

## 10 HOA Rules that Break the Law

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While homeowners' associations (HOAs) adopt and enforce rules, they are also subject to rules themselves. In fact, there are *numerous* rules that govern HOA practices at the local, state and federal levels. When adopting and enforcing rules, HOAs need to be very careful to ensure that they are complying with the law—as failure to do so has the potential to lead to costly, time-consuming and publicized litigation.

Generally speaking, HOAs have broad authority to adopt and enforce rules that are intended to promote a desired look and feel, and that are designed to protect homeowners' property values. However, HOAs must also respect and observe property owners' rights. While **HOA laws** vary significantly at the state and local levels, there are some federal laws that apply, and there are general legal principles that apply in most jurisdictions as well.

### These 10 Types of HOA Rules are Generally Prohibited

So, what types of rules *can't* a homeowners' association enforce? Here are 10 examples of HOA rules that may break the law:

#### 1. Rules that Are Discriminatory in Nature

Homeowners' associations cannot adopt rules that are discriminatory in nature. State and federal laws prohibit HOAs from discriminating on the basis of race, ethnicity, gender, family status and various other protected characteristics. Obvious examples would include adopting rules that provide disparate treatment to African Americans or same-sex couples, but much more subtle forms of discrimination have been found to violate homeowners' rights as well.

#### 2. Rules that Are Discriminatory in Practice or Application

Even if an HOA rule is not discriminatory on its face, it can still be illegal if it has a discriminatory impact. This can either result from practical circumstances (i.e. adopting different rules for different sections of a neighborhood with different demographics), or from discriminatory application (i.e. enforcing a non-facially-discriminatory rule in a discriminatory way). HOAs cannot avoid liability for discrimination simply by writing rules that are facially neutral. If there is a discriminatory purpose behind a facially-neutral rule, the rule is illegal.

#### 3. Rules that Violate the Freedom to Display the American Flag Act

The Freedom to Display the American Flag Act is a federal law that Congress enacted in 2005. Under this law, an HOA **may not**, "adopt or enforce any policy, or enter into any agreement, that would restrict or prevent an association

member from displaying the U.S. flag on residential property within the association with respect to which such member has a separate ownership interest or a right to exclusive possession or use.” However, the law does not prevent an HOA from imposing, “any reasonable restriction pertaining to the time, place, or manner of displaying the flag necessary to protect a substantial interest of the . . . association.” For example, if an American flag’s placement obstructs drivers’ view at an intersection, the HOA may have the authority to prohibit the specific placement. Some states have enacted laws that make it illegal for HOAs to prohibit the display of certain other flags as well. Examples (in varying jurisdictions) include state flags, U.S. armed forces flags and flags of Indigenous American tribes.

#### **4. Rules that Violate the Telecommunications Act of 1996**

The federal Telecommunications Act of 1996 restricts the ability of homeowners’ associations to adopt rules regarding the placement of satellite dishes and other communication devices on residents’ private property. Although these restrictions are becoming less relevant this day in age, they can still come into play in various circumstances. The Federal Trade Commission’s [Over-the-Air Reception Devices Rule](#) also prohibits HOAs from adopting rules that, “(1) unreasonably delays or prevents use of; (2) unreasonably increases the cost of; or (3) precludes a person from receiving or transmitting an acceptable quality signal from an antenna covered under the rule.” While the Telecommunications Act of 1996 and Over-the-Air Reception Devices Rule are fairly restrictive for homeowners’ associations, they do not prohibit HOAs from addressing concerns related to satellite dishes and other communication devices entirely. For example, within limits, HOAs can restrict the size and location of satellite dishes and other communication devices placed on private property, and they can prohibit the placement of these devices in common areas or in areas where their placement would interfere with historical preservation efforts.

#### **5. Rules that Violate Fair Housing Laws**

State and federal fair housing laws prohibit HOAs from engaging in discriminatory practices that negatively impact individuals’ access to homes or their rights within a particular community. These laws commonly prohibit housing-related discrimination on the basis of race, color, national origin, sex, religion, familial status and disability—among other protected characteristics. We have covered rules that violate fair housing laws separately from rules that are generally discriminatory because the enforcement mechanisms under these laws are different in many cases. In addition to civil litigation, HOAs that violate fair housing laws can also face enforcement action from the U.S. Department of Housing and Urban Development (HUD) and its state counterparts.

