



Levying and Collecting Fines in a Community Association

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.

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RECENT COURT OF APPEALS DECISION

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

Superior Court Case # CV2015-095897

Court of Appeals Case #1 CA-CV 16-04566

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 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

Under Arizona law, associations do not have the right to record a lien against the lot/unit for unpaid fines and penalties. Associations can enforce payment of these fines by: 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. After the judgment is recorded, the association has a lien that is effective upon the conveyance of the property or paid at the time of the sale of the unit/lot. Alternately, the association can collect the judgment through garnishing wages, rent or any bank account held by the owner against whom the association has a judgment.

WHAT ARE ALTERNATIVES TO FINES TO GET OWNERS TO COMPLY WITH DOCUMENTS?

The Turtle Rock III case, along with changes in the fines and penalties laws over the past decade, clearly indicate a desire to make it very difficult for associations to levy fines for violations of an association's documents. In light of this, I recommend associations consider all options to pursue enforcement of violations (not just fines):

- Self-help (a procedure whereby an association, after giving notice to the owner, enters the lot/unit and fixes the violation. The right to exercise self-help must be given in in the CCRs)
- Filing a complaint with the Arizona Department of Real Estate against the Owner;
- Filing a lawsuit seeking injunctive relief against the owner;
- Reaching out to the owner to discuss (open the lines of communication);
- Mediation with the owner (many cities now offer free mediation programs);
- Contact your city, town and municipality to determine if any of the violations (the city, town or municipality may enforce the code section which will save your association money; and
- If your documents allow this, consider suspending the rights of owner for the violation (right to use common areas, right to vote, etc.)

Explore some of these options now more carefully because fining is becoming so difficult to collect on and getting compliance through a fine doesn't always work.

ARIZONA STATUTES PERTAINING TO FINES IN A PLANNED COMMUNITY

33-1803. Assessment limitation; penalties; notice to member of violation

B. After notice and an opportunity to be heard, the board of directors may impose reasonable monetary penalties on members for violations of the declaration, bylaws and rules of the association... Any monies paid by a member for an unpaid penalty shall be applied first to the principal amount unpaid and then to the interest accrued. Notice pursuant to this subsection shall include information pertaining to the manner in which the penalty shall be enforced.

33-1807. Lien for assessments; priority; mechanics' and materialmen's liens

A. The association has a lien on a unit for any assessment levied against that unit from the time the assessment becomes due. The association's lien for assessments, for charges for late payment of those assessments, for reasonable collection fees and for reasonable attorney fees and costs incurred with respect to those assessments may be foreclosed in the same manner as a mortgage on real estate but may be foreclosed only if the owner has been delinquent in the payment of monies secured by the lien, excluding reasonable collection fees, reasonable attorney fees and charges for late payment of and costs incurred with respect to those assessments, for a period of one year or in the amount of one thousand two hundred dollars or more, whichever occurs first. Fees, charges, late charges, monetary penalties and interest charged pursuant to section 33-1803, other than charges for late payment of assessments are not enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment of the assessment becomes due. The association has a lien for fees, charges, late charges, other than charges for late payment of assessments, monetary penalties or interest charged pursuant to section 33-1803 after the entry of a judgment in a civil suit for those fees, charges, late charges, monetary penalties or interest from a court of competent jurisdiction and the recording of that judgment in the office of the county recorder as otherwise provided by law. The association's lien for monies other than for assessments, for charges for late payment of those assessments, for reasonable collection fees and for reasonable attorney fees and costs incurred with respect to those assessments may not be foreclosed and is effective only on conveyance of any interest in the real property.

H. A judgment or decree in any action brought under this section shall include costs and reasonable attorney fees for the prevailing party.

ARIZONA STATUTES PERTAINING TO FINES IN A CONDOMINIUM

33-1242. Powers of unit owners' association: notice to unit owner of violation

A. Subject to the provisions of the declaration, the association may:

(ii) [a]fter notice and an opportunity to be heard, impose reasonable monetary penalties on unit owners for violations of the declaration, bylaws and rules of the association.

33-1256. Lien for assessments; priority; mechanics' and materialmen's liens; applicability

A. ...Fees, charges, late charges, monetary penalties and interest charged pursuant to section 33-1242, subsection A, paragraphs 10, 11 and 12, other than charges for late payment of assessments, are not enforceable as assessments under this section... The association has a lien for fees, charges, late charges, other than charges for late payment of assessments, monetary penalties or interest charged pursuant to section 33-1242, subsection A, paragraphs 10, 11 and 12 after the entry of a judgment in a civil suit for those fees, charges, late charges, monetary penalties or interest from a court of competent jurisdiction and the recording of that judgment in the office of the county recorder as otherwise provided by law.

H. A judgment or decree in any action brought under this section shall include costs and reasonable attorney fees for the prevailing party.