

**ENFORCEMENT AND
COLLECTION ISSUES IN
COMMUNITY ASSOCIATIONS**

by

**MICHAEL C. KIM
MICHAEL C. KIM & ASSOCIATES**

VIII. ENFORCEMENT AND COLLECTION ISSUES IN COMMUNITY ASSOCIATIONS

The enforcement of the declaration, bylaws and rules rests with the Board as part of its fiduciary duty. In some instances, the individual unit owner is also expressly given the right to enforce. Typically, enforcement tools include fines, a lawsuit for damages, a suit for injunctive relief, a forcible entry and detainer (eviction) action, lien foreclosure and even involuntary judicial sale of the defaulting owner's unit. Within limits, the Board has the discretion not only as to the means of enforcement but also as to whether any enforcement is warranted. Of course, the failure to take any enforcement action should be based on practical as well as legal grounds and should not give rise to a general waiver of such enforcement. Thus, just as enforcement should be uniformly applied to similar situations, different action or even no action should be documented as to the particular circumstances justifying such treatment.

Importantly, recovery of the Association's attorney's fees incurred in enforcement action must be considered. In most declarations of condominium and homeowner associations, there is an express provision for fee shifting to the defaulting owner. In the condominium setting, the absence of a fee shifting provision in the governing documents is not fatal because the Act expressly provides for such recovery. ICPA Sections 9.2 and 18(n), as well as Section 9-111 of the Illinois Code of Civil Procedure, 735 ILCS 5/9-111. Homeowners associations are also favored under Section 9-104.3 of the Code but not by Sections 9.2 and 18(n); thus, particularly in some older documents, absence of express fee-shifting provisions is fatal.

Finally, while not commonplace at this time, the Act does contemplate use of alternative dispute resolution (mediation or arbitration). ICPA Section 32.

A. FINES AND SHOW CAUSE ORDERS

1. Due Process Requirements

Enforcement of rules by way of monetary fines is a recognized power of both condominium and homeowners associations. ICPA Sections 18.4(1) and 18.5(c)(7). Such internal disciplinary proceedings must afford notice and opportunity for a hearing to the

accused violator. Fundamental due process should be followed, including such components as the right to be apprised of the alleged violation, the right to confront adverse witnesses, the right to produce evidence in defense against the charges, and the right to an unbiased hearing panel. Importantly, monetary fines must be “reasonable” in the context of the seriousness of the offense and the overall circumstances. Some associations have a set schedule of fines, while others decide on an ad hoc basis. Similarly, some associations have a detailed written enforcement policy and related forms, while others use very general guidelines. Often, the parties (that is, the accuser and the accused) are allowed to have their personal legal counsel present as advocates although there is no requirement under the law. Indeed, some associations do not even use their own legal counsel in such proceedings.

2. Conducting a Board Hearing

Unless the Board has gone through the process (correctly) before, it is advisable that the Board review the procedure (possibly set forth in detail in the enforcement protocol in the rules and regulations) before the hearing date.

A key initial consideration is who is going to chair the hearing? Will there be a sufficiently adept Board member or officer? Or will the Association’s attorney have to perform that function? Of course, a knowledgeable Association attorney can make the proceedings move at a proper pace and avoid errors. More generally, is the panel “up to” the potential rigors of a hearing?

How will witnesses be handled? Sequestering of witnesses is advisable to avoid improper collaboration.

Are the witnesses and parties able to conduct themselves civilly? If not, consider retaining either a private security service or other similar peace keeping alternatives.

How much time is being budgeted for the hearing? If the timeframe is unrealistic, will there be a continued hearing? Once a timeframe is established, the hearing must be kept on track.

Will the proceedings be recorded? If so, will there be simultaneous recording by each party as opposed to a shared court reporter? Be sure that the Association's taping device is fully functional with adequate memory or recording tapes.

Will there be attorneys for the parties (defendants) and witnesses? If so, be sure that there is an understanding as to the attorney's role – counselor only to the defendant or full fledged representative/advocate? It's best to confer with opposing counsel in advance.

Will the hearing follow the typical "trial" format? That is, the accuser goes first, then the accused, with an opportunity for rebuttal by the accuser?

