

**The Law Firm of
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presents

*You've Got Fine Written All Over You:
A Guide on How to Properly Assess Fines*

Almost every Association has at least one co-owner or homeowner who thinks that the Condominium Bylaws or Declaration of Restrictions does not apply to him or her. Luckily, most Associations also have neighbors that are more than happy to report violations of these documents to the Board of Directors. Associations should always be very careful to assess fines properly, or they could be successfully challenged later by the co-owner/homeowner (and possibly thrown out of court). This Article will discuss how an Association should go about adopting a valid and useful fine policy, or modifying an existing fine policy, as well as the importance of Associations adhering to required procedural safeguards so that the fines they impose are able to withstand possible legal challenges from the violators.

The first (and most important) step is for the Association to have a uniform and legally valid fine policy in place. This policy could be directly stated in the Association's existing Bylaws or Declaration of Restrictions or attached thereto as a formally ratified Board policy. Most modern sets of Condominium Bylaws and HOA Declarations explicitly mention the Association's power to impose fines and to adopt a fine policy, but the Board should always review the Association's governing documents to verify the existence of such authority before proceeding with the imposition of a fine policy or fines.

It should be noted that in the HOA (i.e., non-condominium) context, the Association's Declaration of Restrictions might be silent on the point of whether the Association has the power to impose fines for violations of the Restrictions. In such cases, the Board may first need to take steps to amend the Association's governing documents so there is no dispute that it has the legal authority to impose fines for violations. Such amendments might include an amendment to the Restrictions themselves granting the Association the power to impose fines or, if such an amendment is not possible/practical, amendments to the Association's Articles of Incorporation or Corporate Bylaws. If an Association fails to take such initial steps to ensure that its governing documents contain adequate legal authority to fine homeowners for violations, it is possible that a disgruntled homeowner, whom the Association has attempted to fine, could mount a successful legal challenge to any fines that the Association seeks to impose on him or her regardless of whether or not the homeowner in that particular situation was in fact guilty of the alleged violation.

If the Association does not already have an explicitly stated fine policy in its governing documents, the Board may, in most cases, vote to adopt one at a Board meeting and then distribute copies of the new policy to all co-owners, or homeowners, via mail. Keep in mind that some Bylaws and Restrictions grant the authority to impose fines, but only if specific rules and regulations for implementation have been duly adopted by the governing Board. The Board should take care to ensure that all such rules and regulations are followed in the process of adopting the fine policy. The Association's Bylaws or Declaration should be reviewed in regard to the need to distribute newly approved Board policies and regulations to the membership as a precondition to their official adoption. For many Associations, such a newly adopted policy will take effect 30 days after it is mailed to all of the co-owners or homeowners.

The fine policy should state that if someone is accused of violating the Bylaws or Declaration, then the Board must investigate whether the reported activity, if it did occur, is a violation of said documents. It is advisable for the policy to expressly reference the section of the Bylaws or Declaration from which the Board derives its authority to adopt the policy and to assess fines. In addition, the policy should further clarify that fines are to be levied in the same manner as assessments. This means that if fines are assessed and unpaid, the Association may record a lien against the unit or lot as part of its action to collect the fines.¹

Ideally, the fine policy should state a fine schedule. We recommend that the fines start with a formal warning without a monetary fine, and then include a monetary fine to be increased each time that the same violation reoccurs to reflect the seriousness of repeated violations. Below is a sample of a fine schedule, which can be easily modified.²

1 st Violation	No fine shall be levied unless the Board determines that the nature of the violation is such as to be best deterred if a fine is imposed for a first violation.
2 nd Violation	\$50.00 fine
3 rd Violation	\$75.00 fine
4 th and subsequent Violations	\$100.00 fine (each)

¹ Most Associations' Bylaws contain a payment application clause such that if there is a balance owing on the account, any payments received will first be applied towards fines, late charges, attorneys' fees or penalties before they are applied to the co-owner's unpaid monthly assessments. In other words, if the co-owner or homeowner refuses to pay the fine but continues to pay his or her monthly assessments, those payments will actually be applied toward the unpaid fines and other charges first, leaving the remaining unpaid balance to consist solely of unpaid assessments, whether the co-owner or homeowner realizes it or not.

² Some Boards choose to adopt specific fine schedules for certain violations, such as violations with victims, or violations of safety rules or regulations.

The fine schedule should also allow flexibility for the Board to change the fine amounts by adopting a new policy and distributing it to all co-owners or homeowners via mail. This allows the Board to make future adjustments for inflation. The fine amounts should not be set unreasonably high or the Board will risk legal challenges on the grounds that the fine amounts are overly punitive. Keep in mind that the Board is exercising “police authority” when it imposes fines. The courts jealously guard the exercise of this authority and will tend to subject the Board’s actions to the same scrutiny that it usually reserves for the actions of public authorities.

If the Board determines that the activity constitutes a violation of the Association’s governing documents, then the Board must issue a written notice to the accused stating the circumstances of the violation and including the specific section from the Bylaws or Declaration which is alleged to have been violated. This written notice or violation letter must also inform the accused of the fine amount that will be imposed for the alleged violation.

In the condominium context, the letter must allow the accused an opportunity for a hearing before the Board on the alleged violation before any fine is imposed (this is *mandatory* under the Michigan Condominium Act). We recommend that the Board include a meeting date and time within 7 days from the date of the letter for the accused to appear before the Board to defend the violation. Written responses to violation letters are strongly discouraged, as they do not allow for further questions or proper presentment of visual evidence or witnesses, nor do they comply with the requirements of the Condominium Act for imposing fines. Both the policy and the violation letter must state that if the accused does not appear for the hearing (or attempt to schedule another hearing date) within the 7 days, then he or she will be found in violation by default and the fine will be assessed to the co-owner’s or homeowner’s account.

Within 10 days after the hearing, or after the passage of the 7 days allotted to request or change the hearing date, the Board should issue a formal letter to the accused with its decision regarding whether a violation has occurred. It is very important that the Board not skip this step, as it provides the accused with a definitive statement of the outcome of the hearing process. The Board may wish to include an opinion on why it believes the violation occurred. The decision, if found to be a violation, should also remind the violator of the fine or penalty that is being imposed and include a payment due date. It is also advisable to include a reference that the policy treats fines in the same manner as assessments with respect to collection action.

If the violator has subsequent violations, the Association *must* repeat the same process in its entirety *for each and every violation*, before it imposes each fine on the violator's account. The Association may include different violations in the same letter, so long as the letter is clear which Bylaws or Declaration sections have been violated and includes the penalty for each violation.

Fine policies frequently neglect to mention how often fines may be imposed for continuing violations. Can a new fine be imposed on a monthly, weekly or even hourly basis? If no such guideline appears in the fine policy documents, such an omission may prove fatal to the Association's attempts to enforce a series of fines for a continuing violation.

The fine schedule for multiple violations applies only to violations of the same nature. For example, if one co-owner or homeowner was found in violation for not picking up after his dog and then is caught walking the dog without a leash, these are two separate violations even though they both involve a violation of the pet section of the Bylaws or Declaration.

It is very important that Associations follow a strict policy for implementing fines. The more uniformly enforced and "air-tight" the policy is, the less likely it will be that a co-owner or

homeowner will be able to successfully challenge any fines issued pursuant to that policy. If fines are not assessed properly, then co-owners and homeowners may refuse to pay them without fear of consequence. As always, we recommend that Board members consult with the Association's legal counsel regarding any specific questions they might have about the levying of fines for violations and the enforcement of the Association's fine policy.