

It's a Beautiful Day in the Neighborhood!

Won't You Be My (HOA) Neighbor?



*Statutes, Case Law, and Legislative Proposals re
Homeowners' Associations (HOAs)*

Presentation for the Interim Local Government Committee

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MOULTONBELLINGHAM_{PC}
ATTORNEYS

Stephanie Baucus

What HOAs and Owners Can and Can't Do in 2021

Topics

* Issue Overview – Natural Tension of Rights in Conflict

1. Current Law

(A) Legal Framework

(B) Caselaw

(i) General Issues

(ii) Cases Expanding HOA Authority

(ii) Cases Protecting Homeowners

(C) Recent Statutes (2019 and 2021)

(i) 2019 SB 300 (grandfather clause)

(ii) 2021 SB 145 (remote meetings)

2. Recent Legislative Proposals

(A) 2021 HB 196

(B) 2021 HB 327

(C) Other Bills and Ideas

3. Legal Implications of Recent Laws; Hotly Contested Topics, Other Issues



Questions and Answers

What HOAs and Owners Can and Can't Do in 2021

Issue Overview

What happens when conflicts develop in a subdivision?

HOA contractual authority

vs.

Homeowners' property rights

- *Just some examples of these conflicts arise when HOAs take actions to:*
 1. *Increase Annual Dues,*
 2. *Change the Rules re Subdividing, and*
 3. *Prohibit Short Term Rentals (VRBO or Airbnb)*

Topic 1A - Legal Framework - CCRs and Common Interest Communities

- What are Restrictive Covenants?
 - Generally called CCRs
 - Most commonly, Declaration of Covenants
 - Bylaws
 - Amendments to Covenants and Bylaws
- Rights and Remedies
 - Breach of Contract
 - Injunction
 - Declaratory Judgment
- What is an HOA?
 - Created by CCRs
 - Not always incorporated – some are unincorporated associations, with very few limits
 - Broader category – Common Interest Communities
 - HOAs
 - Townhome Associations
 - Condo Associations
 - Coops
 - Timeshares
- <https://www.youtube.com/watch?v=u4KfJztaJ5I> (Life in an HOA)

Topic 1A - Legal Framework (Continued) - Statutes

- Applicable State Statutes

- CCRs

- 70-1-304, MCA – ownership of property qualified
 - 70-17-201, MCA – some property restrictions run with the land
 - 70-17-203, MCA – restrictions that benefit or burden use run with the land
 - Membership in common interest community can be a CCR



- Montana will not enforce CCRs that are not valid, however.

- *See e.g.*, 70-1-522, MCA – won't enforce restrictions on political free speech
 - *See also* new statutes

- Common Interest Communities

- Unit Ownership Act – Condominiums, Title 70, Ch. 23
 - Some subject to the MT Nonprofit Corporation Act, Title 35, Ch. 2
 - New law defining HOA, Title 70, Ch. 17, NEW Part 9

TITLE 70. PROPERTY

CHAPTER 23. UNIT OWNERSHIP ACT -- CONDOMINIUMS

Part 1. General Provisions

Part 2. Regulation of Unit Sales Prior to Construction (Repealed)

Part 3. Creation -- Declaration and Bylaws

Part 4. Nature of the Ownership Interest

Part 5. Rights and Duties Incidental to Unit Ownership

Part 6. Conveyances, Liens, and Common Expenses

Part 7. Taxation and Exemptions (Repealed)

Part 8. Removal of Property From Unit Ownership Act

Part 9. Actions and Process

Part 10. Enforcement and Penalty (Repealed)

Part 11. Conversion of Condominium to Townhouse

Topic 1A - Legal Framework

(Continued) – Local and Zoning Issues

- Local rules – City Code, Zoning
 - Some of the same issues regulated by HOAs are also regulated by local code sections or zoning statutes, regulations, and ordinances
 - Ex. – Short term rentals was considered by Billings
 - Billings Gazette article, Jan. 28, 2020
 - Billings Zoning Commission was considering a change that would require VRBO owners to live on their property year-round

2/11/2020

As Billings works to change law regarding vacation rentals, Airbnb hosts push back | Local News | billingsgazette.com



Russ Palmer sits in the living room area of one of his Airbnb rentals on Lewis Avenue in Billings on Saturday, Jan. 18. Billings' newly written zoning code grapples with how to include Airbnb properties.

