney about filing a lawsuit to stop the neighbor from dumping leaves on their property. However, while the neighbor has the responsibility to clean up their own property, the person is not entitled to have the branches encroach upon the neighbor's property. Therefore, there is a risk that the neighbor will exercise self-help and trim the branches back so that the branches do not extend over the property line.

What is the city/county ordinance for limits regarding on-street parking of vehicles, trailers, RVs, motor homes, etc.?

Our association covenants limit the off-street parking to one week duration for any vehicle and it must be parked on the driveway of any lot. How can we enforce this covenant?

What are the definitions of an abandoned vehicle? We have an unlicensed vehicle parked on a resident's lot for two weeks.

Our Association has one lot without a house on it. Can the covenants be changed to reflect the rights of any lot without a house on it?

Carrie replied that the Association probably can't make that change to the covenants. Most covenants usually have a provision in them stating that voting rights transfer to the resident after approximately 75% of the lots are filled. She also stated that this question does not provide enough information for her to make any better judgment on it. She would need to see the covenants to be able to better answer.

Another new Statute concerning Associations is House Bill 1071, Statute # 32-25.5-3. This statute covers Homeowner Associations incorporated after July 1, 2009. Associations incorporated prior to this date can choose to opt in to this new statute. There are certain advantages to the new statute: it spells out that a list of members must

be collected and maintained, the legal description of each member and must be provided if requested (for Association business) and steps to be taken if money needs to be borrowed over the \$5000 amount. If you decide to not opt in to the new statute, your existing By-Laws remain in effect.

What do you do if the bank won't give information to new Board member?

Provide the bank with an official resolution that shows changes were made. Try to keep the Association banking in the Association name.

How to find the Statutes?

All are available online. To find these statutes Google "Indiana Code", then click on the "Homeowners Associations".

How to enforce street parking?

Police won't enforce unless there are rules backing them from the city. There is usually no clear authority spelled out. This would have to be taken to the court and see how the courts handle it.

What are the costs to become incorporated?

The cost is approximately \$95.00 through the Secretary of State. Hire a lawyer. Usually they charge an hourly rate.

How long are Covenants valid?

Unless a time frame is spelled out, they will remain valid.

SWIMMING POOL CODE

675 IAC 20-4-27 Safety features

Authority: IC 22-13-2-2; IC 22-13-2-13

Affected: IC 22-12; IC 22-13; IC 22-15; IC 36-7

Sec. 27. (a) A residential pool shall be provided with a suitable handhold around its perimeter in areas where depths exceed three (3) feet six (6) inches. Handholds shall be provided no further apart than four (4) feet and shall consist of any one (1) or a combination of items listed as follows:

(1) Coping, ledge, or deck along the immediate top edge of the pool which provides a slip-resisting surface of at least four (4) inches minimum horizontal width and located at or not more than twelve (12) inches above the waterline.

(2) Ladders, stairs, or seat ledges.

(3) A secured rope or railing placed at or not more than twelve (12) inches above the waterline.

(b) Rope anchor devices shall be installed at a minimum of one (1) foot and a maximum of two (2) feet on the shallow end side of a point of change in floor slope. In pools where the slope change occurs in water depths less than four (4) feet six (6) inches,

a transition rope supported by buoys shall be installed.

(c) Access to residential pools shall be restricted by one (1) of the following means:

(1) Walls or fencing not less than five (5) feet high and completely surrounding the pool and deck area with the exception of self-closing and latching gates and doors, both capable of being locked.

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(2) Other means not less than five (5) feet high and deemed impenetrable by the enforcing authority at the time of construction and completely surrounding the pool and deck area when the pool is not in use.

(3) A combination of subdivisions (1) and (2) that completely surrounds the pool and deck with the exception of self-closing and latching gates and doors which are capable of being locked. This applies to subdivisions (1) and (2) and this subdivision only.

(4) A power safety pool cover which shall:

(A) provide a continuous connection between the cover and the deck, so as to prohibit access to the pool when the cover is completely drawn over the pool;

(B) be mechanically operated by a key or key and switch such that the cover cannot be drawn open or retracted without the use of a key;

(C) is installed with track, rollers, rails, guides, or other accessories necessary to accomplish clauses (A) and (B), in accordance with the manufacturer's instructions; and

(D) bear an identification tag indicating that the cover satisfies the requirements of ASTM F1346 for power safety pool covers.

- (d) Not less than the following lifesaving equipment shall be installed with each residential swimming pool:
- (1) A ring or throwing buoy fitted with forty (40) feet of one-fourth (1/4) inch diameter line.
 - (2) A pole not less than twelve (12) feet in length.
 - (3) Access to a telephone.