

Violations, Hearings, and Enforcement

Fine Tuning Procedures and Novel Approaches in a Changing Landscape

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Themes In Action

- Clarity
- Deterrence
- Balance
- Procedure

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Sources and Objectives

Governance in Context

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Fines and Finesse: Objectives of Enforcement Programs

- All community associations have some method of governance
 - Declaration
 - By-Laws
 - Rules
- Ombudsperson Act – Unit Owner Complaints
 - Associations are required to have a written policy to resolve unit owner complaints (765 ILCS 615/35)

Complaints at the Beehive Condo

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Declaration, By-Laws, and Rules

- Declaration – big picture governance, creates the condominium, establishes key covenants
- By-Laws – may include use and occupancy restrictions
- Rules – will likely govern the day-to-day
 - Construction
 - Noise
 - Smoking
 - Pets
 - Amenity usage
 - Lease/Rental requirements
 - "Fine Tuning"

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Rules, Continued

- Rules must be enacted correctly to be enforced
 - Must have a unit owner meeting to “discuss” the rule
 - Notice of the meeting must include the full text of the proposed rule
 - No rule can impair rights guaranteed by the First Amendment
 - No rule can prohibit a reasonable accommodation for religious practices



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Ombudsperson Act

- Written policy for unit owner complaints (765 ILCS 615/35)
 - Sample form for unit owner complaints
 - Description of the process by which complaints shall be made
 - Timeline and manner of making final determinations
 - Written final decision – made within 180 days of original complaint
 - Will only apply to complaints made by a unit owner
 - Generally intended for governance, not nuisance

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Pitfalls and Discretion

- Courts view Covenants and Rules differently
- Courts give recorded covenants higher deference when examining them in lawsuits
- Rules get less deference and must be “reasonable in their purpose and application”
 - “Purposes” should not be improper or designed to limit otherwise lawful activity
 - “Application” is the Board’s discretion, but a proper approach is similar treatment, uniform application, and appropriate use


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A rule is broken, now what?

- What is the purpose behind rule enforcement?
 - Compliance
 - Compensation
 - Deterrence
 - Balancing matters of open and closed sessions



How Bob wound up with a whole mess of rules.

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Compliance

Rule violation procedures can assist in gaining future compliance

COMPLIANCE




Example: a unit owner performs construction without following the association's construction rules. Rule violation procedures are started to ensure compliance with those rules, such as requiring a building permit before certain construction can be completed.

Target: eliminating "bad" behaviors that harm others' enjoyment or prevent smooth operation of the property.


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Compensation



- Following rule violation procedures allows an association to recover fines, attorneys' fees, and potentially other costs
- Can compensate for costs associated with the rule violation

Example: unit owner holds a loud and disruptive party that causes cleaning fees, drywall damage, and maintenance expenses for the Association

Target: making the Association and the membership whole from the disruption caused by the owner and limiting the expense of bad behavior on others at the property

Balance: Chargeback for direct compensation versus penalty assessment for expenses

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Deterrence

Rule violation procedures can deter repeat offenses and other owners from committing the same offense

- Consequences may deter a repeat offender
- Fines in meeting minutes – may deter others
- Preventing profits from prohibited activities like rentals or commercial use
- Too much zeal weakens the deterrence value over time



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Balancing Open and Closed Sessions

- Open session minutes must contain record of votes on fines, enforcement action, and related decisions of the Board; anonymity is an option
- Associations should keep clear records of enforcement activity so owners can see that enforcement does occur
- Open minutes showing enforcement also avoid claims of “singled out” owners
- Decision records may be necessary in court to defend certain actions
- Closed session minutes should contain description of the violation, supporting information, and owner dispute
- History is important: good records of prior violation issues with a unit may be very useful for proper escalation
- “Dirty Laundry” stays in closed session to avoid community gossip issues
- Some context is permissible to include in open session minutes depending on the behavior at issue

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Mechanical Considerations

Procedure Is Paramount

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The First Step: a Notice of Violation

- The Condo Act requires that before a fine is assessed as a result of a violation, there must be **notice** and an opportunity to be heard – 765 ILCS 605/18.4(l)
- The Notice of Violation should include:
 - The date of the incident(s);
 - The Declaration Section, By-Law, or Rule alleged to have been violated;
 - Information concerning the facts alleged;
 - Information regarding available documentary evidence; and
 - Information regarding a hearing

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Know your audience?

- Violation notices must be simple, concise, and clear
- No florid prose or hyperbole
- Confusion creates roadblocks both for enforcement and compliance
- What would a judge say?
 - Violation issues increasingly go to court
 - Judges will not affirm notices that confuse, overstate, or lack key information like how to request a hearing



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What documents must be provided prior to a hearing?

