

Association of Condominium,
Townhouse, and
Homeowners Associations



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March 2008

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Upcoming ACTHA Events

Conference & Trade Show, Saturday,
March 29, Drury Lane, Oakbrook
Terrace

“Learn & Lead: ACTHA’s Certified
Leader” Program: Check web site for
course date/time/location beginning
March 29—May 3

For details, visit www.actha.org

Rule Enforcement: A Litigation Perspective

By: David Hartwell, Attorney with Penland & Hartwell

The 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 the 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 manager when enforcing their rules.

I. FEE vs. FINE

To begin with, a board of directors and the property managers 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 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

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TIP OF THE MONTH

Before you hire a painting company or even if you plan to paint for yourself, it is good to know that there are certain recommended finishes for your walls and ceilings dependent on what you are doing and what type of exposure you have.

For example, for typical walls and walls with light reflection or lots of imperfections, a flat finish is recommended so you won't see the "starts" and "stops" of the paint brush or roller, and also to hide the imperfections.

For bathrooms and kitchens, an eggshell finish is recommended because it is more washable. For interior trim in your home, you can use a gloss or semi-gloss enamel, depending on how shiny you want it to look. An enamel denotes the hardness of the coating for ease in cleaning. Otherwise, for walls, typically a latex acrylic is used. Ceilings are always recommended to be done in flat too.

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ACTHA Spring Conference Program

For program descriptions, speakers, times, program outlines, exhibitors, visit ACTHA's web site: www.actha.org: Click on Education/March 29

SUB PRIME LENDING, FORECLOSURES, DELINQUENT ASSESSMENTS AFFECTING YOUR ASSOCIATION?

ACTHA's conference will conduct an all-day "\$ Track" focusing on budgeting, reserves and assessments in this challenging economic period.

When ACTHA's Education Committee met to discuss the conference program and review ideas which had been submitted, we were stunned to know what we didn't know about window replacement.

Woodland Windows' submitted outline for the program met with unanimous approval: ***this was one program ACTHA had to offer!***

So if you're wondering when you need to think about window replacement, what exactly gets replaced, types of windows, material type, installation, when the best time is to replace windows, product warranties and considerations when selecting a company, ***then this seminar is a must!***

(NOTE: If you can believe it—the outline covered even more than that which is listed above!)

ASK AN ATTORNEY!

ACTHA's conference would not be complete if we did not offer our "Ask an Attorney" panel. Once again, this ever popular program will close-out day.

It's the perfect time to raise your questions/issues and receive guidance from leading attorneys in the community association law arena.

What topic consistently appears on ACTHA's "TOP 10" list?

SELF-MANAGEMENT

ACTHA is offering a session on "**Self-Management vs. Professional Management.**" Understand what each means, what your association needs to be aware of if they are considering self-management, the advantages and disadvantages of each, and what you should look for if you are considering professional management.

This seminar is the perfect complement to "**Governance of an Association**" offered in the morning, where attendees will learn the essentials of managing and administering an association.

ACTHA: SAVING YOU MONEY!

ACTHA will present two seminars at our conference designed to help associations save money. We lead off the day with "The Greening of an Association." This seminar will look at cost-saving "green" and energy technologies.

In the afternoon, you'll have the opportunity to see a simulated demonstration of what undetected water leakage can result in and why it is important to think about preventive measures before an unwanted incident occurs.

WHAT'S NEW ON THE WEB SITE?

- ⇒ ACTHA proposes legislation to clarify sections of the Illinois Condominium Property Act
- ⇒ You may now register online for the conference as well as pay your ACTHA membership dues
- ⇒ 2008 Dates, time and locations for "Learn & Lead: ACTHA's Certified Leader" program are now posted

ACTHA Spring Conference Registration Form

YES!! I want to register for the Conference and Trade Show on Saturday, March 29, 2008 at the Drury Lane in Oakbrook. Registration fee includes: seminars, continental breakfast, lunch, Trade Show, and materials.

Fee Schedule: Member rate: \$ 45 or \$30 if sending 3 or more from the same association; Non-member rate: \$120 per person; if registering for "Learn & Lead: ACTHA's Certified Leader (ACL) program and you wish to pre-pay for all six courses the discount rate is \$100 per person

Name of Association: _____

Address: _____ City/Zip: _____

Phone #: _____ Email Address: _____

Name(s) of Individual(s) Registering for ACTHA's Certified Leader Program (please print): _____

Name(s) of Individual(s) Attending if different from above) (please print): _____

For planning purposes, please indicate the number of registrants attending which seminars:

- _____ Governance of an Association (Learn & Lead Certification Course but open to individuals not seeking ACL status)
- _____ Self-Management vs. Professional Management
- _____ The \$ Track
- _____ The Building Track

AMOUNT ENCLOSED: _____

Please make checks payable to ACTHA. Send to: 28 E. Jackson, Suite 910; Chicago, IL 60604 or you may register online using a credit card

NOTE: Registration confirmations are not sent except upon request. No refunds are given after Tuesday, March 25 and there will be an additional charge of \$20 per person for anyone registering after that date or at the door. All other cancellations are subject to a 25% handling fee.

