

Fines and Enforcement: What procedures must the Association follow when issuing sanctions to enforce covenants?

When imposing fines or other sanctions for noncompliance, the Association must not apply arbitrary, capricious, or unreasonable standards and must provide owners with notice and a meaningful opportunity to be heard on the matter.

Before July 1, 1990, the Old Act¹ did not specifically authorize condo Associations to impose fines for violations of Governing Documents and before 1995, there was no statutory authority for HOAs. Unless an Association's Governing Documents provided otherwise, an Association's only recourse for enforcing its Governing Documents was a lawsuit for damages or injunctive relief.

Since July 1, 1990, however, the New Act² and the HOA Act³ have given Associations an alternative to lawsuits for enforcing their CC&Rs and their internal rules and regulations. Under the New Act and HOA Act, Associations may adopt internal enforcement procedures in their Governing Documents, which may include the imposition of fines. The challenge is to ensure that the procedures and the Association's implementation of the procedures comply with the requirements for fundamental fairness by providing notice and a meaningful opportunity to be heard; in other words "due process".⁴

The internal enforcement provisions of the New Act and HOA Act each have "due process" requirements, which ensure that owners facing sanctions will be treated fairly. In order for the due process requirement to be satisfied, internal rules enforcement efforts should include, at a minimum:

- 1) Notice to the offending owner of the pending sanction (See chapter entitled: "Notice: What does 'notice' mean?");
- 2) An opportunity for a hearing before the sanction is issued (See chapter entitled: "Fines and Enforcement: What does 'opportunity to be heard' mean?");
- 3) Hearing procedures that are enumerated in the association's Governing Documents or are inherently fair; and
- 4) A previously published schedule of reasonable fines.⁵

Additionally, due process requires that the rule to be enforced is not arbitrary, capricious or unreasonable and that the means selected to achieve the desired end bears a reasonable and substantial relationship to the rule.⁶

The precise amount of process that is due will vary with the circumstances. As a general rule, an Association's need for efficiency and finality will be weighed against the gravity of the right at stake.⁷ In addition, the courts often look to the enforcement procedures set forth in an association's Governing Documents as the measure of the process required.⁸

¹ RCW 64.32.060 provides, in relevant part:

Each [Unit] owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in the Declaration or in the deed to his apartment. Failure to comply with any of the foregoing shall be ground for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the manger or Board of directors on behalf of the Association of the [unit] owners or by a particularly aggrieved [unit] owner.

² RCW 64.34.304 provides in relevant part:

- (1) Except as provided in subsection (2) of this section, and subject to the provisions of the Declaration, the Association may:

(k) Impose and collect charges for late payment of assessments pursuant to RCW 64.34.364(13) and, after notice and an opportunity to be heard by the Board of directors or by such representative designated by the Board of directors and in accordance with such procedures as provided in the Declaration or by laws or rules and regulations adopted by the Board of directors, levy reasonable fines in accordance with a previously established schedule thereof adopted by the Board of directors and furnished to the owners for violations of the Declaration, bylaws, and rules and regulations of the Association...

This provision is applicable to Old Act condo Associations. See RCW 64.34.010(1).

³ Under RCW 64.38.020(11), a homeowners' Association may:

Impose and collect charges for late payments of assessments and, after notice and an opportunity to be heard by the Board of directors or by the representative designated by the Board of directors and in accordance with the procedures as provided in the bylaws or rules and regulations adopted by the Board of directors, levy reasonable fines in accordance with a previously established schedule adopted by the Board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the Association...

⁴ The Washington Supreme Court has held that contracts, which may include Declarations and CC&Rs, contain an implied duty of good faith and fair dealing. See, *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102 (2014) (where a contract gave one party discretion over how a particular provision could be satisfied in the future, the court determined the party had an implied duty of good faith and fair dealing in performing that provision).

⁵ The legislature explained its intent in drafting the RCW 64.34.304(1)(k) due process requirement in Official Comment 5 to the section. It comment explains:

The powers granted the Association in subsection (k) to impose charges for late payment of assessments and to levy reasonable fines for violations of the Association's rules reflect the need to

provide the Association with sufficient powers to exercise its “governmental” functions as the ruling body of the condominium community. The power to impose sanctions for violations of the Association’s governing documents is subject to a requirement of minimum “due process” for the accused violator. These due process procedures include notice of the alleged violation and an opportunity for a hearing before either the Board of directors or another person or body which has been designated by the Board of directors to conduct the hearing. This section also requires that the procedures for enforcement be set forth in the Association’s governing documents and that the Board of directors has previously adopted a fine schedule and communicated it to the owners. The powers granted under this subsection are intended to be in addition to any rights which the Association may have under other law.

⁶ See *Riss v. Angel*, 131 Wn.2d 612, 628-29 (1997) (reversing Board action disproving homeowners’ building plans because it was unreasonable, based on inadequate inquiry and incorrect information); see also, *Kawawaki v. Academy Square Condominium Association*, 2013 Wn. App. LEXIS 2294, *1 (finding a rule changing rental restrictions to be a use restriction and holding it must be contained in the Declaration, but noting, in the alternative, that the rule was also invalid as an unreasonable house rule.).

⁷ No Washington court has considered the issue of the amount of process due before an Association can sanction an owner. But the Court of Appeals has given some guidance on the amount of process that is due in a given circumstance. Although the precise nature of the process due will vary, the court explained:

We must balance competing interests of an efficient and reasonable administrative process with the [respondent’s] right to a meaningful hearing...Clearly, at least notice and an opportunity to be heard are required. In addition, the [respondent] must be given a written copy of any information on which the...[sanction] is based in time to prepare to address that information at the hearing. The [respondent] should be given the opportunity to present and rebut evidence, and the hearing must be conducted by an objective decision maker. The [respondent] has the right to be represented by counsel and to have a record made of the hearing for review purposes. Finally the [respondent] has the right to a written decision from the hearing Board setting forth its determination of contested facts and the basis for its decision...

Conrad v. University of Washington, 62 Wn. App. 664 (1991). When the necessity for a hearing on proposed sanctions arises, the hearing must be conducted with these minimum due process safeguards. Otherwise, the opportunity for a hearing may be meaningless and the Association's enforcement efforts may be undone by a court reviewing the action.

⁸ See, e.g., *Bixeman v. Hunter's Run Homeowners Association of St. John, Inc.*, 2015 Ind. App. LEXIS 457; see also, *Raintree Homeowners' Ass'n v. Dreyfus Interstate Dev. Corp.*, 2001 Minn. App. LEXIS 739, *3 (Minn. Ct. App. June 26, 2001) (a condo Association's assessment on an owner was invalid because the Association did not follow the provisions of its Declaration and Bylaws requiring ten days' notice).