



Suspension of Use Rights Effective

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Today's column is the fifth and final part of a series regarding the levy of fines and suspension of use rights 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. In the third installment, we looked at the conduct of the fining hearing itself (*Hearing Needed to Levy Fines*, March 9, 2006). Last week, we looked at the procedures for collecting a fine once it has been levied (*Court Best Association Option for Unpaid Fines*, March 16, 2006). Today, we will look at suspension of use rights as a means of ADR, and conclude with some practical tips on when fining is effective, and when it is not.

Suspension of common area use rights is an alternative method of ADR, and perhaps more effective than fining in many cases. The ability to suspend use rights is one area where the law for homeowners' associations differs greatly from the law applicable to condominiums and cooperatives.

Simply stated, suspension of use rights is not an available method of ADR in condominiums and cooperatives. Neither governing statute (Chapter 718 or 719) permits suspension as a remedy for violation

of the governing documents. As a parenthetical note, condominiums and cooperatives also cannot suspend voting rights, although that capability exists for HOA's in limited circumstances as well.

For homeowners' associations, Chapter 720 of the Florida Statutes specifically provides that an association may suspend the right to use common areas, for a reasonable time, for violation of the governing documents, including the rules and regulations. The process affiliated with suspension of common area use rights for homeowners' associations is exactly the same as for levying fines. Briefly stated, the authority to suspend must be contained in the governing documents, no suspension may be meted out without notice and opportunity for a hearing, and an independent committee must agree with the board's decision to suspend use rights. As an additional caveat, to the extent the association's common areas may consist of roadways, an association cannot suspend ingress and egress to the individual parcel (home) under any circumstances.

I am often asked to share my opinion regarding the effectiveness of fining and suspension as a method of ADR. Like all things in life, there are some pros and cons.

On the plus side, the fining hearing provides an official forum for all parties to the dispute to be brought together quickly, with an opportunity for all sides to present their story much sooner than would happen in an arbitration or court-oriented process.

Additionally, because the fining hearing is a public forum (at least if it is held in conjunction with a board meeting), the home owner alleged to have violated the community's rules is given the opportunity to see how seriously the other neighbors take the problem. In many cases, social factors that permeate membership in any organization will have greater force in conforming behavior than the threat of the punishment itself.

I have attended many fining hearings, which all parties considered "successful" where no fine was levied at all. Rather, the owner acknowledged the problem, agreed to correct it, and the parties agreed to move forward. This is the goal of ADR.

On the negative side, fining does not cure an ongoing violation. For example, if an owner is harboring a dog in a no-pets condo, the levy of a fine does nothing to address the animal's presence. Rather, there are now two things to argue about, the violation itself and collection of the fine. For this reason, fines are often ineffective in resolving disputes that are

ongoing in nature, such as unauthorized alterations or construction, pet disputes, and the like. Conversely, a fining hearing may be the best measure to address specific incidents, such as noise complaints or parking violations.

Of course, if the owner refuses to pay, collection of a fine may involve resort to legal procedures, which the association must be prepared to take if it levies fines. In other words, I think that the worst thing an association can do is go through the process of levying a fine, and then back off when it is time to collect it. Since the fine cannot be secured by a lien, the recalcitrant owner will simply never pay, and the association's fining process will be nothing but a toothless tiger.

I believe that associations should have the authority to fine (and for HOA's, to suspend) in the governing documents. It is like having a tool box with more than one tool. In some cases, a screwdriver will fix the problem, in others you may need a sledge hammer. ■

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.

Owner's Attorney Has No Place in Advising Board

Question: At our last HOA meeting, a resident came with their attorney, because they are not happy with how the present board is conducting business. The board made a motion, which received a second, and the board began to discuss the motion. The owner's attorney then proceeded to outline his views on the motion and make recommendations. I was under the impression that once a motion was made by the board and was seconded, the issue was closed to membership discussion. How should this be addressed, as the resident has stated that her attorney will attend future meetings? J.P. (via e-mail)

Answer: In a homeowner's association, a parcel owner has no right to speak at board meetings unless that right is conferred by the bylaws. There is an exception in the statute for special meetings of the board called by petition of the HOA membership, but this does not apply to routine board meetings.

