

Court Best Association Option for Unpaid Fines

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Today's column is the fourth 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, February 23, 2006), we looked at the statutory basis for the levy of fines and required provisions in the association's governing documents. In the second installment (Follow Due Process to Levy Fines, March 2, 2006), pre-hearing due process requirements, including the notice of the fining hearing and preferred methods of serving notice were examined. Last week, we looked at the conduct of the fining hearing itself (Hearing Needed to Levy Fines, March 9, 2006). Today, we will look at how to collect fine once it has been levied.

Once the association has followed all of the required steps for the levy of a fine, and it has been duly levied against the offender, what happens if the fine is not paid? Unfortunately (at least from the perspective of many associations), the collection of a fine will require some type of legal proceeding, which blunts the "swift justice", which many associations consider as the main benefit of fining as a means of ADR.

One of the most frequently asked questions from associations is whether the association can simply put a lien against a property, and let the fine sit until the owner decides to sell, on the assumption that the fine will be paid off as part of the closing. The short answer is no.

Both the condominium statute (Chapter 718 of the Florida Statutes) and the cooperative law (Chapter 719 of the Florida Statutes) have long provided that a fine cannot be secured by a lien against the property. The law applicable to homeowners' associations was historically silent on this issue, and many HOAs were empowered by their governing documents to place a lien for the non-payment of fines.

As part of the substantial reforms enacted to Chapter 720 in 2004, the law was amended to provide that a homeowners' association likewise could not place a lien against a parcel to secure or enforce payment of a fine. This new law raises some constitutional issues for pre-existing HOAs whose covenants permit liens for fines, but there have been no test cases reported about the retroactive application of this law.

Therefore, in many cases, the only remedy for an association to collect an unpaid fine is resort to the courts. This will typically involve small claims court, where the rules of procedure are somewhat relaxed. Nonetheless, it has been my experience that most associations are not comfortable pursuing court action without the services of an attorney. This leads to the obvious question of whether the attorney's fees spent by the association in collecting the fine are also recoverable. If not, if the issue is examined strictly from a profit and loss perspective (rarely the best yard-stick to use when considering covenant enforcement matters), it would not be cost-effective to collect a fine.

Chapter 720.305(2) of the statute applicable to homeowners' associations specifically states that in any action to collect a fine, the prevailing party is entitled to the recovery of their attorney's fees. The condominium and cooperative laws contain no specific guidance on this point, although both laws do contain a generic clause entitling the prevailing party in disputes between associations and owners to recover attorney's fees. A modern, well-written set of documents for a condominium or cooperative will specifically address this issue. It has been my experience that most judges will consider a fine collection case to entitle the prevailing party to the recovery of reasonable attorney's fees.

Assuming that an association prevails in a court action to collect a fine, the association will receive a piece of paper known as a judgment. If the owner remains recalcitrant about payment, it is then necessary to take further legal steps to enforce the judgment. This typically involves recording the judgment in the public records and seeking the seizure and public sale of non-homestead and non-exempt assets to pay the judgment.

There are other glitches in the process as well. For homeowners' associations, the law requires that prior to filing court action for most "covenant enforcement" disputes, the parties must engage in a state-administered mediation program, which requires paid services of an outside mediator, and where attorney's fees are not recoverable. While I do not think that the mandatory mediation requirements

in the homeowners' association statute were intended to require mediation of fine collection cases, the law is written broadly enough so that one could certainly make this argument. Again, there are no reported test case decisions on the point.

Of greater practical significance is what happens when the association has levied the fine, but the complained-of conduct continues. In condominiums and cooperatives, this will require filing arbitration proceedings with the Department of Business and Professional Regulation, in order to obtain a ruling about the conduct itself. In those cases, the association can also ask for an order regarding payment of the fine as "ancillary" relief. In the HOA context, it is clear that if the underlying violation continues, court action is necessary to seek relief, which would clearly require resort to pre-suit mediation.

Practically speaking, the vast majority of owners will pay the fine once it is levied. However, if they do not, the association is left with little choice but to pursue formal legal action. While attorney's fees incurred in that process can often be recovered, it is likely that the process will take much longer than the association had in mind, and courts are sometimes hesitant to award the association all of the fees incurred, even if the association wins.