Will there be a separate "complaining witnesses" as opposed to the Board itself being the accuser and also hearing panel?

Will there be a decision made at the conclusion of the hearing or will the matter be taken under advisement? Who will communicate the Board's determination? That arrangement needs to be communicated to the defendants.

Hearings can be straightforward and efficient or riotous and non-productive. Control is critical to a successful outcome.

B. COLLECTION OF SUMS OWED THE COMMUNITY

1. Forcible Entry and Detainer

In Illinois, the favored remedy to collect assessments, late charges, fines, chargebacks and any other monetary obligation of the unit owners is the forcible entry and detainer ("FED")(eviction) remedy as set forth in Article 9 of the Illinois Code of Civil Procedure. Similar to landlord-tenant actions, the FED allows the Association to ultimately evict the delinquent owner from his/her own unit. The FED is usually a joint action (that is, for both money/assessments and possession). All condominium associations and post-1985 homeowner associations can utilize FED; pre-1985 homeowner associations need to follow the procedure under Section 9-102(b) of the Code to qualify for use of the FED remedy. The process begins with issuance of a demand upon the delinquent unit owner and ultimately, if successful, the Association will be awarded an order of possession, which must be stayed by the court at least 60 days

(which can be increased to 180 days by the court in its discretion) during which time if the defendant satisfies the judgment and becomes current in his/her account, the order will be vacated. Otherwise, the owner can be evicted. If the unit is occupied by a tenant, in lieu of eviction, the Association can have the tenant turn over the rental payments to the Association.

2. Lien Foreclosure

The condominium association has a statutory lien against the unit pursuant to ICPA Section 9(g)(1) for the assessment and other monetary obligations of the owner with respect to that unit. That lien may be foreclosed in the same manner as a mortgage foreclosure. The Association's lien priority will be determined by the date of its lien recordation. In most cases, there is a first (or even second) mortgage of record and thus, a lien foreclosure is not attractive as it may entail the Association's having to deal with those prior lienholders, who may even commence their own foreclosure proceedings.

As for homeowners associations, they do not have a statutory lien but instead usually a consensual lien as reflected in the governing documents, which has to be perfected by recording.

3. Action For Money Judgment

Another alternative remedy is a lawsuit for money damages. Such an action requires personal service on the delinquent unit owner (unlike an FED or lien foreclosure) and if a judgment is obtained, the Association must pursue the typical collection actions such as garnishment and citation to discover assets. This course of action is probably the least preferred.

4. Six Months Assessments in Foreclosure

For condominium associations, ICPA Sections 9(g)(4) and (5), effective January 1, 2007, provide that the association can recover up to 6 months' unpaid assessments which accrued prior to the commencement of its collection action from a purchaser (other than a mortgagee) of the unit at the foreclosure judicial sale or subsequent sale, plus attorneys fees. The assessments cannot have been accelerated. The collection action is most likely a formal legal proceeding as opposed to a demand letter or lien recordation.

5. Fair Debt Collection Practices Act.

Condominium and homeowner association assessments are considered consumer debt and the Federal Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 et. seq., applies to attorneys who regularly engage in debt collection. Be mindful of and compliant with the FDCPA requirements as to the giving of warnings, verification obligations, and prohibitions of certain actions on the part of debt collectors.

C. OTHER MEANS OF ENFORCEMENT

As mentioned above, the enforcement tools of the Association include an action for damages, a suit for injunction and even involuntary judicial sale of the unit. These methods are often reserved for serious, non-monetary breach by the unit owner. Often these remedies are significantly more expensive and possibly take longer time to reach a conclusion.

Before utilizing those “last resort” type methods, it may be useful to see if a third party may be willing and able to resolve the matter (for example, local code enforcement official citing a unit owner for improper construction; a local health code enforcement officer citing a unit owner with a vermin-infested unit; or the public guardian to intervene with an owner who is impaired). See attached materials regarding the State Public Guardian and Cook County Public Guardian Offices. Also, consider use of the persons designated by the owner as “emergency contacts” if they can assist in resolving behavioral issues. While such approaches may be productive, appropriate care must be exercised as to how the situation is described, so as to avoid potential liability for defamation, invasion of privacy, and the like.

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