

## Fines Touchy Area of Association Law

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By Joe Adams

[jadams@becker-poliakoff.com](mailto:jadams@becker-poliakoff.com)

TEL (239) 433-7707

FAX (239) 433-5933

Today's column continues our series on issues debated by associations when considering updating the community's governing documents. Today's topic seems to get substantial play in the media, the levy of fines.

It is important to start the discussion of fining with the understanding that the levy of fines in associations is regulated by Florida's statutes. Although there are a few subtle differences, the law is generally similar for both condominium and homeowners' associations.

Both statutes require that the authority to levy fines be contained in the recorded governing documents, such as the declaration, the articles of incorporation, or bylaws. If the documents do not permit the levy of fines, then the association has no authority to do so.

Under both statutes, the maximum permissible fine is one hundred dollars per violation. The maximum fine for condominiums was fifty dollars in the 1980's (until the law was amended). Many older condominium documents still state that limit, which would likely apply until amended. The preferred modern practice in amending documents is to recognize that laws dealing with fixed dollars change as the times change, and to permit the association a discretionary range in the levy of fines, up to the maximum permissible by the law existing at the time.

Both laws also permit cumulative fines for ongoing violations, although the documents should be written to authorize cumulative fines. The statutory maximum cumulative fine for ongoing violations is one thousand dollars for condominiums. For

HOAs, the maximum is the amount set forth in the governing documents, and if those documents are silent, the one thousand dollar maximum applies.

Since the association essentially serves as prosecutor, judge, jury, and executioner in the fining process, it is no surprise that both statutes require a certain amount of "due process" before a fine can be levied and collected. Both laws, for example, require the appointment of an independent committee which must review a proposed fine. If the committee does not agree with the proposed fine, it may not be imposed. Ideally, the fining committee is not a rubber-stamp for the board, or a kangaroo court, but rather a group of free-thinking individuals who will add impartiality to the process.

A fundamental difference between condos and HOAs is the ability to file a lien against the unit/parcel to collect an unpaid fine. The condominium law has always prohibited the use of liens to collect fines, with small claims court (or in some circumstances, arbitration) being the required venue for relief. Conversely, Florida law has recognized an HOA's right to place liens to secure collection of a fine, if authorized by the appropriate governing document. However, there is a Bill sitting on the Governor's desk at press-time (which most observers feel is unlikely to be vetoed, this column will cover new legislation when the Governor acts) which specifically states that liens cannot be used to collect fines in homeowners' associations. That law will present interesting constitutional questions in associations which currently recognize the right to use liens to collect HOA fines.

In my experience, fines are a useful tool in some circumstances, and are largely worthless in other

cases. For example, I have observed that the fining process is useful when there is a communication breakdown in the community. The formality and openness of the hearing, the presence of the independent committee, and every party being entitled to fully present their case often permits discussions to occur that resolve the problem before it heads to court. In fact, I have attended many fining hearings that were considered successful

by the association where no fine was imposed at all, but instead an understanding reached on how the association and the residents could resolve the perceived problem.

Next week, we will continue this series by discussing proposed amendments regarding the election of the board of directors, board sizes, term limits, and similar concepts. ⚖️

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## Granting Variances can be a Dangerous Business

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**Question:** I am on the Board of my homeowners' association. In the past, the Board has granted variances such as allowing a bigger concrete driveway in front of a house or allowing a 3-car garage but double in depth so it would accommodate 6 cars. Our deed restrictions only allow garages for not less than two nor more than three motor vehicles. Is it legally possible for Boards to grant variances (exceptions to deed restrictions)? The Board now says that it cannot issue any more variances. Can you give me some information about this? J.K. (via e-mail).

**Answer:** I typically do not recommend that the Board grant variances or exceptions to deed restrictions, especially when the documents do not contain a specific variance procedure. Once an exception is granted for one person, other homeowners will also ask for an exception. If the Board grants one exception but denies another, the homeowner who was denied the exception will claim that the Board is selectively enforcing the deed restrictions. The board will likely claim a difference in the two cases. Litigation then ensues over "shades of gray."

If the Board feels that certain deed restrictions are out-dated or should not apply to the community, the appropriate solution would be to amend the deed restrictions. You should talk to your association attorney. The Board may also be able to "grandfather" those who were previously granted an exception and then provide notice to all of the owners that no future exceptions will be granted. In that case, the Board may be able to enforce the restriction prospectively.

**Question:** Does Chapter 720 (governing homeowners' associations) say anything about the vote required to amend our governing documents? Do we

need the approval of two-thirds of the owners present in person or by proxy at a meeting or two-thirds of the total number of lot owners? J.K. (via e-mail)

**Answer:** Section 720.306(1)(b), Florida Statutes, states that unless otherwise provided in the governing documents or required by law, regular amendments to any governing document of an association requires the affirmative vote of two-thirds of the voting interests of the association. Therefore, if your governing documents provide for a different level of approval, your governing documents will control. Generally, if the amendment is to be approved by those present in person or by proxy at a meeting, the language in the documents will usually be clear on that point. If the amendment requires approval of a certain percentage of the lot owners, the documents will usually refer to a certain percentage of "all the owners" or "all voting interests" or something similar. Also, remember that each governing document may require a different level of approval for amendments. You need to look at the Declaration of Covenants, the Articles of Incorporation, and the Bylaws in order to determine what vote is necessary to amend each document.

**Question:** In your column of April 15, 2004, you answered a question about a "President's Council." You stated that the "sunshine" provisions in the Florida Condominium statute and the HOA statute did not apply to the President's Council. Does this mean that this President's Council can adopt rules and regulations and levy assessments without notice to the owners? P.Y. (via e-mail).

**Answer:** No. The President's Council was described as "self-created." Therefore, it would not have the authority to adopt rules and regulations or levy assessments. However, the sunshine provisions would apply if the President's Council was a Board of Direc-

tors for a “Master Association.” If a Master Association meets the definition of an “association” in Chapter 718, it would have to comply with the sunshine laws in Chapter 718. An “association” means, in addition to a typical condominium association, any entity which operates or maintains other real property in which unit owners have use rights (such as a common area pool that is shared by all of the owners of the various condominiums), and where membership in the entity is composed exclusively of condominium unit owners or their representatives and is a required condition of unit ownership.

**Question:** I am about to close on the purchase of a condominium unit. One of the main reasons I chose to purchase a unit in this condominium is because it has no pet restrictions. However, in a recent conversation I had with the President of the association, he

advised me that the board is discussing changes to the rules of the condominium, which would prohibit pets. If there are no pet restrictions at the time I purchase my unit, can the board retroactively enforce this proposed rule and require me to remove my pets? C.L. (via e-mail)

**Answer:** If the restriction imposed against pets is a board-made rule then the board may not retroactively enforce the rule and require you to remove your pet. The Condominium Act necessitates that board-made rules must be reasonable. It is not reasonable to requiring pet owners to remove their pets if the owners purchased units in the condominium because there were no pet restrictions. Therefore, such a rule would be unenforceable against unit owners that own pets at the time the rule was adopted, and you would be grandfathered. ⚖️

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*Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.*

*Send questions to Joe Adams by e-mail to [jadams@becker-poliakoff.com](mailto:jadams@becker-poliakoff.com) This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at [www.becker-poliakoff.com](http://www.becker-poliakoff.com).*