SAFEGUARDING ASSOCIATION FUNDS

In light of the recent news about a management company allegedly absconding with the funds of many of their associations, let's review some steps that board members should take to ensure that this doesn't happen to them.

The single most important safeguard is to insist on seeing bank statements on every account and better yet, on-line access to view the account. That way the designated person, normally the Treasurer, can monitor activity daily if they wish. Also insist on a reconciliation each month and compare it to previous months as well as to the statements to make sure that no checks remain outstanding for more than a couple months and that checks are not being returned NSF. Examine check sequence numbers and ask for copies of checks for numbers skipped.

Demanding that all checks be signed by management plus a board member used to be considered a solid safeguard, however many banks do not actually refuse checks with only a single signature, unless it's an amount that raises a flag. Demanding that checks only be signed by the board is another option, however it makes it difficult for management to handle the association's business properly and can also result in an embezzlement situation should the signers not be ethical and honest. Keep all signature cards current to prevent those no longer on the board from having signing authority and to add new board members as replacements.

Associations should always have an audit done- self- or professionally managed. A yearly audit will reveal shortcomings in safeguards as well as discrepancies. Take heed to what an auditor notes- early warning signs that are ignored can easily and quickly escalate into major financial issues later.

Usually the bulk of an association's funds are in the reserve accounts. Those accounts should be watched as well and the same principles apply- dual signature, viewing of statements, and an audit are your best safeguards.

Insurance is also of great importance. Be sure that proper fidelity bonds exist and keep current signatory authority. If professionally managed, ask for a certificate of insurance from the management company and make sure it indicates fidelity bond, crime and fraud protection.

*Christine Evans, Vanguard Community Management, 50 E. Commerce, Schaumburg
847-490-3833, cevans@vanguardcommunity.com, www.vanguardcommunity.com*

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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 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 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 must be in writing, and the notice of violation should be clear, unambiguous, 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.

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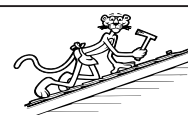
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At some time after the hearing (usually within the same evening), the Board, during a closed session, deliberates over the evidence and renders a decision. The first issue that the board must decide is whether or not the conduct complained of amounts 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.

Lastly, at the next regularly scheduled open meeting, the board openly votes on assessing a violation against a unit owner. The board should only list the unit number (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.

III. INJUNCTION

In extraordinary circumstances, the conduct of an individual is so egregious that the process of determining a rule violation is insufficient to address the conduct. These situations are characterized by conduct or occurrences which threatened the safety and welfare of the residents and/or structural integrity of the property. Typically, the conduct is repeated and ongoing. In these situations, an injunction (i.e. a court order that mandates or prohibits certain actions) must be sought through the circuit court.

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 and not properly ratifying the decision. 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.

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David's partner, Kathleen Penland will be presenting at ACTHA's Spring Conference on Saturday, March 29 at the Drury Lane in Oakbrook Terrace.

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Question of the Month



Q. We have been having problems in our condo building with a unit owner who has been verbally abusive and threatening to other unit owners, occupants and building employees. The unit owner at issue frequently uses foul language. We have a clause in our association's bylaws which states the following: "No noxious or offensive activity shall be carried on in any Unit or in the Common Elements, nor shall anything be done therein, either willfully or negligently, which may be or become an annoyance or nuisance to the other Unit Owners or Occupants." What would constitute a violation of the above? What steps can an association take to handle violations of the covenants and rules?

A. Issues pertaining to disruptive unit owners must be considered on a case-by-case basis, as an association must carefully evaluate the extent to which it should become involved in such matters. In cases in which a unit owner merely is argumentative or rude or uses coarse language within the context of a neighbor-to-neighbor dispute, it may be beyond the scope of the association's proper exercise of its powers and duties to become involved. However, an association should take prompt and decisive action if (1) a unit owner's behavior adversely affects several other persons residing on the property; (2) a unit owner's behavior potentially exposes the association to liability; (3) association action is required under applicable law; or (4) a unit owner's behavior interferes with the association's proper administration of the property. Under no circumstances should an association tolerate a unit owner's harassment of its employees or contractors or interference with their work. An association's residents and employees should be encouraged to call the police if they are threatened with physical harm or if they witness criminal activity.

Should an association determine that it is appropriate to take action against a disruptive unit owner, there are a variety of remedies available to the association. Under Section 18.4(1) of the Illinois Condominium Property Act, a condominium association has the authority to impose reasonable fines against a unit owner for violations after providing the unit owner with notice and an opportunity for a violation hearing. In situations where the unit owner's conduct is particularly egregious, an association may file a lawsuit for an injunction curbing the behavior, eviction and/or requesting a forced sale of the owner's unit.

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