

Should It Stay or Should It Go?

Statutes of Limitation on Setback Violations

Hello, once again, readers. I'm back this month to address a topic I get questions about on a weekly basis, and I'm sure all of you have seen before: violations of setback lines. This is not to address the underlying validity of any restrictions creating those setback lines (Note: for an in-depth discussion of the validity of old restrictive covenants and the NC Marketable Title Act, see our September 2025 article) – in this edition I'll be discussing statutes of limitation on enforcing those violations, regardless of whether the underlying restrictions are valid.

I. Zoning

There are two types of setbacks to discuss today. The first I'll address are setbacks created by the applicable zoning designation for the property in question. These are addressed in the Zoning Ordinance distributed by the planning and zoning department of the city or, in some cases, county where the property is located and violations of these setback requirements are enforceable by the zoning authority. This includes the right to require alteration of the structure in violation to bring it into compliance.

As with most legal remedies, there is a statute of limitations applicable to this right of the zoning authority to bring an enforcement action. In the case of zoning violations, there are actually two – one for a five-year SOL and another for a seven-year SOL depending on the circumstances of the violation. N.C.G.S. § 1-51(5) limits actions to enforce zoning violations to five years:

“...[a]gainst the owner of an interest in real property by a unit of local government for a violation of a land-use statute, ordinance, or permit or any other official action concerning land use carrying the effect of law. This subdivision does not limit the remedy of injunction for conditions that are actually injurious or dangerous to the public health or safety. The claim for relief accrues upon the occurrence of the earlier of the following:

- a. The facts constituting the violation are known to the governing body, an agent or employee of the unit of local government.
- b. The violation can be determined from the public record of the unit of local government.

There are a few things to unpack here. The five-year statute of limitations for enforcing a zoning violation is limited by a couple of key factors: first the violation cannot be for a condition that is actually dangerous to public health/a safety hazard. This makes sense as

something like a fire code violation that could cause death shouldn't be limited at any point. Furthermore, take note of when the five-year period actually starts to run – either from when the facts are known to someone in the local government (such as an inspector) or can be determined from the public record (such as a recorded Notice of Violation).

For the seven-year statute of limitation, I call your attention to N.C.G.S. § 1-49(3), which limits actions to enforce to seven years:

“...[a]gainst the owner of an interest in real property by a unit of local government for a violation of a land-use statute, ordinance, or permit or any other official action concerning land use carrying the effect of law. This subdivision does not limit the remedy of injunction for conditions that are actually injurious or dangerous to the public health or safety. The claim for relief accrues upon the occurrence of the earlier of the following:

- a. The violation is apparent from a public right of way.
- b. The violation is in plain view from a place to which the public is invited.

So, the seven-year SOL has the same limitation regarding dangerous conditions as the five-year SOL. The difference between the two is when the SOL period begins to run. This time, rather than requiring knowledge of the government or evidence in the public record, it is from when the violation is in plain view from a public right of way or other public area. Basically, if the government knew or should have known of the violation the SOL begins to run. Establishing the 5 year can be difficult without a deep dive into the public records or other affirmative proof (such as a zoning violation letter) that the Zoning office actually knew about the violation. Because of that, we typically see these as insurable under the 7-year SOL when we can reasonably say the violation was visible from a public ROW.

Google Street View or even a quick drive by of the property and taking a picture standing in the road can be very helpful here. As I've already pointed out, note that both of the above statutes don't apply where the condition in question is unsafe – if you have a building that is about to fall down due to the violations, the SOL doesn't apply. This is more about something like a setback violation on the front of the house. It helps to be prepared with facts of when the structure was built and provide evidence that the violation would have been visible from a public right of way to bring this to your title underwriter when requesting coverage.

II. Private Setbacks

What if the setbacks in question are not established by zoning, but rather are a private setback created by a plat or recorded restrictive covenant? Per NCGS § 1-50(a)(3), North Carolina recognizes a 6-year statute of limitations to bring an action for injury to an “incorporeal

hereditament”. Case law goes on to define restrictive covenants as incorporeal hereditaments and apply said statute of limitations to actions to enforce restrictive covenants in our area.

