



KEOUGH MOODY

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Newsletter

Happy New Year!

In the article which follows, David Hartwell discusses the difference between fees and fines, and in particular, the difference with which courts view the distinction between them. Everyone here at Keough & Moody, P.C. wishes you a healthy and prosperous 2019.



Chuck Keough

RULE ENFORCEMENT, A LITIGATION PERSPECTIVE

A recent trend has appeared in connection with rule enforcement and the collection of fines. Owners are now more frequently challenging the substance of the rules and enforcement policies being utilized by an association. In addition, courts are firmly requiring a definitive showing of due process in determining the legality of a violation and resulting fine. The purpose of this article is to provide a brief outline of best practices to be utilized by an association and their property management when enforcing association rules.

I. FEE vs. FINE

To begin with, a board of directors and the property manager must be clear on differences between a "fee" and a "fine". A charge to a unit owner for an occurrence, which is incidental, not the result of intentional misconduct and does not interfere with another resident's enjoyment of the property, is generally categorized as a fee. Fees, such as key replacement, late payment, bike registration, reserving the elevator, move in/move out, parking (no deed), can be identified as a charge that usually reflects an actual cost, administrative cost or charge to the association. These charges may be assessed without requiring due process.

In contrast, a "fine" is a penalty that is assessed against a unit owner for a breach of the association rules or covenants. Conduct resulting in a fine occurs when a resident interferes with the administration of the property, violates an enumerated bylaw, rule or regulation, or interferes with another resident's use or enjoyment of the property. In order for an association to successfully impose a fine, the offending owner must be granted due process. Often times, associations routinely assess fines as if they were fees, which if challenged, will generally not be enforced by a court. Moreover, a board of directors' failure to successfully enforce its rules can severely undermine its ability to administer the association.

II. DUE PROCESS

In determining whether or not due process has been achieved a court will first determine if the rule is reasonable. "Reasonability" can be defined as advancing and promoting the efficient administration or operation of the association and the general welfare and enjoyment of the residents in a nondiscriminatory and non arbitrary manner. Rules which a court determines are unreasonable may be found to be unenforceable. Further, a court will look to make sure that the alleged offending unit owner has been fairly apprised of the alleged violation and applicable rules.

In most cases, notice of a violation must be in writing, and the notice of violation should be clear and consistent with the declaration and bylaws as published to all owners. An owner must receive reasonable notice (at least 7 days) of a hearing; and the notice must state a reasonable time and place for the hearing. In addition, if the association intends on having its counsel present, that should also be stated on the notice.

At the hearing, a quorum of directors is required; and if a director is a witness to the behavior complained of, that director must recuse himself/herself and may not deliberate or vote. If the board is in receipt of evidence (i.e. written complaint, report, pictures, etc.), this information must be given to the subject unit owner, prior to beginning the hearing. If an association has clear procedures for reporting claims, the board should also determine if those procedures were followed. In cases where the association fails to follow its own procedures, the court will likely find the hearing to be fatally flawed. Lastly decisions of whether or not certain conduct constitutes a violation must be consistent, otherwise the board's failure to previously enforce a rule may be deemed to be a waiver.

At some time after the hearing (usually within the same evening), the Board, during a closed session, deliberates over the evidence and renders a decision. The first issue that the board must decide is whether or not the conduct complained of amounts to a violation of the rules and regulations or other covenants. If the board finds the owner is in violation, the board next determines whether or not a fine should be assessed. The fine must be reasonably and rationally related to the conduct. Factors a board should consider are the history of fines for that similar offense, history of the unit owners and severity of the offense. In addition to fines, most declarations also permit the assessing of legal fees, engineering fees, costs of remediation, deductible, etc. which are directly related to the violation. Notably, common law now requires that the Board include a brief description of the violation deliberations in the minutes of the closed session.

Lastly, at an open portion of the meeting, the board openly votes on assessing a violation against a unit owner. The board should only address the unit number in the open session (not the name of the individual) and a tally of the vote should be recorded in the minutes. Once a unit owner is found to be guilty of a violation, the board must send written notice of the decision and state all fines. Usually this is handled by the property manager or attorney. If the declaration, bylaws or rules allow for the owner to appeal the decision, the board must recognize when a request for appeal has been made and allow the process to move forward.

CONCLUSION

Pitfalls which commonly plague an association's ability to successfully enforce the provisions of its governing documents include the following: failing to get the complaint in writing, failing to undertake reasonable investigation, not providing sufficient notice of the violation, not properly ratifying the decision in open session and not following its own published rule violation procedures. The most important rule of thumb is that board's should be consistent in regard to all rule violations, thus avoiding confusion about the process and avoiding claims of preferential treatment or failing to give their owners the fundamental right of due process.

Don't forget to stop by and see us at the Illinois Community Association Institute Conference & Expo at the Donald E. Stephens Convention Center on Friday, February 22nd and Saturday, February 23, 2019.

In addition, Attorney Gabriella R. Comstock will be presenting at 1:00 p.m. on February 22nd, at the education seminar entitled, "*It's Not What You Say but How You Say It*", *Effective Communication and Emotional Intelligence* . Please note that this presentation is for managers only.



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