



Follow Due Process to Levy Fines

Fort Myers The News-Press, March 2, 2006

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Today's column is the second part of a series regarding the levy of fines in community associations as a method of alternative dispute resolution (ADR).

Last week, in the first installment, we looked at the statutory basis for the levy of fines, and the requirement that the authority to levy fines be contained in the governing documents. Today, we will look at conducting the fining hearing and the "due process" requirements of the law.

First, a couple of housekeeping points. Last week's column contained two typographical errors. While the law states that the maximum per-violation fine is \$100 (one hundred dollars) per incident, the aggregate fine for condominiums is \$1000 (one thousand dollars) and that is also the maximum aggregate fine in Homeowner's Associations, unless otherwise provided in the governing documents. Kudos to one sharp reader for picking that up.

Second, it was brought to my attention that a number of resident-owned mobile home communities in Southwest Florida are governed under the cooperative form of ownership, and are thus governed by Chapter 719, the Florida Cooperative Act. For purposes of this series, the comments for condominiums may be deemed equally applicable to cooperatives.

The condominium and cooperative statutes provide that no fine may be levied until the alleged violator is given "reasonable notice and opportunity for a

hearing." The HOA law provides a similar provision, but specifically states that at least fourteen days' notice must be given.

The condominium law does not state what "reasonable" notice is. There used to be an administrative rule from the state enforcement agency which required fourteen days' notice, and many bylaws use the fourteen day threshold as "reasonable" notice. If lengthier notice requirements are contained in the bylaws, they should be followed, but otherwise the fourteen day notice requirement seems to be a safe harbor for both condominiums and homeowners' associations.

The content of the fining hearing notice is not specified by law. This is where the more generic concept of "due process" comes into play. By analogy to constitutional law, a party accused of an offense has certain basic rights, including the right to know the charges levied against him or her; the right to be heard; the right to confront and cross-examine witnesses; and the right to be represented by legal counsel.

While notice of a fining hearing does not need to be a legal brief, it should give the alleged violator certain basic information, including:

- The nature of the alleged violations;
- If more than one violation is alleged, information regarding each violation;

- The provisions of the governing documents or rules and regulations which are alleged to have been violated;
- Notice of the date, time, and place of the hearing where the matter will be considered; and
- A basic statement of due process rights, including the right of the accused party to present his or her own evidence, to review and challenge the association's evidence, and the right to be represented by legal counsel.

One area where the law is not entirely clear is whether a hearing must actually be held in order for the fine to be levied. The applicable laws simply require "opportunity" for a hearing, not an actual hearing. However, a common mistake made by many associations is for the board to levy a fine without a hearing, and then tell the owner that the fine has been levied and that they can request a hearing to "appeal" it. This is not the intention of the law, and several condominium arbitration decisions have invalidated fines which were levied before the opportunity for a hearing process was examined.

Service of notice of the fining hearing also requires consideration. If fourteen days' notice is the minimum time-frame, dropping notice in the mail to an Ohio resident who has left for a month-long cross-country trip, fourteen days before the hearing, will unlikely be considered sufficient notice. In fact,

one condominium arbitration decision arising from a local condominium fining dispute held that actual notice is required.

I recommend that an association use a thirty (30) day pre-hearing notice window. I also recommend that the notice be sent by certified mail, return receipt requested, with a second copy being sent by regular United States Mail. In some situations, receipted commercial express delivery may be sufficient. The point is that the association needs to go "above and beyond" in making sure that the accused has "reasonable" notice and the opportunity to attend the hearing if they so choose.

I also recommend that if the owner requests a continuance or rescheduling, that the association be reasonable in addressing such requests. As will be addressed in a future edition of this series, if the association cannot collect the fine, you must head to court, and the association would then bear the burden of proof that it has ensured the owner's due process rights. Since the association's role in the fining hearing is akin to prosecutor, judge, and jury, it is important to demonstrate that the fining hearing is more than a kangaroo court.

In the next edition of this series, we will take a look at the actual conduct of the fining hearing. We will conclude the series with a discussion of how to collect fines, once properly levied, and I will share some of my practical tips on those cases where fines work, and those where they do not. ■

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 board of seven directors is having a “closed” meeting to discuss one issue; our presentation of a new roofing system. This will be followed by a secret paper vote in favor or against. How many people, by law, must be present to count the vote? T.A. (via e-mail)

Answer: There are several issues that are raised by your question. First, all condominium association board meetings must be open to members, with the exception of board meetings with legal counsel present to discuss proposed or pending litigation. A similar rule applies to homeowners associations, but those boards can also hold closed meetings with legal counsel to discuss personnel matters.

