



Enforcement of Governing Documents

MULCAHY Community Association Cheat Sheet®

**BRINGING ANSWERS
TO COMMUNITY
ASSOCIATIONS**

This publication discusses significant points of law as they apply to community associations and is not intended to offer specific legal advice or responses to individual circumstances or problems.

MULCAHY LAW FIRM, P.C.

3001 East Camelback Road
Suite 130

Phoenix, Arizona 85016

Phone: 602.241.1093

Toll Free: 877.206.7164

Facsimile: 602.264.4663

E-mail:

bmulcahy@mulcahylaw.net

www.mulcahylawfirm.net

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ENFORCEMENT

A recurring problem in community associations is owner compliance with the governing documents. An important component in the enforcement process is communication between the association and its membership. Members should have copies of all governing documents, which include the architectural guidelines, rules and regulations, articles of incorporation, bylaws and the CC&Rs.

STEPS IN THE ENFORCEMENT PROCESS

**Under Arizona law, when sending a violation notice, an association is always required to give notice to owners of the owner's right to petition for an administrative hearing with the Department of Fire, Building and Life Safety.*

Courtesy Letter: When a violation occurs, the board of directors or management company should send a courtesy letter or post a notice on the property requesting that the owner cure the violation. This notice should contain the owner's name, lot number, the time the violation was noticed and the person who observed the violation, the nature of the violation, the date by which the owner must comply, and any information regarding the right to appear before the board to discuss the violation. Contact information for the management company or association representative contact should also be included. This letter, in most cases, results in the owner addressing the problem immediately.

Formal Violation Letter: If the violation is not corrected by the date compliance is required, the next step is for the board, management company, or association's attorney to send a formal violation letter stating that fines that could be assessed against the owner if the violation is not corrected and/or that the association can file an action with the court to have a judge compel compliance. This letter should also contain the date the violation was first noticed and if the violation is continuing, then it should include the date the property was last inspected. The formal violation letter must also set out the process the member must follow to contest the notice. It should give the owner an opportunity to request a meeting with the board and provide the owner with the name, phone number and email address of the person to be contacted by the owner in violation.

FINES

Fines: Under A.R.S. Section 33-1803, after notice of the violation, as set forth in the formal violation letter, and an opportunity to be heard, the association through its board of directors, may impose reasonable monetary penalties on the owner in violation of the governing documents.

A 2017 Arizona Court of Appeals decision will have a major impact on a community associations' ability to validly assess and collect monetary penalties/fines.

Turtle Rock III Homeowners Association, Plaintiff/appellee

vs.

Lynne A Fisher, Defendant/ Appellant

In this case, the Arizona Court of Appeals found that (1) attempting to levy monetary penalties/fines without a properly adopted fine schedule, which demonstrates the fine amounts and appropriateness of those fines, is per se unreasonable; and (2) even if a community association has a validly adopted fine schedule, the community association still has the burden of proving its damages.

As such, a community association must now meet the following minimum requirements in order to validly assess monetary penalties/fines:

- (1) the owner (or occupant/guest) must be in violation of the declaration, bylaws and/or rules;
- (2) the community association must provide the homeowner with notice and opportunity to be heard prior to levying the monetary penalty/fine;
- (3) the monetary penalty/fine schedule must be reasonable;
- (4) a valid monetary penalty/fine schedule must be properly adopted prior to imposition of the monetary penalty/fine; and
- (5) the community association must prove damages to obtain a judgment against the owner (note: it may be difficult for an association to prove that it has been "harmed" by the violation and thus is entitled to damages).

Procedure to collect fines from owners:

1. Filing a lawsuit against the owner;
2. Obtaining a judgment against the owner; and
3. Recording the judgment with the county recorder's office.

FINES (CONTINUED FROM PREVIOUS PAGE)

After the judgment is recorded, the association has a lien that is effective upon conveyance (or paid at the time of the sale of the lot/unit). In addition, associations may proceed with collection of the judgment through traditional collection means, such as bank, wage or rent garnishment. Pursuant to Arizona law, A.R.S. Section 33-1803(B) Condo A.R.S. Section 33-1242 (A) (11) associations no longer have the right to record a notice of lien for unpaid fines and penalties, interest, late charges on fines and other fees and charges.

CERTIFIED LETTER RESPONSE BY OWNER

If a member receives a written notice that the condition of the property owned by the member is in violation of the governing documents, they may provide the association with a written response by sending the response by certified mail within 21 calendar days after the date of the notice. The response must be sent to the address set forth in the notice or in the records of the Arizona Corporation Commission. If an owner sends such a written response, the association is required to provide certain information to the owner. However, to ensure that the owner is fully aware of the nature of the violation, this firm recommends providing that information in the formal violation letter because the association is barred from proceeding with any action against the owner until this information has been given to the owner. That information is: (1) the provision of the community documents that has allegedly been violated; (2) the date of the violation or the date the violation was observed; (3) the first and last name of the person or persons who observed the violation; and (4) the process the member must follow to contest the notice. (5) The Following statement: "You have the option to petition for an administrative hearing on this matter in the Arizona Department of Real Estate pursuant to A.R.S. Section 32-2199.01 (this was formerly handled by the Department of Fire, Building and Life Safety)."

"SELF-HELP"

If an owner fails to correct a violation in a timely matter, some association documents allow the association to correct the violation on a lot/unit, at the owner's cost. This is known as "self-help". If association documents allow for the use of "self-help", it is important that the association specifically follow the procedures outlined in the association's documents prior to entering the lot/unit to rectify the violation. It is recommended that the association provide the owner with the date on which the work will be done, the person who is doing the work and the expected time that the person will enter the lot. While an association can use self-help if authorized in the governing documents, it cannot cause a breach of the peace. Therefore, if the owner confronts the worker who enters his/her property, either verbally or physically, then that worker must withdraw and the association is required to pursue its other legal remedies to effectuate a cure of the violation.

COVENANT ENFORCEMENT

An association should adopt a covenant enforcement policy and notify residents of this policy. This policy should set out the steps the association will take to address a violation (such as reminder notices, demand letters, fines and penalties, self-help, filing a lawsuit, etc.), as well as any fines which may/shall result as the continuation of the violation. The policy should make it clear that if the association incurs attorney fees and costs, the association will seek reimbursement from the owner and could be included in any judgment against the owner which may be entered by the court. An association should also consider reminders in the association's newsletters or other mailings to the owners regarding certain types of common violations (such as parking violations) and request that all owners comply by a certain date.

LITIGATION

If litigation is the only method by which an association can compel compliance with the governing documents, an association has the right to file claim in superior court, asking the court to order that the owner bring the property into compliance by correcting the violation. This type of case requires an evidentiary hearing before the judge where the association has to provide witnesses and exhibits showing the violation and the association's attempts to have the violation corrected without having to resort to court action. In most cases, once the judge enters an order requiring compliance, it will also enter judgment in favor of the association for its attorneys' fees and costs incurred, although the amount awarded for attorney fees is discretionary on the judge's part.

An association also has the option to file a complaint against an owner in the Arizona Department of Real Estate. The Arizona Department of Real Estate will set a hearing with an administrative Law Judge. The Association can request that the Administrative Law Judge order the owner to comply with the governing documents. However, the remedies in this department are limited and the association will not be able to recover attorneys' fees.