

UNDERSTANDING COMMUNITY ASSOCIATION FINES & OTHER ENFORCEMENT TOOLS

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INTRODUCTION

Board members have an affirmative duty to uniformly enforce the covenants, and all other governing documents. The most practical and economic method for enforcement is to levy a fine against the violator. Fines have two important purposes. The first is to deter owners from violating the governing documents. The second purpose is to encourage violators to quickly correct any violations.

I. Does the Association Have the Authority to Levy Fines?

When someone purchases a home, the property is subject to all the documents of record affecting the chain of title. In order for an association to have the authority to levy fines, the ability to do so must appear on the county deed records. Such authority is usually contained within the recorded covenants for the subdivision.

Occasionally the authority to fine will appear in the bylaws, instead of the covenants. Since bylaws are usually not filed of records, this may mean the association does not have the authority to fine for violations. The exception IS if the bylaws were filed at the same time as the covenants on the deed records. In a situation where the ability to fine was not included in the recorded covenants (or recorded bylaws), the covenants have to be amended to give the association the power to levy fines.

II. Other Forms of Enforcement.

Suspension of Amenity Privileges & Right to Vote. Although an association usually has the authority to suspend amenity privileges and a member's right to vote, these types of sanctions may not be strong enough to encourage compliance with the covenants. In addition, not all subdivisions contain amenities, such as a pool or tennis courts.

If the subdivision is a condominium or townhome community, it may be possible to suspend use of an assigned parking place, with the threat of towing or booting for ignoring the suspension. There are important pre-conditions to utilizing this type of enforcement, and it is important to have an attorney review the governing documents.

Interruption of Utility Services. Some condominium and townhome complexes, supply the water service for the individual Units. If the necessary language is included in the covenants, the association can have the authority to turn-off the utility service; until such time as the owner corrects the violation. Prior to an interruption of the water service, it's imperative to follow all required procedures, and this should not be done without legal counsel.

Filing a Notice of Covenant Violation on the County Deed Records. If the covenants allow it, an excellent option could be to file a Notice of Covenant Violation on the deed records (also known as a Notice of Noncompliance). The purpose for the notice is to alert any perspective purchasers that there is a violation present on the property, which needs to be addressed. This can also impact an owner who is applying for refinancing. A Notice of Covenant Violation is usually for architectural infractions, but some covenants allow for the notice to be filed for all types of violations.

Self-Help for Abatement of the Violation. Most covenants include a 'self-help' provision, which allows the association to go onto the owner's property for the purpose of correcting a violation. Such provisions normally include the ability to specifically assess the owner for any related expenses incurred by the association. For various reasons, this type of enforcement is probably most practical for unoccupied homes or vacant Lots.

Recent Georgia case law has suggested that self-help abatement has to be attempted prior to the levy of fines. This is simply not feasible for many situations. An association should contact an HOA attorney for assistance to determine if the covenants should be amended, or Board regulations be adopted and recorded, in order to limit self-help abatement to unoccupied homes or vacant Lots.

Filing Suit for an Injunction. An association always has the option to file an action to obtain an injunction, ordering the owner to correct a violation. Unfortunately, this is an alternative of last resort because, like any sort of litigation, it can be very expensive when considering attorney fees. Although the court may include reimbursement of attorney fees in the judgement, it doesn't

guarantee the association will ever collect. In addition, it can take a very long time to go through the courts, especially if the judge does not grant an immediate ‘temporary injunction’.

As mentioned above regarding the levy of fines, recent Georgia case law has indicated that an association must first attempt self-help abatement prior to filing for an injunction. For some situations, self-help abatement is not practical, and an HOA attorney should be consulted about the possibility of a covenant amendment, or the Board adopting and recording some regulations to limit the situations to which self-help can be applied.

III. Types & Amounts of Fines.

Continuing Fines vs Flat Amount Fines. There are two types of fines: (i) continuing fines by the day, week, or month; and (ii) one-time, flat fines. Flat fines sometimes vary in amount, based upon different types of violations (also known as a ‘fine schedule’). Since one of the primary reasons for a fine is to motivate owners to quickly correct violations, most associations use daily fines as opposed to a one-time, flat amount. If an owner only had to pay a one-time fine, there is no further incentive for them to address the actual violation. In spite of this, there are some appropriate ways to make use of flat-fee fines.

Appropriate Uses of Flat Fines. There are three occasions when the Board should consider utilizing flat-fee fines:

(i) **FLAT FINES IN ADDITION TO DAILY FINE.** Flat-fee fines can be levied in addition to daily fines. For instance, if an owner does not apply for approval prior to putting up a new fence, a one-time, set amount fine could be issued for not seeking written pre-approval from the association. If the unapproved fence is otherwise in compliance with the design guidelines, the owner may never incur an additional daily fine (as long as the owner still provides the required paperwork for the association’s records).

On the other hand, if the fence as built is in violation of the design standards, then a daily fine would also be levied until such time as the owner submitted revisions for review and approval. In these situations, the association is actually levying two types of fines for separate violations; the flat-fee fine for not seeking pre-approval, and a daily fine because the fence is not in compliance with the design standards.

(ii) **SINGLE INCIDENT FINES.** Another use of flat-fee fines is for when there is a ‘single incident’ violation. An example of a single-incident is an owner cutting down a mature tree in their yard without pre-approval from the association. There may be no way to truly replace the mature tree, so a set fine amount could discourage it from happening in the first place.