The next issue raised by your question is the manner in which board members vote. Board members may not vote by secret ballot or by proxy, except in the election of officers. This rule is set forth in both the Florida Condominium Act at Section 718.111(1)(b), F.S., and the Florida Homeowners’ Associations Act at Section 720.303(2)(c)3, F.S.

Finally, because board members may not vote in secret on any matter other than the election of officers, it is not necessary to have any independent group count votes. It is adequate to simply have the votes that were cast by the directors recorded in the minutes of the meeting. There is also no statutory requirement that the votes for the election of officers be counted by an independent group. The board is charged with fulfilling that obligation on its own.

Question: Can a property owners association prevent a parcel owner from recording a board of directors meeting? Chapter 720 gives this authority, however, the board says that there is a federal law that says you cannot tape without permission. M.G. (via e-mail)

Answer: You are correct that Section 720.306, Florida Statutes allows a parcel owner to tape record or videotape

meetings of the board of directors and meetings of the members. This law also allows the board of directors to adopt reasonable rules governing the taping of these meetings.

Florida cases provide little insight as to what is “reasonable.” A court will determine what is “reasonable” by evaluating the applicable provision of law and its spirit, intent, and purpose. Therefore, a rule which is so cumbersome such that it substantially hampers one’s ability to tape would likely be considered “unreasonable.” In my opinion, a rule that requires taping to be made by nondisruptive video recording devices, set up in advance of the meeting, would likely be considered reasonable.

The board is correct that federal law exists which prohibits “interception” or acquisition of oral communications. There is also a Florida law that prohibits “interception” or acquisition of oral communications. The state and federal communication interception laws coexist and when read together lead to the conclusion that, with limited exception, interception of “oral communications” are prohibited.

Federal law defines “oral communication” as “any communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation” and Florida law adds that an oral communication is “not any public oral communication uttered at a public meeting.”

A meeting of the board and association members is likely not a public meeting because members of the general public do not attend. However, it appears that the board cannot reasonably expect that the meetings will not be recorded, because state law allows the recording of board and members’ meetings.

Question: We recently lost our pool cage during Hurricane Wilma. Due to the fact that my insurance carrier is only allowing about half of what it would cost to replace it, we would like instead to erect a fence around the deck. The problem is that our homeowners’ association has

denied our request stating that the governing documents require that we rebuild in conformance with the original home specifications. Our pool was not part of the original building plans, but was added one year later. Also, the building codes and specifications have changed greatly in the last 10 years since the pool was built.

Other cages in the neighborhood were also damaged and are going to be replaced by smaller units, but this is OK. Can they legally deny us? A pool cage would take anywhere from 6 to 8 months to rebuild; a fence could be erected in 2 weeks. Who assumes responsibility if someone's child or pet gets past our orange construction barrier (which we had to put up around the pool) and gets hurt? Our association has an architectural committee that can approve this, but will not even consider it. R.M. (via e-mail)

Answer: The Architectural Committee is the appropriate forum to hear your request for a barrier fence to enclose your swimming pool.

Whether the Architectural Committee will approve your request is dependent on how it will construe the requirements to rebuild in conformance with the "original home specifications". It is possible that your homeowners' association will assert that the original

home specifications are those specifications for the pool and pool enclosure when it was constructed, even if it was after the original construction of the residence. If this is the case, the architectural committee may be able to require you to install a screen enclosure similar to your former screen enclosure.

Because decisions of an architectural committee (or board) are required to be consistent under similar facts, you may choose to find out what decisions your architectural committee has made on similar requests. If you believe the architectural committee is required to accept and consider your application and it will not accept your application you may choose to pursue mediation through the Department of Business and Professional Regulation to resolve your dispute. Mediation is allowed by Florida Statute regardless of what your governing documents state.

If someone is able to get past your orange construction barrier and gets hurt it will likely be your responsibility because the pool is on your property. The extent of liability that you would have is largely dependent on the precautions that you have taken to ensure that your pool is sufficiently enclosed. These precautions would include making sure that you comply with the requirements for barriers under the Florida Building Code and local ordinances.



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