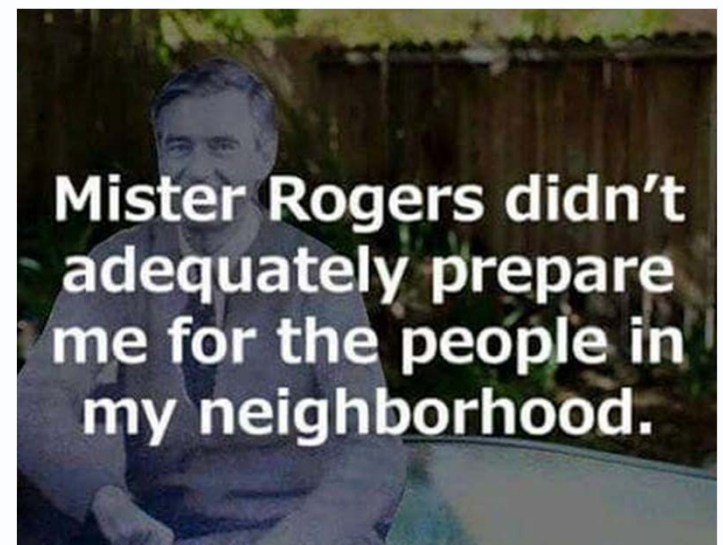
CASEY PAGE, Billings Gazette

- Ex. – Residential vs. commercial use
 - Notably, MT Zoning Laws provide exemptions for non-confirming prior existing uses, 76-2-208, MCA

Topic 1B – Caselaw

(i) General Issues

- Generally, HOAs have Restrictive Covenants, CCRs, Bylaws
 - Are contracts
 - *Bordas v. Va. City Ranches Assn.*, 2004 MT 342, 324 Mont. 263, 102 P.3d 1219
 - » Are construed as contracts
 - *Town & Country Estates Assn. v. Slater*, 227 Mont. 489, 740 P.2d 668 (1987).
 - » Owners are subject to the benefit and burden of the CCRs
 - Contract law applies
 - Amendments
 - CCRs may change, through valid amendment processes
 - » See discussion in Section 2 of this presentation.



Topic 1B – Caselaw

(ii) The Broad Scope of HOA Authority

How HOAs can exercise their power

- Not too many cases in Montana
- Increase assessments (most of the time)
 - *Windemere Homeowners Ass'n Inc. v. McCue*, 1999 MT 292, 297 Mont. 77, 990 P.2d 769
- Enforce the residential character required by Covenants
 - *Jarrett v. Valley Park, Inc.*, 277 Mont. 333, 344, 922 P.2d 485, 491 (1996), overruled on other grounds by *Shammel v. Canyon Res. Corp.*, 2003 MT 372, 319 Mont. 132, 82 P.3d 912 (holding commercial garage was prohibited)
- Add provisions to or Amend Declarations or Bylaws (most of the time)
 - *Windemere*
 - *Graziano v. Stock Farm Homeowners Ass'n, Inc.*, 2011 MT 194, 361 Mont. 332, 258 P.3d 999 (2011) (amendment adding arbitration provision was okay)
- Ex. Architectural Committees – Paint Colors, House Size, Fences, and More
- Fire safety, common area maintenance, roads and parking
- Can even require owners to remove mobile homes and other structures. *See Newman v. Wittmer*, 227 Mont. 1, 917 P.2d 926 (1996).

Topic 1B(ii) HOA Contractual Authority (cont.)

Examples of HOAs exercising authority, possibly in the extreme?



- Fences
 - <https://www.youtube.com/watch?v=nxbxoZbCUTY>
- Parking
 - <https://www.youtube.com/watch?v=8qqaYLPvMVk&t=97s>
- What about privacy?
- What about property rights?



Topic 1B – Caselaw

(iii) Cases Protecting Homeowners/Placing Limits on HOA Authority

Protecting Owners' Reasonable Expectations

- *Craig Tracts HOA, Inc. v. Brown Drake, LLC*
 - MT SC, 2020 MT 305
- *Palisades Prop. v. Hogan*
 - Cause No. DV 18-66, 22nd Jud. Dist., Carbon Co. (2020)
- *Houden v. Todd*
 - Twenty-Second Judicial District, 2009 WL 10243660 (Mont. Dist. Dec. 14, 2009) (aff'd in relevant part)
 - Found amendments or interpretations invalid because they violated the legitimate expectations of owners.
- The **majority of states around the country** that have examined these issues apply the “Reasonableness Test” and support the reasoning of these Montana cases.
 - *See e.g., Wilkinson v. Chiwawa Communities Ass’n.*, 180 Wash. 2d 241, 257 (2014) (invalidating short-term rental prohibition in part because the owners “were not on notice” of such limits and to protect the reasonable expectations of the owners)



