

Everything You Wanted to Know About Fines... And More



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At some point, almost every association comes across one of those owners who, even after receiving notice of a violation, simply refuses to follow the association's covenants. If authorized by the governing documents, fines are the most efficient enforcement tool an association has against a recalcitrant owner. When an association has the authority to levy fines, it must ensure that it is acting within that authority and that it follows all procedures required by its governing documents. This article will explore the steps that an association should follow in order to levy legally enforceable fines.

Because the authority to impose fines must be explicitly stated in an association's recorded documents (and cannot be created by a board-made rule or regulation) we often see associations who assume fines are authorized only to be unpleasantly surprised to learn that they are not. That realization occurs when the association turns the file over for collection. If the express authority to impose fines is not in a recorded document, the association cannot impose a fine.

Once an association has verified that it has the authority to fine, it must confirm the person's conduct, an action or inaction, is a violation of the association's Declaration, Bylaws, or Rules and Regulations. An association must be able to show exactly why the action or inaction is a violation. Having confirmed there is a violation, the last preliminary verification that must be undertaken before commencing the fining process is to determine the amount of a fine. Occasionally, an association's governing documents will provide a set dollar amount or a schedule of allowable amounts. In those cases, a board should impose the designated fines. But in most cases, an association's governing documents will provide only that the board has the authority to impose "reasonable" fines.



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There is only one case in Georgia that has addressed the reasonableness of the amount of a fine imposed by a board of directors. In that case, the Georgia Court of Appeals held a \$25.00 per day fine for a continuing violation was reasonable – the recalcitrant owner continued the violation (unauthorized leasing) during the litigation and the fine totaled more than \$25,000.00 by the end of the litigation. Inasmuch as that case was decided in 1997, it is probable a court would uphold a higher amount in 2016. For one-time violations, however, it will be up to the board to determine a reasonable fine amount that is commensurate

with the violation. It needs to be enough to obtain compliance, but not so much as to be unreasonable. Whatever fine the board decides upon, it should have good reasoning to support its decision to levy the amount chosen in the event that the case ends up in court and the reasonableness of the fine is challenged.

Sometimes compliance is not possible. Cutting down a mature tree without permission is an example. The community has lost an asset which is irreplaceable. A commensurate fine in that instance is intended as a deterrent, so it must be an amount which is substantial. Several associations impose a fine of \$5,000.00 per tree.

Only after those three preliminary verifications are completed, should an association proceed to the next step to commence the fining procedure set forth in an association's governing documents. It should be noted that community association documents vary greatly as to the requirements for providing an owner with notice of an association's intention to impose a fine, with some documents providing no procedure at all and others requiring that the board send out multiple letters and set numerous hearing dates for the owner to contest the fines. Because of that, it is essential that a board, when implementing the fining procedure, understands it and then complies with it.

Generally, fining procedures require an association to send one or more letters to the owner which 1) identifies the violation; 2) tells the owner how the violation can be corrected; 3) tells the owner that the Association will assess fines against the owner if the violation is not corrected; 4) states the amount of fines that will be charged; 5) gives the owner the date that the Association will begin to impose fines; and 6) gives the owner a certain time frame, usually ten days, to request a hearing in front of the board to contest the violation or the amount of the fines.

Courts have held that associations must follow all of the steps in its process. A failure to adhere to all of the requirements abridges the violator's right of due process. Generally, a court will not enforce a fine that was imposed unless all of the due process requirements have been followed. Even if your documents do not contain a fining procedure or require that you give any prior notice of fines to a violating owner, it is a good idea for a board to develop a fining procedure that gives the owner written notice of the violation and an opportunity to request a hearing before the board. This is because doing so will make the Association appear more reasonable to a judge if the association ends up in court to enforce its fines against the Owner.

If an owner timely requests a hearing before the board on his or her covenant violation, the board should schedule the violation hearing in accordance with any requirements found in its governing documents. In most cases, the board must simply allow the owner time to come before the board to state his or her case as to why the fines should not be levied. The board should conduct this hearing in executive session and generally has the right to make rules concerning the length of time that the owner and any witnesses can speak.

It is important to remember that these violation hearings are simply an opportunity for the violating owner to tell the board why he or she should not be fined. It is not a trial. The board does not have to present any argument, evidence or testimony to support its decision; it is only required to listen to the owner and consider his or her argument. Once the hearing is concluded, the board should excuse the owner and make its decision. The board should notify the owner of the decision and a short statement of the board's decision should be included in the meeting minutes.

With obtaining compliance the goal of imposing fines, boards must temper the urge to be unreasonably punitive. In other words, a member's non-conformist reputation should not result in a fine for a new violation that exceeds the standard fine for that offense. Likewise, the courts have held an association cannot allow the unlimited accumulation of a per diem fine. An association is obligated to file suit seeking an order that the owner stop the violation(s) and to collect the fines. The \$25,000.00 fine upheld by the Court of Appeals accumulated over the years after the case was filed.

What if an association's recorded documents do not authorize the imposition of fines? Without an amendment adding that authority, those associations must file a lawsuit seeking an order to force compliance. Such lawsuits are costly and can take years to be heard by a court.

If you have any questions about fines, please contact us.