#### **6. Rules that Violate State or Local Laws or Ordinances**

Several states and municipalities have adopted laws and ordinances that restrict the types of rules local HOAs can impose. When drafting an HOA’s covenants, conditions and restrictions, it is imperative to identify and review all pertinent sources of legal authority. Frequently, HOAs will fail to address unique state-level or local requirements; and, in doing so, they will expose themselves to litigation risks as a result of adopting or attempting to enforce unlawful rules or restrictions.

#### **7. Rules that Impair Homeowners’ Property Rights**

A common source of litigation between HOAs and homeowners is HOA rules that impair homeowners’ property rights. The Takings Clause of the Fifth Amendment and various other laws and regulations protect homeowners against both government and private actions that either deprive them of or

restrict their ability to use their property. For HOAs, there is a fine line to be drawn. Clearly, HOAs can adopt rules that restrict homeowners' ability to use, and even profit from, their property. But, there is also a huge body of case law that has arisen out of HOAs attempting to take their authority too far. Granting access to homeowners' property, attempting to place community assets on homeowners' property, and adopting rules that deprive homeowners of property value are just a few examples of issues that can (and often do) lead to disputes.

#### 8. **Rules that Violate Homeowners' Free Speech Rights**

Disputes also frequently arise in relation to HOA rules which homeowners claim violate their freedom of speech. While the First Amendment does not apply to HOAs, state laws protecting free speech and HOA covenants establishing homeowners' rights do. When adopting rules regarding things like flags, political signs and holiday decorations, HOAs cannot infringe upon homeowners' rights of free speech. Rules that violate these rights are unenforceable, and they can (and often will) lead to costly litigation.

#### 9. **Rules that Promote or Facilitate Fraud**

Homeowners' associations cannot adopt rules that promote or facilitate fraud. Disputes regarding budgeting, accounting practices and transparency are common, and *any* indication of potential financial impropriety is almost certain to lead to issues with the community's homeowners sooner or later.

#### 10. **Rules that Promote or Facilitate Selective Enforcement**

Finally, HOAs cannot adopt rules that promote or facilitate selective enforcement. This applies not only with regard to discriminatory enforcement, but also with regard to enforcement that disproportionately targets individual homeowners for other reasons—whether personal vendettas, individual board members' personal preferences, or a house's proximity to a board member's residence.

## **Ensure that Your HOA's Rules Don't Break the Law**

With this (non-exclusive) list of potentially unlawful HOA rules in mind, how can homeowners' associations ensure that their rules don't break the law? Here are five best practices that developers, property managers and HOA boards should keep in mind:

- **Review Your State's HOA Laws (if Any)** – Developers and HOA managers should ensure that they thoroughly review all pertinent state and local laws. This includes, but is not necessarily limited to, laws that apply specifically to HOAs.
- **Review Your HOA's Governing Documents** – Before adopting new rules, HOAs should review their governing documents to ensure that the rules they intend to adopt are permitted.
- **Focus on Rules that Preserve the Look, Feel and Property Values of the Neighborhood** – Generally speaking, HOA rules should serve the purpose of preserving the look, feel and property values of the neighborhood. Proposed rules that serve any other purpose, whether overtly or in their application, should be examined carefully.
- **Emphasize Clarity, Conciseness and Consistency** – Homeowners' associations should ensure that their rules are clear, concise and easy to understand. HOAs should also ensure that their rules are consistent (i.e. do not create conflicting obligations) and are capable of being consistently enforced.

**Have a Valid and Specific Purpose for Each Condition, Covenant and Restriction** – Homeowners’ associations should not adopt rules simply for the sake of adopting rules, nor should they rely on “cookie-cutter” HOA documents. If a particular rule does not serve a valid and specific purpose within a **particular community**, then adopting the rule may simply create unnecessary trouble.

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