



March 8, 2018

ASSIGNMENT OF COMMERCIAL COVENANT ENFORCEMENT AUTHORITY

Assignment by Howard Research and Development Corporation (“HRD”) to CA of covenant enforcement responsibilities for CA-assessed commercial properties throughout Columbia:

- Assignment is legally possible, but will not be uniform
 - Would not include all CA-assessed commercial properties
 - Would not include all types of covenants
 - Would have to be implemented through the use of multiple different forms of agreement.
- Assignment of commercial covenant enforcement authority is greatly complicated by a variety of factors, including:
 - the number of different covenant agreements,
 - differences in language among those agreements,
 - the patchwork of commercial covenant enforcement authority, which may be held by
 - HRD, or
 - one of six of the Village Community Associations, or
 - the property owners within a commercial development
 - HRD’s willingness to agree to the assignments, which will depend on the location of the property and the type of covenant

A. Definition of a Covenant

Covenant agreements are:

- private agreements with respect to real property
- may include provisions regarding, for example, use of the land, the architectural design of buildings and other improvements to the property, maintenance of the property, and/or payment of assessments
- separate from zoning restrictions, although the agreements often contain provisions mandating compliance with zoning requirements. Covenants also may impose more restrictive requirements than zoning laws.
- filed in the County land records, forming part of the chain of title of a property
- binding on all subsequent owners acquiring the property following the date of filing of the covenant agreements

B. Covenants Affecting Commercial Properties in Columbia

Multiple covenants are applicable to commercial properties subject to the CA annual charge.

CA's Deed, Agreement and Declaration of Covenants, Easements, Charges and Liens (the "CA Declaration") dated December 13, 1966

- Imposes the annual charge on all properties that are part of the Columbia Association, describes the method of calculation of that charge and states that the charge is a lien against property with first priority except as to taxes
- Prescribes the uses that CA may make of annual charge funds
- Declares the rights of enjoyment of property owners and renters with respect to CA facilities, and
- Allows CA to charge fees for the use of its facilities
- Does NOT contain any architectural, land use or maintenance covenants

Commercial properties may or may not be annexed to a village.

- If not annexed to a village, property is subject to covenant agreement with HRD
 - more than 30 such agreements covering different developments
 - depending on the provisions of the applicable covenant agreement, there is also a property owners' association
- Commercial properties in Harper's Choice, Oakland Mills, Wilde Lake (with the exception of the commercial strip on Little Patuxent Parkway), Long Reach, parts of the Owen Brown Village Center, and the Kings Contrivance Restaurant property are annexed to their respective Villages
 - Those properties are subject to the applicable village's Deed, Agreement and Declaration of Covenants, which addresses:
 - Membership in the village community association
 - Voting rights in the village elections for village board members and the Columbia Council Representative
 - The right of the village to impose assessments on properties in that village
 - 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, and signs.

C. HRD's Covenant Agreements

There are more than thirty different covenant agreements covering particular commercial developments throughout Columbia.

1. HRD covenant agreements were created in a variety of different legal forms. They may be
 - Attached as exhibit to property deed
 - Declaration executed only by HRD
 - Declaration executed by HRD and property owner

- Construction, Operation and Reciprocal Easement Agreement
2. There also is considerable variation in the terms of the agreements as to:
- Parties - CA is a party to only a few of these agreements. In most cases HRD and the property owner/developer are the only parties to the agreement (although, of course, all subsequent owners of the property covered by the recorded document are also bound by law to its terms).
 - Termination date – A few agreements are perpetual; the rest have termination dates ranging from 2000 to 2055. Most provide for automatic renewals, but a few do not.
 - Architectural Review – The agreements all require submission of architectural plans for review and approval by HRD’s Architectural Committee (“AC”). Generally, the described process is the same in all agreements, but there are some variations (indicated below) with respect to covenant review.
 - Transfer of architectural review and enforcement authority – Variations among the agreements as to transfer of authority:
 - devolves to the property owners when HRD relinquishes control
 - assignable by HRD to the property owners
 - assignable to CA (specified in only five agreements)
 - assignable to the Village (specified in only one agreement)
 - freely assignable (specified in only a few agreements)
 - agreement is silent as to allowable assignee(s)
 - Vote required to modify or terminate covenant agreement – The required vote may be:
 - A majority of the property owners in the development covered by the agreement
 - 2/3 of the property owners
 - 3/4 of the property owners
 - A unanimous vote of the property owners
 - Joint consent of HRD and a majority or higher percentage of the property owners
 - Property owners association - 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 – These vary from agreement to agreement and may include:
 - 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
3. “Office and Commercial Design Guidelines” (the “Guidelines”) issued by HRD apply to all commercial properties subject to covenant agreements with HRD. The Guidelines elaborate on the covenants and describe:
- The Architectural Committee (“AC”) 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
 - The process for issuance of certificates of compliance.
4. In many cases, there also are guidelines issued by HRD that are specific to a particular development or property.

