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Refining **Fining Techniques** To Keep **Condo Owners** in Line

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Condominium boards' legal remedies for enforcement of rules against recalcitrant unit owners are severely limited. This is because, unlike coop boards, condo boards are not in a landlord-tenant relationship with their unit owners and therefore lack power to evict for infraction of the rules.

There are really only two realistic remedies available to condo boards for unit owners' infractions of the building's rules: (1) seeking injunctive relief and (2) imposing fines, for which authority is typically found in most condominiums' by-laws.[1]

Injunctive relief is far from a perfect remedy because it is labor intensive and costly. Although an injunction is, by definition, a court order, as a practical matter many courts are reluctant to punish unit owners who flout injunctions with monetary penalties or contempt citations. As such, injunctive relief is frequently a toothless remedy.

Fining, on the other hand, is a more concrete and less costly legal remedy. However, there may be practical enforcement difficulties, as well as a vast potential for abuse by boards to exceed their fining authority. Abusive fines are highly vulnerable to legal challenge.

This article suggests ways for condominium boards to make their fining policies more enforceable and less vulnerable to legal attack. Adherence to the concepts and strategies enumerated herein will maximize the efficacy of fining as a rule enforcement remedy for any condominium board.

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The cardinal rule governing a condominium board's power to levy fines as a means of enforcing its rules is that the authority must be embedded in the association's by-laws. In the event the by-laws do not contain fining authority, this remedy is not available to the board. See *Cave v. Riverbend Homeowners Assn.*, 38 Misc. 3d 1205(A) (Sup. Ct. Westchester Co., 2011), aff'd 99 A.D.3d 748 (2d Dept. 2012); *Blumberg v. Albicocco*, 12 Misc.3d 1045 (Sup. Ct. Nassau Co. 2006); *Miller v. Board of Managers of Fox Hill Condominium I*, (Sup. Ct. Dutchess Co. 2010), Index No: 1181/10. So, before resorting to fining as a rule enforcement technique, boards must consult their by-laws to ensure that they have this kind of power. In the unlikely event that the power is lacking, boards should consider amendment of their by-laws to include such a grant of authority.

Even if fining is permitted, the precise language of the enabling provision determines the potency of the board's remedy. To the extent that the by-law provision merely states that the board "has power to levy fines against unit owners for violation of the Rules and Regulations," the board's exercise thereof merely results in its right to sue the unit owner for a money judgment in the amount of the assessed penalty. However, to the extent that the enabling provision also states that "*fines shall be considered common charges payable by the Unit Owner against whom they are assessed*," the proceeds attach to the Condominium's lien for unpaid common charges, and the board has the means to pursue collection by means of a foreclosure action. See *Cave v. Riverbend Homeowners Assn.*, supra. Obviously, the ability to collect fines through foreclosure vastly enhances the efficacy of a board's rule enforcement activity. Thus, to the extent that an association's by-laws permit imposition of fines but do not deem the proceeds to constitute common charges, a condo board might consider amendment of its fining provision.

Even if fines are properly authorized in a condominium's by-laws, the imposition of such a penalty will not be upheld where the specific conduct which it purports to punish has not been proscribed by the Board of Managers. For example, in *Blumberg v. Albicocco*, supra, the court struck a $500 fine imposed by the board of managers due to the plaintiff unit owner conducting a garage sale. Although imposition of the fine was duly authorized in the by-laws, there was no specific prohibition against garage sales within the complex. 12 Misc.3d 1045 at 1048-49.

Therefore, in addition to making sure that the fining remedy is properly authorized in their respective association's by-laws, boards should ensure that the entire gamut of conduct which they seek to proscribe is properly embedded in their rules and regulations and, hence, subject to the fining authority in the by-laws.