Nonetheless, many homeowners' associations do permit residents to address the board with regard to agenda items, so that the board may know how the association's members feel about a particular topic. If owner input is going to be taken, I suggest that it be done as each agenda item is called up, before any motion or second is made. Once the matter is formally before the board, it is rarely productive to have free-for-all debate by everyone in the room.

Chapter 720 of the Florida Statutes states that a parcel owner has a right to attend meetings of the board. There is no right in the law for an owner's attorney to attend, although my personal viewpoint is that the right to counsel is a fundamental right, and to the extent the board is going to accept commentary from owners, it should permit owners to speak through their counsel.

However, an attorney for an individual owner has no place in advising the board on how to conduct the association's affairs, in fact it is a conflict of interest for an attorney not representing the association to do so. Further, it has been my experience that if the owner is represented by an

attorney in a matter, the association would likely want to have its counsel involved as well. In those circumstances, I recommend that the board instruct the owner's attorney that the association has legal counsel, and any communications from the owner's legal counsel should be directed to the association's legal counsel.

Question: Can a homeowner's association accept a proxy that does not have the time of the meeting written on the form? In our situation, there was a defective proxy turned in and it was the deciding vote in the outcome of the election of directors. E.P. (via e-mail)

Answer: Chapter 720.306 of the Florida Statutes states that for a proxy to be valid, it must be dated, must be signed, and must state the date, time and place of the meeting for which it was given. In my opinion, a proxy that does not contain the time of the meeting is invalid, and should not have been counted in the election.

Florida's courts have generally held that a proxy creates an "agency" relationship, with the giver of the proxy being the "principal" and the holder of the proxy being the "agent." An agency relationship is one of delegation of power and trust. For example, had the proxy-holder filled in the time of the meeting on the proxy form before turning it in to the association, it is my opinion that it then would have been counted as valid, on the theory that the principal delegated to the agent the authority to make any corrections necessary for a valid proxy before turning it in. However, once the proxy was tendered in a defective manner, it should not have been counted.

Question: Recently, the board of directors of my condominium association named a non-director as the treasurer. Can they do this? H.R. (via e-mail)

Answer: The statutes governing condominium associations (Chapter 617 of the Florida Statutes, which is known as the Florida Not-For-Profit Corporation Act, and Chapter 718, which is known as the Condominium Act) do not offer any real guidance as to who is able to

serve as a corporate officer of a condominium association. To answer the question, the condominium documents (typically the bylaws) will need to be reviewed to determine the limitations of who is eligible to be appointed an officer.

Different associations' by-laws can vary quite substantially on this issue. For instance, one set of bylaws might indicate that anyone can be appointed by the board as an officer, including nonowners, while another set of bylaws might indicate that an officer must be a director.

Ultimately, the answer to your question will be found in your bylaws.

Question: We had our yearly meeting a few weeks ago. At the end of the meeting we were electing our board. They were going to take a vote by raising hands and I told them they had to take a ballot vote according to state laws. Our secretary tossed out some pieces of paper and told me to make up ballots. I am not a board member, but a lady next to me and I made up the ballots and we voted. After the meeting, another member asked why I brought up the ballot requirement and was tearing into me all the way to the car. I would appreciate your opinion on this. P.O. (via e-mail)

Answer: It depends on whether your association is a condominium association or a homeowners' association. Section 718.112(2)(d)3 of the Florida Condominium Act requires that the election of condominium association directors be conducted by secret written ballot according to that statute. The Florida Administrative Code at Rule 61B-23.0021 provides additional details as to how that vote must be conducted. It is possible for a majority of the members to vote to opt out of these detailed rules, but that

vote must be done in advance of the election meeting and must provide details of the alternate voting procedure to be followed.

If your association is governed by the condominium statutory election procedure, your description of the facts indicates your association did not meet those requirements, and the election was likely invalid. Under the condominium statutory election procedure, ballots must be sent to the members with the second meeting notice, which must be sent at least 14 days prior to the meeting by statute, or even earlier if required by the bylaws. Clearly, that did not happen.

Conversely, if your association is a "homeowners' association," you are governed by Chapter 720 of the Florida Statutes. Chapter 720 basically defers to the association's bylaws regarding election procedures. The HOA law only states that the election must occur at the annual meeting, and that any parcel owner must be permitted to nominate himself or herself from the floor at the meeting (floor nominations are not permitted for condominiums).

If your association is an HOA, and absent any contrary provisions in your bylaws, the election procedure you described is probably valid.

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