



2019 HOT TOPICS: Fines, Fees and Remedies!

Julie McGhee Howard
NowackHoward, LLC



QUESTION

What authority is required for Boards to impose fines?

ANSWER

Georgia Condominium Act and Georgia Property Owners' Association Act both state:

“If and to the extent provided in the (condominium) instrument, the association shall be empowered to impose and assess fines.”



QUESTION

Does this Association have the authority to impose fines?

ANSWER

Enforcement provision of Declaration states:

“The Association can enforce its documents and rules and regulations by bringing suit for damages and injunctive relief.”



Financing Authority

Abdullah v. Winslow at Eagles' Landing Homeowners Association, Inc., 823 S.E.2d 872 (GA Ct. App. February 20, 2019)

- ❑ Owner installed a flower bed without permission – could not grow grass due to roots and shade.
- ❑ \$100 per week fine commenced in August ended in December when request submitted and approval granted.
- ❑ Owner sued for Declaratory Judgment that fines were invalid.



Fining Authority

Abdullah v. Winslow at Eagles' Landing Homeowners Association, Inc., 823 S.E.2d 872 (GA Ct. App. February 20, 2019)

- Declaration provided owners would pay assessments including *reasonable fines as may be imposed in accordance with the terms of this Declaration.*
- No provision in Declaration, in fact, expressly allowed Board to impose fines. And, there were no rules, no fine schedule, no notice to owners.



Finning Authority

Abdullah v. Winslow at Eagles' Landing Homeowners Association, Inc., 823 S.E.2d 872 (GA Ct. App. February 20, 2019)

“[T]he simple fact that the association has a ten-year practice of levying fines against all owners at the rate of \$100 per week per covenant violation does not mean that such fines were properly implemented.”



QUESTION

What fines
are
reasonable?

ANSWER

- Not extreme.
- Not arbitrary or capricious.
- What is reasonable depends on a variety of considerations and circumstances.
- Notice provided!



Financing Authority

Sainani v. Belmont Glen Homeowners Association, Inc., Case No. 181037 (VA Circuit Ct. August 26, 2019)

- Association sued Owners for violations of HOA's holiday decoration guidelines.
- ARB fined Owners \$10/day for violations.
- Court held unpaid fines of \$884.17 invalid because, strictly construing Declaration, no covenant gave the Board right to adopt seasonal guidelines.



Financing Authority

Brown v. Spring Valley Homeowners Association, Inc., 2016 WL 3595791 (SC Ct. App. June 29, 2016)

- The amount of a fine may not be disproportionate to any probable damage to the association for the violation.
- The sum must have a relationship to any cost incurred by an association.
- In addition to being reasonable, the owners must be given notice of their potential liabilities.



Financing Authority

Turtle Rock III Homeowners Assoc. v. Fisher, 406 P.3d 824 (Ct. App. AZ October 26, 2017) (depublished)

- Declaration provided for a fine of \$25.00 per day/per violation.
- State Statute and declaration required the association to publish a schedule of fines.
- 93 notices of failure to maintain the house.
- Failure to publish a schedule invalidated the \$25.00 fine.
- “Even if the fine schedule existed, the HOA had the burden to prove its damages.”



Key Considerations for Fines

- Have counsel confirm the authority to impose fines.
- Adopt a schedule of fines.**
- Set a maximum amount.

OR

- Provide the formula $\$ \text{ per day } \times \# \text{ of days } = \text{ the total amount of fines that may be imposed on account of a continuing violation.}$
- File suit to stop the violation and to collect fines.



QUESTION

What authority is required for Boards to impose fees and remedies?

ANSWER

Case law dictates that there must be express authority in the recorded governing documents.



Fees and Remedies – Must be Express

McVicker v. Bogue Sound Yacht Club, Inc., 809 S.E.2d 136 (NC Ct. App. December 19, 2017)

- Owners cut trees and cleared brush from lot.
- ACC demanded \$250 refundable construction bond with application for Association approval of work.
- Court held bond invalid because not expressly allowed by covenants— so fines (for failure to pay bond) were also illegally imposed.



Fees and Remedies – Must be Express

- **Westbridge Condominium Association, Inc. v. Lawrence, 554 A.2d 1163 (Ct. App. D.C., March 9, 1989).**
- Condo Association filed suit to compel owner to pay Board adopted move-in fee.
- Declaration did not expressly authorize move-in fee and Court held invalid.



Fees and Remedies – Must be Express

Elvaton Towne Condominium Regime II, Inc. v. Rose, **453 Md. 684 (MD Ct. App. June 23, 2017)**

- Board adopted “suspension-of-privileges” rule to prohibit delinquent owners’ use of common element parking lot and pool.
- Court held rule invalid – declaration did not give express right to suspend common element privileges as collection remedy.



Fees and Remedies - Must Be Express

Northside Bank v. Mountainbrook of Bartow County HOA, 789 S.E.2d 378 (GA Ct. App. July 14, 2016)

- Declaration must specify the **late fee** to be charged and **cannot be left to Board discretion** or it is deemed an **impermissible penalty**.
- Mountainbrook Declaration provided: “[I]f the assessment is not paid within five (5) days after the due date, the assessment shall bear a late charge in an amount set by the Board.”
- Did not specify any amount, percentage, cap or criteria to determine late fees. **HELD: there must be criteria and ceiling for permissible late fees.**



Fees and Remedies – Must be Express

Crawford v. Dammann, 626 S.E.2d 632 (GA Ct. App. February 2, 2006)

- Declaration authorized imposing fees for water services on the basis of “benefits received.”
- No construction could be commenced without obtaining a permit from the ACC.
- Association imposed a \$3,000.00 building fee to obtain a permit and a \$100.00 water permit processing fee.
- Fees were unauthorized; need to amend the Declaration.



QUESTION

Can an association charge an “administrative fee” for delinquent accounts?

ANSWER

Heartland Crossing Foundation, Inc. v. Dotlich, 976 N.E.2d 760 (IN Ct. App. October 5, 2012): **NO**

- Declaration allowed “late charges, all costs of collection, reasonable attorney’s fees and paraprofessional fees actually incurred.”
- Court ruled \$50 “administrative fee” invalid “junk fee” and not a collectible cost actually incurred.



Key Considerations for Fees

- Identify portions of income budget that rely on charges and fees.
- Have counsel confirm charges are authorized.
- If not authorized, accept the need to amend your recorded governing documents.
- Do Not** take the attitude of charging “and we will worry about it if we are challenged; we can always back off. “
- Owner likely entitled to attorney’s fees if prevails.
- Don’t assume D&O insurance will defend a claim or pay attorneys fees – Board may be deemed acting beyond the scope of authority.



Thank You

Julie McGhee Howard
770.863.8903
julie@nowackhoward.com

nowackhoward.com