



Hearing Needed to Levy Fines

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Today's column is the third part of a series regarding the levy of fines in community associations as a method of alternative dispute resolution (ADR). In the first installment (Dispute resolution outlined, Feb. 23) we looked at the statutory basis for the levy of fines and required provisions in the association's governing documents. Last week's edition (Follow due process to levy fines, March 2), looked at pre-hearing due process requirements, including the contents of notice of the fining hearing and preferred methods of serving the notice on alleged violators. Today, we will look at the conduct of the fining hearing itself.

As noted in our earlier discussion, all community association statutes require that prior to levy of a fine, an opportunity for a hearing before an independent committee must be afforded. There is no specific name given to this committee in the laws, most people call it the "fining committee," although names like "grievance committee," "hearing committee," "compliance committee" and "rules committee" are often used as well. For simplicity's sake, we will use the term "fining committee."

As was also previously discussed, the fine is levied by the association, which requires action of the board. Stated otherwise, the fining committee does not levy the fine. As we also examined, the board cannot levy the fine until the appropriate notice and opportunity for hearing is given.

Accordingly, after due notice, I recommend that the hearing where the fine is to be considered be

structured as a joint meeting of the board and the fining committee. There is no guidance in the laws, nor in most governing documents as to the actual process to be followed in conducting the fining hearing. Remember, fairness to all parties to the dispute is paramount, and the association will ultimately not be able to collect a fine if appropriate due process rights are not observed.

I have attended many fining hearings, and no two of them have been conducted in the same manner. One thing is certain, there is no need to emulate the pomp and drama affiliated with television's depiction of court trials, which often bears no resemblance to the real world anyway.

Rather, I recommend that the hearing start by the appointment of a presiding officer, typically the association's president. If the president is going to serve as a witness, it might be better (although I am aware of no legal requirement) for someone else to chair the proceedings. Typically, the association will present its "case" first. The presiding officer should open by explaining what alleged conduct is being considered as a possible violation of the governing documents, and what provisions of the governing documents are involved. Usually, the case presentation will involve verbal testimony from witnesses to the incidents, as well as documentary evidence such as letters which have been written, e-mails sent, and the like. The accused owner should be afforded a liberal opportunity to ask questions of all of the association's

witnesses, review written evidence and make whatever comments or arguments about that information that they deem relevant.

Then, the owner subject to the potential fine gets his or her turn. Again, there are no formal rules of evidence that need be followed, the basic goal is to permit both sides to tell their story, make whatever points they feel are relevant and have the opportunity to be fully heard. As an informal proceeding, there is no rule that prohibits members of the board, or even members from the fining committee from asking questions and chiming in where they wish to do so, subject to normal rules of order established by the presiding officer.

Also, remember that if the fining hearing is held before the board, it is an open meeting of the association and must also be open to all members of the association, with proper advance posting of notice, and for condominiums and cooperatives, affording unit owners the right to speak to designated agenda items, which in this case would include the fine under consideration. In situations where members may wish to speak, it is typically best to make provision for those comments at the beginning of the proceedings, so that some resemblance of order can be maintained. At the conclusion of the fining hearing, a member of

the board should move that a fine be levied, in what amount, and when it should be paid. Of course, a motion would also be in order to vote that no fine should be levied.

Like any motion, there should be a second, final discussion, and the vote taken. The vote of each director, by name, should be recorded in the minutes of the meeting. If a fine has been levied, then a second vote must be taken, this one by the fining committee. As mentioned, the fining committee must “agree with the fine,” and therefore may affirm the fine, reduce it, suspend it, or throw it out altogether. The vote of each member of the fining committee should also be recorded in the minutes of the meeting, as should other customary formalities including the establishment of a quorum, proof of notice, and the date, time, and place of the meeting.

Next week, we will take a look at the suspension of use rights and voting rights as a parallel to fining, which is permissible in homeowners’ associations, but not for condominiums and cooperatives. We will also look at how to collect a fine once it has been levied, and conclude with some practical observations about fining and suspension as a means of ADR in community associations. ■

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 This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.

