

## A FIELD GUIDE FOR BOARD MEMBERS

### *Understanding Fines*

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*This marks the third installment of a series for Board members about commonly faced questions and issues. Many of these challenges require a combination of legal, political and practical solutions. Hopefully these articles will be useful for Board members in determining what is in the best interests of the Association.*

Board members have an affirmative duty to enforce the covenants and other governing documents. The only practical tool for enforcement is fines.

Although an association usually has the authority to suspend a member's right to vote and use of amenities, these types of sanctions are often not strong enough to encourage compliance. Of course, an Association could also bring suit for an injunction to force someone to correct a violation, but this can create a very large expense to the association in the form of attorney fees.

The most common types of fines are those that accrue on a daily basis. Since the purpose of fines is to encourage compliance, the violator has no further incentive to correct a violation after a one time, lump-sum fine. The other advantage to using a daily fine for every type of violation is the ease in demonstrating the fine was applied equally and fairly to everyone.

The law also requires that the amount of the fine be 'reasonable'. Although we don't know what the upper limits of reasonable might be, a Georgia court found that a daily fine of \$25 was not excessive. This is the reason almost all associations in Georgia set their daily fines at \$25.

There are several important considerations for the Board regarding the handling of fines.

First, it is imperative to follow the procedural requirements in the governing documents (usually contained in the bylaws). These provisions will usually dictate the exact language contained in the notice...including the number of days to correct the violation without a fine and the homeowner's right of appeal. Since fines are such a strong remedy, a court will want to see notices that include all of the mandated provisions.

Secondly, fines must be uniformly applied to all violations within the subdivision. If the association levies fines for some types of violations, but not others, the violator may have a valid defense of selective enforcement, waiver, or abandonment.

Finally, the association must have a reasoned approach towards the forgiveness of fines. If an association always waives the fines after a violation is corrected, this will become common knowledge throughout the community. Once this happens, the fines will lose their effectiveness in deterring homeowners from violating the governing documents; which is the purpose for using fines in the first place. The easiest solution is to always insist the balance is paid in full, but this does not offer much flexibility to the Board.

If the fines are challenged in court because other violators' fines were forgiven in the past, it will become important to prove that the Board had a basis for why they decided forgiveness was in the best interest of the association. This is why the Board should keep documentation of the reasons behind forgiving a fine.

The most frequent situation for accepting less than the full amount is when a home is in the process of being sold or refinanced. Sometimes the seller will offer a lump sum payment for less than the balance due. Since fines are a 'soft' cost and the association is getting money in hand now, it can make sense to take less than payment in full. Another example is when the homeowner has an arguable defense (such as improper fine notice) and the association agrees to forgive fines in return for correction of the violation.

#### **In Summary:**

- Daily fines are much more effective than lump-sum fines.
- Fines should be uniform in their amount and in their application.
- Fine notices should track the language required by the governing documents.
- Boards should have a reasoned and documented approach to forgiveness of fines.