Boucher v. 111 East Chestnut Condominium Association, 2018 IL App (1st) 162233

- “When investigating charges of misconduct against a unit owner, the duty of candor imposes on the board members an obligation ‘of full, fair, complete, and timely disclosure of material facts’ concerning all allegations against the owner that may provide a basis for imposition of a penalty.”
- Unit owner/association employee complaints or incident reports
- Surveillance videos
- Emails
- Damage invoices or other repair invoices
- Anything that will be used to support allegations of a rule violation

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The Second Step: a Hearing

- Your notice of violation has been sent – now what?
- If the owner requests a hearing, that owner must be given an opportunity to present his or her “case.”

Considerations for Hearings:

- **When?**
 - When is the hearing held?
- **Who?**
 - Who “hears” the matter?
- **What?**
 - What “evidence” is heard?

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When: Hearing Scheduling

- Yes, even hearing scheduling is an issue now!
- In *Winnitt Park Condominium Association v. Bourdage*, 2021 IL App (1st) 192536, the Illinois Appellate Court refused to uphold a fine imposed at a violation hearing that was held at a time the board knew the accused unit owner was unavailable.
- The Association sought to evict the unit owner as a result of her failure to pay a fine. Similar to the owner in *Boucher*, Bourdage was accused of defaming, using profanity, and confrontational words against staff and unit owners, as well as threatening violence.
- The owner owned a jewelry store which was open late and informed the board that she was unavailable at the time suggested for the hearing.
- The Board did not accommodate the owner’s request for a hearing on another day and held the hearing on a date different than the two dates originally offered.

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Who: the Board or a Hearing Committee?

- All decisions must be made by the Board.
- However, a committee may conduct the hearing and make a recommendation to the Board.
- If the committee consists of a quorum of Board members, it is still considered to be a Board meeting.
- Larger associations may benefit from appointing a hearing committee so that they can better accommodate unit owner scheduling requests.



“I’ll now show the doodles from the last committee meeting.”
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What: A “Due” Process

- Lawyers live in a “due process” world, a bedrock concept of proper notice of claims, clear definition of the theories at issue, and a full opportunity to challenge your opponent’s evidence and present your own in defense
- Surprises are not the norm
- Basic Due Process:
 - Notice of Claim
 - Evidence supporting it
 - Chance to “challenge” the facts
 - Opportunity to state a defense



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Evidence 101



- Hearings are becoming “mini trials”
- Board should be mindful of basic evidentiary standards when presenting its case against a unit owner
- Courts have not imposed legal evidence standards but the key concepts apply
 - “Hearsay” versus “I Say:” firsthand knowledge is paramount
 - Anonymous versus identified statements
 - Present witnesses or information based on actual knowledge
 - Use the best information available
- When evidence is lacking, aim for compliance and understanding of the rules rather than fines or penalties
- Should you record the hearing?

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The Third Step: Notice of Decision

- After the hearing is held, the Board needs to make a decision in open session
- If the owner does not request a hearing or does not show up or present evidence at a requested hearing, the owner can be found in “default” (include a warning in the notice of violation)
- The Board should issue a written “Notice of Decision,” which sets forth the findings of the Board
- Some Association’s rules allow for an “appeals” process – check to make sure any such process is being followed
- If the hearing arose as a result of a unit owner complaint, make sure ombudsperson requirements are met

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The Final Step: Enforcement Actions

- "Exhaustion of Remedies"
- Prepare your witnesses
- Firsthand knowledge and direct inspection
- Follow procedural steps in Declaration precisely
- "Emergency" standards
- Awareness of court limitations:
 - First Amendment/Constitutional Rights
 - Illinois Human Rights Provisions (at the door)
 - Fee shifting?
 - Leverage versus Harassment
- Safety first



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How much?!

- Do the Association's Rules have a fine schedule?
- If so, does the fine schedule allow for discretion?
- Larger fines are more likely to get legally challenged.
- Creativity in fines
 - Deferred Fines
 - Escalating Fines



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Trends in the Law

Owners Gain Traction

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The *Boucher* Decision

- Unit owner was sent a notice of violation alleging that he yelled profanities at an association staff member on two occasions – cited for violating the Association's prohibition on "obnoxious and offensive activity."
- The Unit Owner requested a hearing and asked to review "all underlying evidence, information and/or documents relating to the allegations," which request was denied. The owner was fined \$500 after the hearing (\$250 for each violation).
- The owner paid the fine and sued the Association for: breach of fiduciary duty, violation of Section 19 of the Condo Act, and violation of section 18.4(h) of the Condo Act.
- The Illinois Appellate Court found that failure to provide documentary evidence (surveillance video and an employee complaint) prior to the hearing could be a breach of fiduciary duty on the part of Board members.
- The Association wound up paying Boucher \$125,000 to settle his claims.