(iii) **REPEATED VIOLATIONS.** Some types of violations can occur on a repeated basis, which is not the same as it occurring on an ongoing or continuous basis. If a violation is ongoing (built unapproved deck) a daily fine would be the best option, but what if a resident parks their car on the front lawn a few times every month? In this case, each time the resident parks the car on the lawn it is a separate incident, and the daily fine of \$25 may not be enough to encourage compliance. In this circumstance, a larger per-incident fine may be more effective.

Fines Amounts Must Be Reasonable.

The law requires that the amount of the fine be ‘reasonable’. Although we don’t know what the upper limits are for a daily or flat fine, over two decades ago the Georgia Appeals Court found that a \$25 daily fine of was not excessive. This court ruling is the reason most associations levy at least a \$25 daily fine. It’s more difficult to know what the limits are for flat fine amounts. Unless a fine amount is blatantly excessive on its face, a court would look into the reasons and logic used by the Board to arrive at the amount.

For instance, an association who was a client of our firm, recently adopted a larger daily fine of \$50 that only applied to leasing violations. The reason stated by the Board in its resolution was that the subdivision had a high rental value of approximately \$2,500 a month. The general daily fine of \$25, which otherwise applied, might not be enough to discourage an owner from renting their home for the rate of \$2,500 a month.

IV. Uniform Application of Fines for All Types of Violations

The two main responsibilities of an association are to enforce the governing documents, and to maintain any common areas. In terms of enforcement, it is important for fines to be uniformly applied to all violators, but it is also important to enforce every type of restriction contained in the governing documents. If the association levies fines on some violators but not others, or only for certain types of violations, the violator may have a valid legal defense for selective enforcement, waiver, or abandonment of covenants.

It should be noted that if a Board has adopted various fine amounts for different types of violations, it could open the door for a court to consider certain fines unreasonable. Therefore, an advantage to a uniform daily fine amount versus varying amounts of fines, is to show a court that the fines were applied equally and fairly to all owners. (Examples of the proper situations for applying flat-fee fines are outlined above in paragraph III.)

V. Requirements for the Notice of Owner Appeal & Publication of Fine Amounts

The notice procedure for levying a fine is usually contained in the bylaws, and is occasionally included in the covenants. It’s important to follow the procedural steps outlined in the governing documents. This usually includes the exact language required to appear in the fine notice, such as:

- (i) description of the violation including the governing document reference;
- (ii) action required to correct the violation;
- (iii) the number of days to correct the violation;
- (iv) the amount of the fine, and any suspensions of voting rights or amenity privileges;
- (v) when the fine and/or suspensions become effective; and
- (vi) the number of days the violator has to request an appeal regarding the violation and the fines.

Fines are such a powerful, private remedy on the part of an association, they can be highly scrutinized by some judges. If a suit is filed to collect delinquent fines, a court will want to confirm the violation notices contain all of the mandated provisions, especially the right to appeal to the Board or Architectural Committee. If neither the covenants nor the bylaws contain

a fining procedure, the Board should adopt a written procedure, and mail a copy to all of the owners.

Under recent Georgia case law, a Board is also required to adopt a written schedule listing how fine amounts are calculated. In this way, the owners have notice of the fine amounts prior to committing any violations. Once a fine schedule is adopted by the Board, a copy of the schedule should be mailed to all the owners.

VI. Forgiveness of Fines

Sometimes Boards become concerned with the large amount of daily fines accumulated by an owner. If the owner eventually corrects the violation, the Board may want to consider waiving a portion of the fines, especially since fines are not considered a part of the association's funding source. Even a majority amount of the fines could be forgiven, but it's essential to have the owner pay something. If an association is known to always waive the full amount, fines might lose their effectiveness in deterring owners from committing violations, or correcting a violation.

The Board needs a reasoned approach towards the forgiveness of fines. If fines are challenged in court because other violators were forgiven in the past, it will become important to prove the board had a rational basis for waiving fines. This is why the Board should always keep documentation for the reasons behind forgiving a fine. This is often done by entering the rationale into the minutes of an executive Board meeting.

VII. Legal Collection of Fines

Fines are usually considered a type of specific assessment against the owner and property. This means they are collected in the same manner as other types of delinquent assessments, such as recording a notice of lien and filing suit. If the owner does not correct the violation after being fined by the association, sometimes initiating legal collection will encourage compliance.

It should also be pointed out that the association needs to make a demand for payment of accumulated fines, in order for the fines to be considered 'delinquent'. This could be accomplished with an invoice requiring payment of the balance due within ten days or more.

Finally, if the board also wants to consider asking the court for an injunction requiring the owner to correct the violation, it should be done within the suit for collection of the delinquent fines. Keep in mind that although the statute of limitations for filing suit on fines is four years, the statute of limitations for requesting an injunction is only two years from when the violation arises, or from when it should have been observable by the association.

VIII. Summary

Fines are often the most effective enforcement tool for both discouraging violations, and for the correction of a violations. Unfortunately, some subdivision covenants lack a provision for authorizing the association to levy fines. In this circumstance, it is imperative for the Board to attempt a covenant amendment adding the power to fine. This will take a vote of the owners, and the assistance of an HOA attorney.