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CARPENTER HAZLEWOOD DELGADO & WOOD

E-NEWSLETTER

The Danger of Assuming Violations are Innocent—A Fresh Look at Fines By J. Roger Wood and Scott B. Carpenter

There is no free or easy way to enforce a homeowner's violation of a community's restrictions. In this economy, we find that Board members and managers have developed an enforcement-phobia. The Association's duty to enforce is unchanged, but we are seeing that many Boards assume that the enforcement process is too costly and the results are uncertain. Unless the violation is serious, the phobia extends further to enforcement litigation. Boards are fearful of paying "exorbitant" attorneys fees to pursue compliance.

Our statistics show that fewer than 10% of enforcement issues referred to our office ever move to a lawsuit, but many Boards are content to ignore the violations, continue to assess ineffective fines and hope for compliance.

Hope is not a strategy and so it is our intent to offer another one. Our previous mantras and strategies here still apply: "enforce or amend", "duty to enforce", filing enforcement lawsuits, and "spring cleaning enforcement letters". A fresh look at fines is in order.

Our recent experience is that Boards have constructed fine policies that assume violations are "innocent" or unintentional. In simplest terms, generic fine policies establish lengthy time periods and low dollar fine amounts in the hopes of gently gaining an owner's compliance. Our recent experience is that many owners would rather face a modest fine than comply with the documents. Others choose to pay a modest fine and continue with the violation. For this reason, fine policies must be more severe by permitting the imposition of hefty and regular fines.

The law in this area is simple: a fine must be "reasonable". While a \$25 trash can fee sounds reasonable, why couldn't a \$250 trash can violation fine be reasonable? There is little question that \$250 packs more of a punch and may catch a few "innocent" violators off guard. But if the fine schedule is in place to encourage compliance, \$25 for a one time violation might not get even the most innocent of violator's attention. Perhaps it is time to add a few zeros to the fine amounts and impose those fines more regularly. The innocent violator still has the opportunity to be heard and to argue innocence. But the chronic violator that had long ignored a compliance obligation might just do something about that unkempt yard when a \$100 a day fine is imposed. The absent landlord who cared little about \$25 fines and more about profit margins might begin to care about tenant behavior and non-compliance when the fine is \$1,000 per occurrence.

Fine amounts often depend on language in governing documents and must comply with formally adopted fine policies. If the plan of attack for violations in the downturn economy is to encourage compliance by imposing fines against violating owners, the thinking needs to shift from believing that owners will change their behavior over a \$25 fine to accepting the reality that with all of the stresses people are under, it may take a bigger number to hold the average owner's attention.



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