Next week, we will wrap up this series with a discussion of some practical tips on the fining process, and consideration of how these laws apply to suspension of use rights when the rules have been broken. ■

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.

Association Board Meetings Must be Open to Members

Question: Our condominium association has a five (5) member board of directors. However, one of the board members lives out-of-state and never attends our meetings. This really creates a problem as often the vote on issues confronting the board ends up in a 2-2 tie. Is there anyway we can disqualify the board member who never attends. This person is never here and therefore does not know what is going on in our condominium association. D.H. (via e-mail)

Answer: The only permissible method of removing a board member from a Florida condominium association board is set forth in Chapter 718.112(2)(j), Florida Statutes and in Chapter 61B-23.0027-.0028, Florida Administrative Code. These provisions require either a vote of, or the written agreement of, a majority of all voting interests of the association membership in order to recall a director.

In addition, you should know that any unit owner is permitted to be a candidate for board membership, without regard to whether that unit owner is a permanent resident or frequent occupant of the unit. While I have seen some bylaws which provide that so many unexcused absences from board meetings constitutes resignation, I doubt such a clause is enforceable.

Question: Can a husband and wife owning and living in the same condominium unit serve on the same Board of Directors? R.C. (via e-mail)

Answer: Yes, co-owners, even if husband and wife, can serve together on the board. The Condominium Act states that any unit owner or other eligible person desiring to be a candidate for the board must give notice to the Association of their intent to be a candidate. This language was analyzed in a condominium arbitration decision and the arbitrator suggested that a bylaw amendment prohibiting more than one owner of a unit owned by more than one person to sit on the board would be invalid.

There have been attempts during previous legislative sessions to amend the Condominium Act to prohibit

family members from serving together on the board, but such bills have not passed.

Question: In the documents of the condominium where I live, there is a rule that owners may have pets, but renters cannot. Is this legal? S.W. (via e-mail)

Answer: This is a common issue where an association's condominium documents will treat owners and renters differently. The Florida Condominium Act states "when a unit is leased, a tenant shall have all use rights in the association property and those common elements otherwise readily available for use generally by unit owners". This statutory provision relates to a tenant's use rights in the "Association property" and the "common elements", not the rights in the "unit" (i.e., whether a tenant can keep a pet in a unit).

There have been a number of condominium arbitration decisions that address this issue. In one, an association's rules and regulations allowed owners to keep pets within certain guidelines established by the rule, and further indicated that tenants were not allowed to have any pets. The arbitrator ruled that the rule precluding tenants from having pets was enforceable, and that the differential treatment between owners and tenants was valid.

In another condominium arbitration case, the association had a pet restriction contained in its Declaration of Condominium allowing owners to have pets. The association's Rules and Regulations further provided that renters were not allowed to have pets. The arbitrator in that case indicated that the rule against pet ownership by tenants did not appear to be arbitrary, did not violate public policy, nor did it abrogate any fundamental constitutional right. As a result, the tenants were required to remove their dog from the unit.

Question: Two years ago, I purchased a single-family residence in a subdivision. The main reason for the purchase was the lovely view of a lake. A

survey of my property that I first viewed at closing showed that the portion of the land adjacent to my property bordering the lake is actually owned by a neighboring subdivision. The neighboring homeowner's association has recently erected a fence that obstructs my view of the lake and only surrounds part of the lake. I am inquiring as to whether a permit is required for a fence and where the fence may be located. S.S. (via e-mail)

Answer: Authorization of a building permit is required by the Florida Building Code to erect a permanent structure (i.e., fence, gazebo, storage shed, etc.) As part of its local land development regulations, a County or City will typically dictate what the fence may be made of and its maximum height. These regulations usually

vary depending on the use of the property and the zoning district that it is located within.

Where a fence may be erected is also determined by the zoning district and whether there are any competing land use concerns. For instance, a fence should not be located within a drainage or utility easement because it would obstruct the use of these areas and hinder maintenance of the facilities within.

It seems that your neighboring subdivision has installed a "perimeter fence" within its property. Often times, perimeter fences are allowed or even required by planned development ordinances to buffer the property from its surrounds properties. Planned development ordinances are typically available on the local government's website. ■

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