

Fine Collectability: How to Ensure Fines are Properly Authorized



By: **Megan Elaine Harsh**

Fines can be an invaluable tool for a community association in enforcing its governing documents. By levying fines, an association can incentivize an owner or occupant to correct a violation and, in many cases, avoid the expense and emotional toll of filing litigation. However, based on recent cases from around the country, courts are increasingly scrutinizing fines levied by community associations and increasing the burden on community associations to show that fines levied by the association were authorized by the association's governing documents, that the association followed all proper procedures for levying the fines, and that the association provided the violating owner with proper notice of the fines.



In light of this recent judicial scrutiny of fines, it is more important than ever that Board of Directors and property managers make sure the fines levied by their associations are properly authorized. To help you ensure that the fines your association levies will be enforceable in court, we've provided the below guidelines on levying enforceable fines.

Know Your Documents

To fine for a violation:

- (1) a violation of either the association's recorded Declaration, Bylaws or rules and regulations must exist; and
- (2) the association's recorded governing documents must specifically provide the Board with authority to levy fines.

Associations must rely on recorded documents for the authority to levy fines, the Board cannot base the authority to fine from a Board made policy or rule. In addition, even if the Board has fining authority, if there isn't a current violation of a provision of the Declaration, Bylaws or rules and regulations, the Board cannot impose a fine.

Consider Adopting a Fining Policy/Schedule

Most governing documents provide a Board of Directors with the authority to impose "reasonable" fines but leave it to the Board to come up with the specific fine amounts it will impose for each violation. However, recent court cases emphasize the importance of providing violators prior notice of the amount of fines the violator could be facing for a particular violation. A Board can help ensure collectability of fines by adopting a fine policy or schedule that states the amount of fines that the Board will levy for most common violations, and distributing that policy/schedule to owners and occupants so that they know the amount of fines they face for different violations. Fine policies/schedules must strike a careful balance between

providing notice of the amount of potential fines for common violations, but still providing the Board flexibility to use different fines for uncommon or unusually flagrant violations. For that reason, we recommend that Boards work with their NowackHoward attorney on any proposed fining policy or schedule.

Follow Your Documents

Knowledge is power, but knowledge is only half the battle. Once you've established that a violation exists and that the Board has the proper authority to fine, the Board must follow the procedures laid out in the governing documents and its fining policy or schedule, if any, to fine. In order to fine a violating owner or occupant for a violation, most documents require that a Board notify the owner of the violation, give the owner a chance to correct the violation, and provide an opportunity to request a hearing before the Board before a fine can be enforced. If it is a tenant or occupant, rather than the owner, who is the violator, it is good practice (and often required by the governing documents) to also send the notification of the violation to the violating tenant/occupant and also give that person(s) the opportunity to contest the violation.

Pictures, Pictures, Pictures

A picture is worth a thousand words. The Board needs to be able to establish that the violation existed, and that the violation was ongoing for the period that it levied fines. The more pictures of the violation the better. Make sure the picture shows the violation so that a judge and/or jury can see that it exists. Tip: blurry photos and photos taken far away are difficult to identify violations.

Guidelines on levying enforceable fines:

1. Know Your Documents
2. Consider Adopting a Fining Policy/Schedule
3. Follow Your Documents
4. Pictures, Pictures, Pictures
5. Keep Good Records
6. Apply the Fines

Keep Good Records

Associations should keep copies of every violation letter sent to the owner and violator. If the enforcement action goes to court, it will be important to show that the association strictly followed the governing documents. Associations should also keep any and all correspondence relating to the existence of fines and violations. A paper trail is your best friend.

Apply the Fines

It is important to ensure that applicable fines are added to the owner's ledger on a regular time schedule. If the fines are not added daily, the description should include the timeframe of when the fines are being assessed. Without adding fines to ledgers in a timely manner, owners are unable to determine the amounts they owe and can cause problems for the association if the fines come before a court.

By complying with the guidelines above and with your association's governing documents in levying fines, you can make sure that your association has the best chance of proving its entitlement to fines in a legal action to collect them from a responsible owner.

As always, for more information or questions about your association's fine collectability, please contact your NowackHoward attorney. www.nowackhoward.com