Topic 1B(iii) Cases Protecting Homeowners (Continued)

- **Courts will not imply restrictions or enforce restrictions that are implied without notice to owner**
 - *Goeres v. Lindsey's Inc.*, 190 Mont. 172, 619 P.2d 1194 (1980) (holding that a restriction could not be enforced because owners were not on notice and restriction could not be implied).
- **Strict Construction of Covenants – Won't enforce if vague or ambiguous**
 - *Town & Country Estates Ass'n v. Slater*, 227 Mont. 489, 492, 740 P.2d 668, 671 (1987)
 - *Creveling v. Ingold*, 2006 MT 57, ¶ 8, 331 Mont. 322, 325, 132 P.3d 531, 534
- **Strict Construction of Amendments to Covenants**
 - *Point Service Corp. v. Myers*, 2005 MT 322, 329 Mont. 502, 125 P.3d 1107
 - *Brewer v. Hawkinson*, 2009 MT 346, ¶¶ 30-31, 353 Mont. 154, 221 P.3d 643 (concluding that the amendment was not binding because the requisite number of lot owners had not voted).
- **Courts will Scrutinize Covenants or Amendments that Create Additional Burdens on Homeowners**
 - *Town & Country*
- **Selective Enforcement – HOAs can waive their rights to enforce CCRs**
 - *Porter v. K&S Partnership*, 192 Mont. 175, 627 P.2d 836 (1981)



Topic 1C - Recent Changes in MT Law (2019 and 2021)

- **Grandfather Clause Statutes; Defines HOAs**
 - MCA § 70-17-901 (2019 SB 300)
 - Applies to HOAs
 - Limits HOA amendment and enforcement powers
 - Defines HOAs
 - MCA § 70-23-507 (2019 SB 300)
 - Adds section to the Unit Ownership Act
 - Applies to Condominiums
 - Limits association amendment and enforcement powers
- **Allows Remote Meetings; Defines HOAs**
 - MCA § 35-2-525, 35-2-550, 70-23-309 (2021 SB 145)
 - Allows HOAs (both corporate and unincorporated associations) and unit owner associations to hold meetings remotely
 - Provides another definition of HOAs

Image from helenamt.com



Topic 1C – Recent Law (cont.)

(i) 2019 SB 300

- During the 2019 Legislative Session,
Sen. Kenneth Bogner (R-Miles City) sponsored SB 300.

- Co-Sponsored by

- Sen. Ellsworth
- Sen. Fielder,
- Sen. Hinebauch
- Sen. MacDonald
- Sen. Small
- Rep. Keogh
- Rep. Zolnikov

66th Legislature

SB0300



AN ACT GENERALLY REVISING REAL PROPERTY LAWS TO PROTECT REAL PROPERTY RIGHTS; PREVENTING HOMEOWNERS' ASSOCIATIONS FROM IMPOSING MORE ONEROUS RESTRICTIONS ON A PROPERTY OWNER THAN THOSE RESTRICTIONS THAT EXISTED WHEN THE PROPERTY OWNER ACQUIRED THE REAL PROPERTY; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

- Passed the Senate initially 50-0,
- **Then 39-11** after the House Amendments
- **Passed the House 73-24**

Topic 1C – Recent Law (cont.)

(i) 2019 SB 300 (cont.)

SB 300 created two new statutes

Effective May 8, 2019



- New **§ 70-17-901, MCA** – Limiting HOA amendment powers **70-17-901. Homeowners' association restrictions -- real property rights.**

- And Defining HOAs

(6) As used in this section, the following definitions apply:

(a) "Homeowners' association" means:

(i) an association of all the owners of real property within a geographic area defined by physical boundaries which:

(A) is formally governed by a declaration of covenants, bylaws, or both;

(B) may be authorized to impose assessments that, if unpaid, may become a lien on a member's real property; and

(C) may enact or enforce rules concerning the operation of the community or subdivision; or

(ii) an association of unit owners as defined by **70-23-102** subject to the Unit Ownership Act.

- New **§ 70-23-507, MCA** – Unit Ownership Act – Condominiums – Limiting amendment powers

Restriction On Covenants By Association Of Unit Owners

70-23-507. Restriction on covenants by association of unit owners. An association of unit owners shall abide by the provisions of **70-17-901**.

Topic 1C – Recent Law (cont.)

