



# Community Association

## *HOT TOPICS!*

Presented by

Julie McGhee Howard

and

Jason LoMonaco

9.12.19



# Key Considerations: 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.



## Finning 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.



## Finning 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

### **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](mailto:julie@nowackhoward.com)

nowackhoward.com



# Enforcement Revisited & a note on Security & Tax

Jason LoMonaco  
NowackHoward, LLC



## QUESTION

What are the *potential* options for enforcing covenant violations?

## ANSWER

- Fines
- Lawsuit for a Court Order requiring removal/modification of the violation and/or to collect fines, costs and expenses.
- Suspension of use/vote
- Suspend services paid for as a common expense
- Towing/Booting Vehicles
- Record notice of violation
- Abatement/Self Help
- Specifically assess costs/expenses of self help
- Discontinue utility service – (Under Condo Act a Judgment of \$750 or greater is required)



## QUESTION

What are the sources of Your Association's enforcement authority?

## ANSWER

Declaration of Covenants  
By-Laws  
Rules and Regulations  
Design Guidelines  
Plats  
Deeds



## QUESTION

Is it a violation?

What can we do about it?

## ANSWER

# Know Your Covenants!

- There must be a violation before you can enforce.
  - If the Declaration doesn't prohibit leasing, then an owner isn't violating the Declaration by leasing his/her home.
- The Association must have the authority to fine, suspend voting or use etc. before it can do so.
  - If the Declaration doesn't say the Association can impose fines for a violation, it can't impose fines.





# Follow Your Covenants!

Even if the Board has the authority to adopt rules, it must actually adopt them before they can be violated!

- Write them down, adopt them at a meeting, and publish them to the community.

If the Board has the right to assess expenses back to an owner, it actually has to levy the assessment!

- Know the cost (receipts etc.).
- Vote to charge it back to the owner and the reason why.
- Note it all in the minutes (or a resolution).
- Inform the owner.



# Follow Procedure! Meet Deadlines!

## Notices

- How many days before you can fine, suspend rights/use, assess costs, tow/boot or use self help?

## Violation Hearings

- Are they required?
- When, where and who must the owner contact?

## ACC Procedures: What is the Deadline?

The answers are in the Declaration  
and/or By-Laws



# Special Attention: Towing and Booting

## Why are we towing/booting?

- Were parking privileges suspended for non-payment or a violation?
- Is the vehicle just not allowed to be there in the first place?

There may be a different procedure for each situation

## Where is the vehicle parked?

- Common Area/Elements, lot, designated space, emergency lane?
- Public Street . . . only the County/City can Tow/Boot
- Can parking restrictions even be enforced on public streets??.?.  
Probably not!



## Special Attention: Towing, Booting and Suspension

***CAUTION: Suspension based on unpaid Fines or Attorneys Fees can expose the Association to liability if the Court awards a lower amount.***

- MAKE SURE ALL ACCOUNTS ARE ACCURATE AND UPDATED.
- Separate Fines and Attorney's Fees from Assessments.
- Make sure the violation is clear and indisputable before you suspend.
- Keep all documents (pictures, notices, correspondence etc.)
- Take a picture of the notice placed on the car.
- **CONSULT WITH YOUR ATTORNEY!**



## Special Attention: Architectural Review Deadlines

If the ACC/ARB/ARC fails to approve or to disapprove by the deadline, then the plans are deemed approved.

- Know your deadline: usually 30-60 days
- Meet regularly and keep good records.

If you can't complete the review by the deadline . . .  
Deny Deny Deny! Then revisit immediately and make an informed decision.



# Preparing for Court

## Information Your Attorney Needs:

- Declaration, By-Laws, Rules/Guidelines, resolutions policies.  
**\*\*\*PICTURES, PICTURES, PICTURES\*\*\***
- Correspondence, account statements, notices, invoices, applications, plans, specifications, approvals, denials, maintenance records etc.
- Minutes: Board, Annual/Special Meeting, ACC & Committees.
- Inspection/engineering reports and opinions, work orders etc.
- Plats, maps and/or surveys of property/subdivision
- Witnesses with ***personal knowledge*** of events/violation
- Witnesses with ***personal knowledge*** of books, accounts records and procedures



# Prepare to be sued!

- Owners sometimes strike first and file suit against the Association.
- Many Owners assert a counterclaim in the lawsuit filed by the Association.

**Make sure you have good Directors and Officers Insurance!**



# Taxation of Common Area

Common Area owned by an HOA/POA should only be subject to nominal property tax if it is:

- Subject to a declaration of covenants;
- Is dedicated to the common use and benefit of *ALL* owners for which the owners have an easement; and
- The Association may exclude the general public

Common Area will usually be given a “nominal value”





# No Tax on Common Elements

Per O.C.G.A. 44-3-96 the Common Elements of a Condominium are not subject to taxation separately from a unit as follows:

“For all purposes, each *condominium unit* shall constitute a separate parcel of real property which shall be distinct from all other condominium units. If there is any unit owner other than the declarant, no tax or assessment shall be levied on the condominium as a whole but *only on the individual condominium units.*”



# No Tax on Common Elements

“Unit,” Common Elements” & “Condominium Unit”

“Unit” is the physical space designated for individual ownership and use by an owner [44-3-71(28)]

“Common Elements” are all portions of the condominium not located within the boundaries of a unit [44-3-71(4)]

“Condominium Unit” is a “Unit” **and** the undivided interest in the common elements pertaining to that Unit [44-3-73] 1(9)



# No Tax on Common Elements

“Unit,” Common Elements” & “Condominium Unit”

- Since ownership of a “condominium unit” also ***includes*** a percentage ownership of the “common elements,” when all condominium units are taxed, all of the common elements are also taxed.
- This is why there can be no separate taxation of the common elements



# Security Concerns

- Amend Declaration to expressly state that the Association does not provide, and is not responsible for, Security and that Owners are responsible for their own safety and security
- ***Never*** use the “S” Words
  - SAFETY
  - SECURITY
  - SURVEILLANCE
- Disassociate with “Neighborhood Watch”



*Thank You*

Jason LoMonaco

770.863.8904

[jason@nowackhoward.com](mailto:jason@nowackhoward.com)

nowackhoward.com