In each case, fines must be duly enacted by board resolution to be enforceable. This means that discussion of the proposed fine must be properly placed on the agenda for discussion in the notice of meeting to the board members, that a quorum of board members be present at the subject meeting, that a vote by majority of a quorum occurs and is duly documented in the minutes of the meeting, and that the targeted unit owner be notified of the fine levied against him. Non-compliance with any of these procedural steps exposes the fine to legal challenge as being an ultra vires act of the condominium. See *Board of Managers of the Beekman Regent Condominium v. Bauer*, 2011 N.Y. Misc. LEXIS 3930 (Sup. Ct. N.Y. Co. 2011); *Esposito v. Barr*, 2015 N.Y. Misc. LEXIS 3091 (Sup. Ct. Richmond Co. 2015). Moreover, to the extent that fines are selectively enforced by a board, they are vulnerable to legal challenge. See *Bauer*, supra.

Courts routinely strike fines imposed by condominium boards to enforce their rules when such penalties are deemed "confiscatory." Thus, in one recent case, a $500 fine levied by the board to punish a unit owner's single violation

of the building's guest policy was voided. See, e.g., *Gabriel v. Board of Managers of the Gallery House Condominium*,130 A.D.3d 482 (1st Dept. 2015). The concept underlying this judicial approach is that fines are more of an administrative slap on the wrist than a punitive measure.

Case law offers little guidance as to what constitutes an unacceptable "confiscatory" fine as opposed to an acceptable "administrative" fine. However, a review as to how courts have defined the term "confiscatory" in the context of late charges on payment of rent is instructive. The standard for "confiscatory" charges which courts seem to have adapted is whether the charge at issue bears a reasonable relationship to the conduct which it purports to prescribe. See *Sandra's Jewel Box v. 401 Hotel*, 273 A.D.2d 1 (1st Dept. 2000); *Clean Air Options v. Humanscale*, 142 A.D.3d 923 (1st Dept. 2016); *943 Lexington Ave. v. Niarchos*, 83 Misc.2d 803 (App. Term, 1st Dept. 1975). Some courts have defined the standard a little differently, inquiring as to whether the charge at issue is reasonably related to the probable harm which it seeks to compensate. *Wilsdorf v. Fairfield Northport Harbor*, 34 Misc.3d 146(A) (App. Term, 2d Dept. 2012); *Brenner v. General Plumbing*, 46 Misc.3d 1215(A) (Civ. Ct. Kings Co. 2015).

While these standards are rather subjective when it comes to pairing specific fine levels with categories of proscribed acts, two principles become clear. First, fines should be set at a relatively minor level rather than at a staggering level which would "shock the conscience" of a reviewing judge. Second, we strongly advise our condominium board clients to adapt a system of progressive fines (beginning with modest fines for first offenses and escalating with each multiple act of misconduct) with respect to each category of conduct they are proscribing. Since the public policy underlying imposition of fines is to deter chronic rule breaking, a system of progressive fines seems well suited to addressing the objective and "reasonably related" to the actual anticipated harm to be suffered by the association.

Boards should ensure that the **entire gamut of conduct** which they seek to proscribe is properly **embedded in their rules and regulations** and, hence, subject to the fining authority in the by-laws.

Finally, while there is little case law on the subject, due process issues are of concern to courts in their evaluation of the bona fides of fines levied by condominium boards. *Blumberg*, 12 Misc.3d at 1048; 1pt3-44 Condominium Law and Practice: Forms §44.06 (2017). It is easy to envision a court being so offended by the imposition of a staggering penalty for a seemingly trivial infraction, the basis of which the unit owner has not even been given the opportunity to dispute, that it summarily concludes the fine is impermissibly "confiscatory." We therefore strongly recommend to our condominium board clients that they adopt some sort of review process that affords unit owners on whom fines have been levied an opportunity to present evidence disputing the factual basis of their imposition. In our experience, the forum of a tribunal consisting of both board members and non-board members to hear presentation of such evidence works best. Any good faith adjudication by such a panel of the unit owner's peers would doubtlessly enjoy "business judgment rule" protection. The "optics" created by due process protections go far in fortifying seemingly arbitrary fine against legal challenge.

1. Real Property Law §339-j does provide: "In any case of flagrant or repeated violation by a unit owner, he may be required by a board of managers to give sufficient surety or sureties for his future compliance with the by-laws, rules, regulations, resolutions and decisions…." However, in its entire 53 year legislative history no court has ever applied this provision as a sanction against a condominium unit owner's chronic misconduct.