The Court in *Davis v. Robinson* 189 N.C. 589 (1925), citing *Mackey v. Harmon*, 24 N.W. 702; *Clawson v. Wallace* (Utah), 52 p. 9., stated that “An easement is an incorporeal hereditament...” Quoting Black’s Law, it goes on to say:

“‘A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner,’ is an easement....A private easement is a privilege, service or convenience which one neighbor has of another. ‘Easements are classified as affirmative or negative. Negative easements are those where the owner of a servient estate is prohibited from doing something otherwise lawful upon his estate...’ (Citing Black’s Law; 2 Washb.. Real Prop., 301; Tiffany on Real Property (2 ed.), 1199; *Nash v. Shute*, 182 N.C. 528.

While the facts and outcome of the case are not relevant to the discussion here, the key takeaway is that the Court held that easements are “incorporeal hereditaments” and brought negative easements (requiring an owner not to do something with their property) under this same definition.

In *Craven County v. First Citizens Bank Trust Co.* 237 N.C. 50; S.E.2d 620 (1953), the NC Supreme Court further expanded on the definition of negative easements to explicitly include restrictive covenants: “These servitudes, commonly referred to as negative easements, are usually imposed by restrictive covenants...” Again, a full discussion of the facts and decision in the case is not relevant to the matter at hand, other than to say that the SCNC in this case continued to reference restrictive covenants as negative easements or servitudes.

More clarity on the application of the 6-year statute of limitations to enforcement of restrictive covenants came in the case of *Hawthorne v. Realty Syndicate* 43 N.C. App. 436, 440; 259 S.E.2d 591, 593 (1979). The court cited both *Davis* and *Craven* in stating “A restrictive covenant is a servitude, commonly referred to as a negative easement...and an easement is an incorporeal hereditament...G.S. 1-50(3) requires that an action for injury to any incorporeal hereditament be brought within 6 years.” (internal citations omitted)

This same logic and conclusion were applied in a case local to the Charlotte area in *Irby v. Freese* 206 N.C. App 503,511; 696 S.E.2d 889, 894 (2010, 2011). Defendants in that case owned residential property in the Myers Park neighborhood of Charlotte. Defendants constructed a garage addition on their property, the placement of which violated deed setback lines from 1915 within the chain of title for their property. The adjacent property owners (funded by the Myers Park HOA) filed suit to require compliance with the setback, including the removal of the garage. The Court in that case cited *Hawthorne* in finding that the plaintiffs’ action was brought within the 6-year statute of limitations applicable to the enforcement of restrictive covenants and ultimately

requiring the compliance of the structure with the 1915 setback lines (despite defendants having completed the structure and spent over \$500,000).

From the above line of cases, it can be determined that restrictive covenants are “incorporeal hereditaments” for purposes of defining a 6-year statute of limitations to bring actions for injury under G.S. 1-50(a)(3) – specifically actions by other affected property owners to enforce violated restrictive covenants. The only remaining question is when said SOL begins to run. In *Duke Energy Carolinas LLC v. Gray* 237 N.C.App. 420, 726; 766 S.E.2d 354, 358-59 (2014), the Court found that a statute of limitations for a claim under 1-50(a)(3) “runs from the time that the claim accrues, even if a plaintiff is not aware of the injury at the time...does not require a holding that the statute of limitations runs from when plaintiff knew or reasonably should have known of the encroachment.” It would stand to reason that, at the latest, a claim for enforcing restrictive covenants where a newly built structure violates those covenants “accrues” no later than completion of the violating structure. The *Gray* court further cited the above line of cases in affirming that “[t]he statute of limitations for enforcing a restrictive covenant is six years.”

That is a lot of involved and very boring case law, but hopefully you can see the headlines here: a restrictive covenant is an incorporeal hereditament for purposes of applying a 6-year statute of limitations to actions to enforce violations per G.S. § 1-50(3). As with the zoning violation, the best evidence to show here is definitive proof of when the violating structure was completed.

III. Final Thoughts

Hopefully the above discussion is helpful. I should add the caveat that none of the above is intended to say that there are not other facts that could toll the running of the statutes of limitations outline above or affect the validity of the underlying ordinance or restrictive covenants if specific facts are present or under special circumstances. My goal with The Beacon is to put out articles that are relevant to the practicing attorney both for discussion of the issues covered with your clients – be they the property owners, a lender, a realtor or others – as well as giving you insight into the analysis your title insurance underwriters are running so that you are as prepared as possible to discuss these issues and get the best possible overage for your client.

I welcome your comments as well as suggestions for topics for future articles. Thank you as always for reading.

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