D. HRD’s Covenant Review and Enforcement Process

Generally the process is as follows:

- The AC (in some covenant agreements and in the Guidelines referred to as the Architectural Review Committee) must be composed of three or more members appointed by HRD. At present, the AC consists of two HRD employees and three architect consultants.
- The AC meets at least once a month.
- The AC is authorized to review and approve the exterior design of all improvements, which include:
 - buildings
 - parking lots
 - fencing
 - signage
 - lighting
 - landscaping
 - communications equipment
 - security cameras
 - mechanical equipment.

- The following must be approved by the AC as compliant with the covenants and guidelines before commencement of any work:
 - clearing
 - grading
 - excavation
 - construction
 - planting
 - removal of trees and landscaping
 - an exterior addition, material alteration or improvement to any site, structure or building
- HRD may charge a fee for reviewing applications but does not currently do so. (The villages also are permitted by their Covenants to charge a fee.)
- The time period allowed for review ranges from 30 to 60 days depending on the applicable covenants.
- Frequently, there is a dialogue between HRD and the property owner, and plans may be revised and reviewed multiple times before an approval is granted.
- If an application is disapproved, the review form will state the reasons for disapproval.
- A decision by one AC member is final unless appealed by the owner.
- If decision appealed, some covenant agreements provide that a decision of the majority of the AC is final and binding while some permit AC decisions to be contested in arbitration proceedings.
- Once a plan is approved, there may not be any deviation from the plan unless submitted to and approved by the AC.
- HRD attempts to periodically inspect each project under construction so that deviations from plans may be corrected during construction. Inspections are normally done by the AC's Administrator (an HRD employee), sometimes accompanied by one of the architects.
- On completion of the improvement, the AC will inspect the property and issue a certificate of compliance if the project is completed in accordance with the approved plan. If not, the AC may give the owner a written violation notice. The owner must cure the violation by removal or alteration of the improvement or termination of the impermissible use.
- If an existing structure contains violations discovered due to an inspection or third party complaint, HRD will give the owner a written violation notice. Only HRD is authorized to determine that a violation exists. 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 the violator to remedy the violation. A few of the covenant agreements also give this authority to CA.
- If the owner fails to take steps to cure the violation, HRD may enter the property and cure the violation or take legal action to remedy the violation. To date, HRD has not exercised either remedy, but instead has followed an escalation process. If a notice sent by the AC is ignored, a violation notice is sent by HRD's in-house counsel. If still ignored, a notice is sent by outside counsel. In most cases, the owner capitulates, or HRD and the owner negotiate and reach a solution. Occasionally, if this process fails, HRD asks CA to flag the assessment file for the property. As result of a flag, when the owner attempts to refinance or sell the property, the owner is unable to obtain the certificate of compliance required by the lender or purchaser until the violation is corrected.

E. Village Commercial Covenant Review and Enforcement

For commercial properties annexed to a village, that village is responsible to:

- review and determine whether to approve architectural plans for construction and exterior alterations
- investigate and handle complaints of maintenance violations

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

F. Properties Over Which Neither HRD Nor A Village Has Covenant Authority

There are seven commercial properties that are not annexed to a village and over which HRD no longer has any covenant enforcement authority. Those are:

- Oakland Ridge
- Rivers Corporate Park
- Sieling Industrial Park
- Corridor Industrial Park
- Corridor North Industrial Park
- Patuxent Woods Business Park
- Dorsey Hall Business Park

There is a property owners' association for Oakland Ridge that has taken responsibility for the covenants. In the other six developments, no owners' association has been formed, so there is no one exercising authority with respect to covenant enforcement.

