



KEOUGH
MOODY

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News letter

This month's article addresses adding charges to an owner's account. Regardless of whether such charges are management related, late fees, fines, chargebacks or attorney's fees, it is necessary to find a contractual right (as described in governing documents or management contract) or a statutory right before levying sums to an owner's account. We hope this article is useful to you in describing the legal foundation underlying an association's right to assess.



As a reminder, the new changes to the Illinois Property Act and Common Interest Community Act took effect on January 1, 2018. If you would like a copy of our handbook including both statutes, please contact our office.

Chuck Keough

TAKE CARE WHEN ASSESSING ITEMS TO AN OWNER'S ACCOUNT

It is no secret that condominium and common interest community associations levy assessments to owners' accounts at various intervals to fund a board's obligation to provide for maintenance, repair and replacement for association property. But other than those assessments levied pursuant to an adopted budget (or separate/special assessment) the most commonly charged items to an owners' accounts include: fines; late fees; chargebacks related to maintenance or repair and attorney's fees. True, democratically elected boards are afforded latitude to run the businesses of their associations. However, adding expense to an owner's account requires discretion by the board. The board must support its decision by reference to a process, procedure and/or documentation in its hands. Without a rational basis to support a decision to levy sums to an owner's account, a board subjects itself to potential liability.

Fines are a great example. Prior to considering levying a fine, the board first must have adopted an expression of its policies, the violation of which could result in a fine. Of course, these are most commonly found in rules and regulations which must be published to the owners. Then, both the Illinois Condominium Property Act ('Condo Act') and the Common Interest Community Association Act ('CICAA') state that a board may levy reasonable fines for violations of its declaration, bylaws and rules and regulations, but only after notice and an opportunity to be heard. Fining first and hearing from the owner later (if at all) defeats the expression of the legislature's intent.

In the same vein, many declarations permit a board to assess a late fee, and often interest, against the account of an owner who has not paid an assessment by a date certain. But in what amount? The job of the board is to pre-determine the late fee (or

interest) amount, and establish those figures in the association's rules and regulations. Because rules and regulations must be published to the owners, there is no opportunity for improvisation on the part of the board. Thus, the consequence resulting from an owner paying late is transparent and logical to all concerned.

Chargebacks usually require a reference made both to a board's policy or statute, and to documentation kept in the ordinary course of the association's business. Example #1: An owner's toilet overflows and causes damage to the common elements. The board hires a contractor to clean the common area carpeting and is invoiced for same. In our example, there is no insurance coverage as the damage is within the deductible. Then the board elects to levy the expense associated with clean up to the owner from whose unit the damage originated. Section 12 of the Condo Act permits the board to do so, but before doing so, the board must notify the owner and give the owner an opportunity for a hearing. Both the statutory enabling provision and the invoice permit the board to levy the charge back to the account of the owner.

Example #2: An owner, not well liked by the board, makes a request for documents from his board. The association is self-managed and has no policy in place for document requests. Meanwhile, the board wants to charge a reasonable fee for its time in making documents available to the owner. Can it do so? Under the Condo Act and CICAA, the actual cost to reproduce or copy records may be charged. But here, since the board members serve without compensation, and there is no written, adopted policy in place notifying owners what it will cost them if a request for documents is made, then a fee for their time is not justified. Certainly, the cost associated with copying documents can be charged, but the board is limited to that actual cost. Without an adopted policy, the board hurts itself by improvising and trying to impose a charge which cannot be supported by prior board deliberation.

Much like chargebacks, levying attorney's fees to an owner's account requires a board to draw a nexus between owner conduct or inaction and policy found either in state statute or in the association's own governing documents. For example, in Section 9.2 of the Condo Act, attorney's fees incurred by the association arising out of a default by an owner or his tenant, guest or invitee in the performance of any of the condominium instruments or applicable statute, shall be added to and considered part of the owner's share of common expenses. Thus, for example if a condominium association enlists its attorney to send a letter to an owner who is in default of a leasing provision, the association may add the attorney's fee to the account of the owner. There is no need to wait for a court to adjudicate the issue of attorney's fees before levying the same to the owner's account.

In the same example for a community association, there is no similar statute found in CICAA or elsewhere. Therefore, in such an instance, an association must look to empowering language in the association's own governing documents for authority to levy attorney's fees to an owner's account. In the absence of such authority, levying attorney's fees to an owner's account is not advisable and further, will likely provoke a challenge by the owner.

In a different example, suppose an association seeks advice from its attorney regarding an owner's request for a hardship from the cap on leasing. By doing so, the association incurs attorney's fees related to the advice provided in response to the owner's request. Without a default by the owner in the performance of any of the provisions of the association's documents (like in this example), the association may not levy the attorney's fees to the account of the owner. In other words, the attorney's fees here are a cost of doing business, rather than something that may be recouped from the owner.

Finally, why does any of this matter? As a general matter, owners that understand their obligations and the consequences of failing to abide by them are more likely to pay what they owe. Even in the case of an owner that clearly violated a rule, fining an owner without giving them the opportunity to be heard violates both statutes referenced above. Inappropriately levied fines, late fees and attorney's fees often lay the messy groundwork for a problematic attempt to collect the debt at a later time. Consequently, conducting a periodic review of an association's existing governing instruments, policies and procedures is advisable. Doing so increases the likelihood that a board is able to levy and collect sums which in the absence of such updated language, it cannot otherwise do.

Chicago
312-899-9989
info@kmlegal.com

Naperville
630-369-2700
www.kmlegal.com

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