(i) SB 300 (cont.) – Grandfather Clause

New Statutes, effective in May 2019

- Both § 70-17-901, MCA and § 70-23-507, MCA create a grandfather clause available to homeowners/condo owners for certain types of use.
- Effectively limiting some Association amendment or enforcement powers
- **70-17-901. Homeowners' association restrictions -- real property rights.**
 - (1) (a) A homeowners' association
 - may not
 - *enter into,*
 - *amend,* or
 - *enforce*
 - a covenant, condition, or restriction
 - in such a way that imposes *more onerous restrictions* on *the types of use* of a member's real property
 - than those restrictions *that existed when the member acquired the member's interest* in the real property,
 - *unless* the member who owns the affected real property *expressly agrees in writing at the time of the adoption or amendment* of the covenant, condition, or restriction.

Topic 1C – Recent Law (cont.)

(i) SB 300 (cont.) – Definition of Types of Use

- **70-17-901. Homeowners' association restrictions -- real property rights.**
 - (6) As used in this section, the following definitions apply:
 - ...
 - (e) **“Types of use”** means the following lawful types of use of the real property:
 - » (i) *use for residential, agricultural, or commercial purposes*, unless the use was impermissible according to the written or recorded restrictions;
 - » (ii) the *ability to rent the real property*, including the land and structures on the real property, *for any amount of time*; and
 - » (iii) the ability to *otherwise develop the real property* in accordance with applicable federal, state, and local laws, ordinances, and regulations, *unless the ability was impermissible according to the written or recorded restrictions*.

Topic 1C – Recent Law (cont.)

(i) 2019 SB 300 (cont.) - Scope and Exceptions

- Owners still have to comply with all CCRs in place when they purchased their property.

- 70-17-901(4) Nothing in this section may be construed to prevent the enforcement of a covenant, condition, or restriction limiting the types of use of a member's real property as long as the covenant, condition, or restriction applied to the real property at the time the member acquired the member's interest in the real property.

- Does not apply to future purchasers except for:

- (1) those with shared ownership to owner when new CCR was adopted or
 - (2) those who are lenders who acquired through foreclosure from those who owned when new CCR was adopted.
 - 70-17-901(2) A successor-in-interest to a member's real property may not claim the benefit of subsection (1) to the extent that the homeowners' association entered into, amended, or enforced a covenant, condition, or restriction before the successor-in-interest purchased the real property, even if the covenant, condition, or restriction was not enforceable against the previous owner pursuant to subsection (1), ***unless the successor-in-interest is owned by or shares ownership with the previous member or unless the successor-in-interest is a lender that acquired the real property through foreclosure.***

- Only applies to CCRs (1) that are subject to enforcement by HOAs and (2) that are not otherwise required by law.

- 70-17-901(3) This section does not apply to a covenant, condition, or restriction:
 - (a) that is not subject to enforcement by a homeowners' association; or
 - (b) that is required in order to comply with applicable federal, state, and local laws, ordinances, and regulations.

Topic 1C – Recent Law (cont.)

(i) 2019 SB 300 (cont.) – Timeframe

- Does the law have any effect on CCRs adopted or amended before the Bill's effective date (if adopted or amended after a purchaser acquired his or her property)?
- Yes a narrow impact.
 - 70-17-901(5)
 - Nothing in this section invalidates existing covenants of a homeowners' association or creates a private right of action for actions or omissions occurring before May 9, 2019.
 - However, after May 9, 2019, unless the member has consented as provided by subsection (1), a homeowners' association may not enforce a covenant, condition, or restriction in such a way that limits the types of use of a member's real property that were allowed when the member acquired the affected real property.

Topic 1C – Recent Law (cont.)

(i) 2019 SB 300 (cont.)

Intent, History, and Similar Laws

- Reasons for law
 - Helped to draw the lines between *Houden v. Todd* and *Windemere*.
 - Protects the reasonable expectations of homeowners.
 - Defined homeowners' associations.
- Montana has a grandfather clause for prior uses like SB 300 in the zoning context. MCA 76-2-208.
- Other state models
 - Two-thirds of states around the country (37 states) have grandfather clause laws like SB 300, including
 - States that have adopted the Uniform Condominium Act of 1977 (§ 2-117(d) re amending declarations), incl:
 - » Fla. Stat. § 718.110(13);
 - » Tenn. Code Ann. § 66-27-317;
 - » Ariz. Rev. Stat. § 33-1227;
 - » Wash. Rev. Code § 64.34.264.
 - As well as other states that have guaranteed this protection to homeowners in HOAs, including Idaho, Nevada, Alaska, California, and Georgia.
 - » Idaho Code Ann. § 55-115(3);
 - » N.R.S. § 116.2117;
 - » Alaska Stat. § 34.08.250;
 - » Cal. Civ. Code § 4740(a) and (b);
 - » Georgia Code § 44-5-60(4).