G. Assignment of Covenant Enforcement Authority to CA

To the extent that HRD is willing to assign its covenant enforcement authority, this can be achieved, although not by a simple or single agreement and not as to all commercial properties or covenants.

- Due to the varied provisions in the covenant agreements regarding assignment and modification, transfers of authority to CA will require different forms of agreement for different properties.
- Assignments may require modification of many of the covenant agreements, which in turn may require the consent of a large percentage of property owners subject to those agreements.
- HRD cannot, of course, assign to CA an authority it does not have.
- Commercial covenant enforcement would continue to be a function of those villages which include commercial properties
- CA also would have no covenant authority with respect to developments for which authority has passed or passes to the property owners.

- HRD has the right to decline to transfer authority as to certain properties and certain types of covenants. That decision is in HRD’s sole discretion.
- Consistency of covenant enforcement for all of Columbia would not necessarily be achieved through assignments from HRD to CA, since such authority would not rest solely with CA. Depending on the property at issue, covenant authority might lie with:
 - HRD
 - CA
 - Harper's Choice
 - Oakland Mills
 - Wilde Lake
 - Long Reach
 - Owen Brown
 - Kings Contrivance
 - Oakland Ridge Owners Association
 - Commercial property owners

Other considerations for CA with respect to acceptance of commercial covenant enforcement responsibility include the following:

- a need for architectural and engineering expertise to allow for skilled review of plans and specifications and expert compliance inspections
- the requirement that CA implement multiple types of procedures dictated by the different covenant agreements
- the expense and substantial amount of time necessary to litigate commercial enforcement cases
- a decision as to whether CA wishes to discuss with each village that has commercial covenant authority whether it wishes to transfer that authority to CA

In order for CA to accept from HRD responsibility for commercial covenant enforcement, at least the following steps would be required:

- Execution of an agreement with HRD identifying the properties and types of covenants for which authority is to be assigned to CA and outlining procedures for coordinating covenant enforcement between the two entities
- Execution of multiple assignment agreements
- Execution of multiple covenant agreement amendments, after obtaining if possible the consent of the requisite numbers of property owners
- Education of commercial property owners as to the covenant requirements applicable to their properties and the identity of the entity responsible for enforcement of those covenants
- Establishment of a commercial Architectural Review Committee (“ARC”) to include architectural, engineering and commercial design experts
- Creation of processes and procedures for the commercial ARC and its inspection of commercial properties and review of applications
- Hiring of a CA team member or expansion of an existing team member’s part time to full time status to staff the commercial ARC and manage the operations of the commercial covenant function

H. Discussions with HRD

There has been a series of meetings and conversations between CA and HRD to discuss a possible transfer of commercial covenant authority. Those conversations are continuing.

HRD's view is that there are two different aspects with respect to the covenants:

- Architectural and maintenance review and enforcement
- Land use and changes of use

As of now, HRD is willing to assign to CA responsibility for reviewing exterior alterations applications and for enforcing applicable design, sign and maintenance guidelines in the commercial covenants, **with the following exceptions:**

- HRD will not assign any covenant authority to CA for Downtown Columbia, Town Center or Gateway
- HRD will retain covenant authority with respect to land use and changes in use.

It is contemplated that HRD and CA would each have its own ARC, and that with respect to properties as to which CA has authority, applicants seeking to make alterations would file one application. Applications then would be reviewed by the entire CA ARC before a decision would be made on the application. Additionally, there would be coordination between the two ARCs, so that to the extent an application includes both architectural and use matters, the application would be reviewed by and require approval from both ARCs. To further such coordination, one member of CA's ARC would be appointed by HRD. CA and HRD also would enter an agreement on the specific procedures for coordinating the use and architectural review processes.