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Much Ado About Nothing?

- "A condominium association in the Gold Coast has agreed to pay a unit owner \$125,000 to settle seven years of litigation resulting from a \$500 fine."
- Boucher was described as using "sexist, racist, and scatological language," having "insulted employees" and "exposed his scrotum to people in a board meeting."
- Following the proper procedure matters!
 - The unit owner in Boucher not only got away with his conduct, he received a six figure settlement from the Association from it.



Loop North News – January 24, 2021

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Winnitt Park

- *Winnitt Park* also found in favor of the unit owner.
- The court held: "the sequence of events clearly demonstrates that Bourdage did not have an opportunity to defend against the charges at a hearing before the board."
 - Even though Bourdage told the Board to "leave her alone" in response to an email.
 - Even though Bourdage stated only that her business was open until 7 pm.
 - Even though Bourdage repeatedly said she was not available.
 - *Winnitt Park* demonstrates a clear preference by the courts for association boards to accommodate owners as much as possible.
 - In a footnote, the court stated: "We further observe that Bourdage is under the impression that she has a right to keep her business open until 7 p.m. and that the board must schedule a hearing during the hours of the day or night to accommodate her. The board should work with Bourdage to formulate a reasonable time for hearing, and if Bourdage must close her business a few hours early to appear at a hearing, she should be required to do so."

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Westgate Townhome Association

- In *Westgate Townhome Association v. Kirsch*, 2021 IL App (2d) 200373-U, the Illinois Appellate Court re-weighed evidence and found a hearing did not prove the violation.
- The owner was charged with allowing her dog to urinate in a neighbor's yard. A hearing was held that the court described as being "20 minutes," where the owner was the only "witness," and no video was shown despite one apparently existing.
- The court found that the association failed to "provide sufficient evidence of a violation." The association "introduced no evidence to substantiate its claims that Kirsch's dog damaged her neighbor's lawn or that Kirsch violated Westgate's rules."
- Once again, *Westgate* demonstrates our courts' propensity for treating board violation hearings and decisions as mini-trials. It also shows that courts are not willing to give board decisions much deference absent proper procedure.

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Beyond the Governing Documents

Alternatives and Considerations

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The Balancing Act

- Procedural pitfalls make the unusual case difficult
- Pressure from counsel may help to get a response
- Consider asking for a discussion once the owner is responsive
- Focus pressure on repeat offenders and major issues
- Court action may be necessary to reach a result, but beware of a good defense or judicial tendencies
- Courts awaken to penalties against Boards for overly-zealous enforcement actions (*Boucher*, *Thai*, IDHR)

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External Remedies: Types of Enforcement Actions

- Eviction actions
- Lien Foreclosure
- Injunction
- Termination of Rights
- No matter what the Association chooses, it must follow the legal requirements exactly
 - Example: many Declarations require a certain number of days' notice before suit can be filed



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Outside Recourse?

- Local government may be a suitable resort for some issues
- Ask first – who enforces what?
- If laws regulate the action at issue, consider a complaint to the relevant authority
- Owners often look to the Board to be the Police
- “Illegal” versus “Unlawful” activity
- Be firm on rejecting enforcement of local laws

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Law's Promise and Law's Reality

- Court action is very useful in obtaining compliance and preventing further harm
- Judges favor a “last chance” resolution after negotiation from the parties
- Declarations/Acts entitle Associations to fees and costs, but judges have discretion
- Courts are hesitant to displace owners, but are less concerned about tenants

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Limitations and Roles

- Boards are not the police
- Criminal laws are not yours to enforce
- Political considerations of enforcement programs
- Developing Issues:
 - Personal Safety and Welfare Problems
 - First Amendment and Fundamental Rights
 - Managing ageing communities
 - Mixed Occupancy Developments
 - FHA Concepts for Intervention
 - Dangerous animals, people, and things
- Hatfields and McCoys: an eternal problem or a uniform response?
- Duties to contact regulatory, law enforcement, or public welfare authorities are (generally) non-existent.

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Conclusions: Keep Improving

- Be open to prioritizing compliance over revenue or penalties
- Know what result fits the community's goals
- Examine current policies and procedures before you use them
- Seek legal advice when fundamental rights are at issue
- Paper your file
- Clarity, Simplicity, and Precision are key
- Remove unnecessary steps and detail from fining procedures
- Escalate properly and precisely
- Court as a last resort?
- Tread carefully on anything beyond your governing documents
- Educate, listen, and adapt

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