Topic 1C – Recent Law (cont.)

(i) 2019 SB 300 (cont.)

Controversy and Constitutionality

- Opponents have claimed that the law is unconstitutional, due to its interference with contracts.
 - This is not likely a successful argument.
- First, many Montana laws interfere with contract rights, such as laws involving liquor and gambling licenses, consumer protection, environmental safety, and others.
- Second, under a **contract clause analysis**, Montana courts would apply the 3-part test from *Seven Up Pete Venture v. Montana*, 2005 MT 146, 327 Mont. 306, 114 P.3d 1009, and this law would be constitutional.
 1. The law does not create a substantial impairment because it protects the reasonable expectations of contracting parties.
 2. The state has a significant and legitimate purpose.
 3. The law imposes reasonable conditions that are reasonably related to achieving the state's legitimate public purpose.
- Third, this law actually prevents ex post facto amendments by HOAs that dramatically change the contract with the HOA without the owners' consent, other contracts that owners have, and private property rights.
 - The law does not retroactively interfere with contracts or create any private rights of action for previous acts or events – it only prohibits making/enforcing amendments for these certain types of uses against non-consenting owners in the future.

Topic 1C – Recent Law (cont.)

(i) 2019 SB 300 (cont.) - Application

- Operation of the law and drafting CCR amendments now
 - 70-17-901(b). When a member claims the benefit of this subsection (1), the *member shall request* that the homeowners' association *record, or allow recording of, the exception* applicable to the member.
 - Upon request by the member, the homeowners' association, the member, or a designee *shall record the member's exception with the office of the county clerk and recorder of the county* where the real property is situated.
 - The member shall provide the homeowners' association with the date the real property was conveyed to the member and shall pay the recording fees for the document setting forth the exception.
- Examples – Q & A - Does 70-17-901 prevent the HOA from taking actions related to these things or not?
 - Parking
 - Paint colors
 - Home offices
 - Increasing dues
 - Short term rentals
 - Subdividing

Topic 1C – Recent Law (cont.)

(ii) 2021 SB 145

- SB 145 (Senator Fitzpatrick)
- Codified three new sections of law to allow owners' associations to hold remote meetings.
- MCA § 35-2-525 – HOAs that are corporations
- MCA § 35-2-550 – HOAs that are unincorporated associations
- MCA § 70-23-309 – Condo associations
- Some concerns with definition, including that now there are two definitions of HOAs.

Topic 2 - Recent Legislative Proposals

- **HB 196**
 - Went before House Local Government
 - Would have amended MCA 70-17-901
 - Included a sample form for recording exceptions
- **HB 327**
 - Went to Judiciary Committee
 - Would have created definitions for the words “residential” and “commercial”
 - Was opposed by many different groups, including foster parents, in-home treatment providers
- **Others**
 - LC 525 (Would have limited 70-17-901 to condos and to rentals only)
 - LC 2792 (Would have repealed 70-17-901)
 - LC 523 (Was to revise HOA laws)
 - LC 2167 (Was to generally revise HOA laws)
 - LC 2168 (Was to generally revise HOA laws)

Topic 3 – Implications and Specific Issues

Specific Subjects Hotly Contested in Litigation

– Potential Conflicts Include:

- Amendment Power Generally
- Changing the way HOA members can vote
- Assessments – Annual Dues and Special Assessments
- Changing the rules re Subdividing
- Commercial vs. Residential Use
- Short-term rentals (STRs) – Airbnb or VRBO



Topic 3 – Implications and Specific Issues (cont.)

- Whether SB 300 allows owners to take exceptions to any HOA actions that are remotely related to use?

It does not.

- Examples. Grandfather clause won't help:
 - To prevent HOA from making owners
 - Change the color of their houses
 - Comply with specific building requirements imposed by an architectural committee
 - To prohibit HOAs from increasing their dues
 - To keep HOA from changing rules about having pets.
 - Theoretically an HOA in Montana could amend its rules and force owners to sell or give away their pets.
- Those are aspects of use – not types of use.

Topic 3 – Implications and Specific Issues (cont.)

- Possible new laws
 - Anything from model codes?
- Possible amendments to existing laws
 - Amend definition of HOAs in MCA § 35-2-525 and MCA § 35-2-550 to cross reference definition in MCA § 70-17-901.
 - Possible form to add to MCA § 70-17-901 to aid in recording exception.
 - Possible other tweaks to language in MCA § 70-17-901.

Conclusion



Questions and Discussion

Thank you!