Patios Added by Owners Shouldn't be Covered by All

Question: Our condo association says that the repair and/or replacement of storm damaged patio enclosures installed by individual unit owners is now the responsibility of the association as stated in the new Florida statute regarding hazard insurance law. Is this correct? In the past, homeowners were responsible for maintaining and repairing any damage to patio screen enclosures as a result of storms. Has the burden of financial responsibility now shifted to the association? M.B. (via e-mail)

Answer: As has been widely reported, the Florida Legislature adopted amendments to Section 718.111(11) of the Florida Condominium Act, dealing with insurance, effective January 1, 2004. Unfortunately, the 2004 amendments to the law have spawned urban legends and interpretations that do not appear to be borne out by the discussions which surrounded the actual adoption of the law.

In my opinion, the main effect of the 2004 law was to standardize the adjustment of insurance losses for condominiums, regardless of when the condominium was created, or how the condominium documents were written. In fact, the 2004 change added only a couple of small items to the list of elements that should not be insured by the condominium master policy, most notably air-conditioner compressors and window treatments (which were probably excluded from master insurance responsibilities anyway).

If the enclosures were added by the unit owners after initial construction, they are not part of the "condominium property," as that term is defined, and would not be insured by the association unless specifically required by the declaration of condominium. Even in such cases, it would be rare indeed for the documents to require other owners to share in the costs of repairing a neighbor's upgrades.

Question: The board of directors of our association was recently put on notice that they must comply with the notice and open meeting requirements of the Florida Statutes. Can you tell me what defines an emergency meeting? C.L. (via e-mail)

Answer: With the exception of certain meetings between the board of directors and its attorney, Florida law requires that notice of all meetings of the board of directors be either posted in a conspicuous place in the community at least 48 hours in advance of a meeting or (for homeowners' associations only) mailed (or delivered) to each member at least seven days before the meeting, except in an emergency.

The Division of Florida Land Sales, Condominiums, and Mobile Homes has the authority to hear disputes between condominium associations and its members. Generally, the Division has held that emergency meetings must be justified by some reason that precludes waiting for the required notice, that the emergency must be shown as to the particular agenda item in question, and that circumstances giving rise to the emergency must have been unforeseen. Essentially, proof of emergency requires the showing of a genuine threat to the continued well-being of the community or the owners from a delay sufficient to allow notice.

For example, the Division has held that an emergency was not presented where the reasons given were difficulty in holding meetings due to disruptive participation of certain members. The Division, however, has held an emergency was presented where it was shown that the association's new treasurer had recently discovered that the association would have defaulted on debt payments and injured its credit rating if it had waited for the required notice period before holding the meeting. In sum, it is reasonable to conclude that the Division will not consider it an emergency if the meeting is held for the mere convenience of the board of directors or where there is no genuine threat to the continued well-being of the community or owners.

For HOAs, the courts would be the arbiter of what constitutes an emergency. I am not aware of any reported case decisions on point.

Question: Our condominium documents state that we need a 75% approval vote from all of the residents in order

to levy any special assessment. The only way we can avoid this vote is if we prove it is an emergency. We have tried to amend this clause without success. We need to update many things in our aging building, including painting the garage area and updating the security system. Our residents do not want to pay a special assessment. Is there any other way to generate funds for the work that needs to be done? Can the Board's fiduciary duty to maintain the building supersede the clause in our documents? C.B. (via e-mail)

Answer: Your condominium documents should be viewed as a contract. Whatever the contract provides will govern. If the contract requires a 75% vote of all members in order to levy a special assessment, then I would expect that you would not succeed in trying to collect an assessment from a non-paying member in the absence of that approval; the contract would simply not support such a claim. If the documents state that an assessment may be levied for "an emergency", you may have some leeway. The law typically defines an "emergency" as a situation in which person or property

is in imminent danger of injury or damage. If there is any question on whether your situation constitutes an emergency, you should consult experts in the relevant fields and obtain their written opinion on the emergency nature of your situation.

Other than annual assessments, which are typically limited to address recurring, annual, operating expenses, and special assessments, the most common method for an association to obtain funds is by obtaining a loan. As with special assessments, it is necessary to check your documents to determine if there are limitations or prerequisites to the Board obtaining a loan. The repayment of that loan may be a proper expense to put into the regular, annual budget of the association.

Finally, while the emergency nature of the repairs and the board's fiduciary responsibility to maintain the property may support a board undertaking a "material alteration" without member approval, I do not believe these facts supersede the clear language of the declaration/contract regarding special assessments. ■

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