

no later than 72 hours before the scheduled hearing date. If the complaining owner supplements or amends the complaint, the committee should have the authority to reschedule the hearing date.

§7.19 b. Discovery

A community association's enforcement procedures should provide that before the scheduled hearing date the committee members, the complainant, and the alleged violator are entitled to obtain the names and addresses of witnesses whom any party intends to call and to inspect and copy any statements, writings, and investigative reports relating to the subject matter of the hearing. Some governing documents provide that a party will not be permitted to introduce the testimony of any witness whose name and address was not disclosed to the other parties in response to a request for such information, as long as the request to furnish such information was served on the introducing party at least 48 before the hearing. Other associations may find such a requirement unduly formalistic and simply require that the parties exchange witness lists some specified number of days before the hearing.

c. Hearing

§7.20 (1) Challenging Enforcement Committee Member

The community association's enforcement procedures should provide that if a formal hearing is initiated before the enforcement committee, the original complainant must agree to appear as a witness to the alleged violation or the committee may refuse to consider the allegations. Owners are often reluctant to confront a neighbor who is accused of a violation, so a policy of requiring personal testimony will reduce the number of frivolous complaints. The courts are also more likely to consider a policy to be fair and reasonable that permits the alleged violator to confront the contrary evidence (see §7.10).

An association's enforcement procedures should also permit an alleged violator to challenge a member of the enforcement committee for cause, at the opening of the hearing and before any evidence is taken. The affected owner should be permitted to demonstrate to the committee that under the circumstances it is impossible for a particular member to be fair and impartial. The decision of the enforcement committee on a challenge for cause should be final.

§7.21 (2) Explaining Rules and Procedures

At the beginning of an enforcement hearing, the chairperson of the enforcement committee should explain to all parties the rules and procedures for conducting the hearing. The following rules and procedures should be made part of a community association's enforcement procedures and required for each hearing:

- Each party should be entitled to make an opening statement, starting with the complainant's case;
- Each party should be entitled to produce documentary evidence and testimony and to cross-examine the opposing party and the opposing party's witnesses;
- Each party should be entitled to make a closing statement;
- Formal rules of evidence should not apply, and all relevant evidence should be admitted;
- Any party should be permitted to waive the right to exercise his or her rights in any part of the hearing process, and the enforcement committee should be entitled to exercise its discretion in specifying the rules by which the hearing will be conducted, as long as the alleged violator is given an opportunity to confront and to challenge any evidence and to cross-examine any witnesses introduced by the opposing party and to be heard in his or her own defense.

§7.22 (3) Decision

The enforcement procedures should require that the enforcement committee make its determination promptly after all testimony and documentary evidence has been presented and closing arguments have been made (see §7.21). The procedures should empower the committee to make its decision at the conclusion of the hearing or to take the matter under submission, provided it makes its determination within a specified number of days after the hearing. **The committee should be required to make its decision in writing and to make factual findings on all issues that must be resolved to decide the controversy.** Failure to make factual findings may invalidate a decision. See *Cohen v Kite Hill Community Ass'n* (1983) 142 CA3d 642, 191 CR 209, discussed in §7.10.

The procedures should require the decision to have the support

of a majority of the committee members present at the hearing and require the committee to serve copies of the decision, **including any minority views**, on each party and on the board of directors.

§7.23 d. Appeal

A community association's enforcement procedures should provide that either party may **appeal a decision of the enforcement committee to the board of directors**. See App C, section 5.13(b)(iii). The board may be authorized, on appeal, either to review the committee's decision or to conduct a new hearing. The advantage of an appeal process is that the losing party has the opportunity to be heard by two separate entities, **reducing the likelihood of litigation**.

Once an owner exhausts his or her rights of appeal, the decision is final, and the association may invoke its remedies to correct the violation. See §§7.24-7.33.

§7.24 4. Remedies

A community association has a variety of remedies available to it as methods of enforcing its covenants internally. **After an internal enforcement hearing**, an association may impose a monetary penalty (see §7.25) or suspend the owner's membership or ownership rights (see §§7.26-7.32). The declaration may also give the association a right of entry for specified purposes that may include correcting violations of the covenants (see §7.33). An association may also be entitled to foreclose its assessment lien as a method of enforcing assessments (see §§5.53-5.60), and to tow illegally parked vehicles (see §§6.62-6.63).

§7.25 a. Monetary Penalties

Statute controls the levying and collecting of fines and penalties. Any fine that the community association imposes must bear a reasonable relationship to the gravity of the infraction and the burden on the association. The fine cannot exceed "the amount necessary to defray the costs for which it is levied." CC §1366.1.

Further, CC §1363(g) provides that if an association adopts or has a policy imposing any monetary penalty, including any fee, on its members or the guests and invitees of members, or both, the board of directors must adopt and distribute a schedule of the

monetary penalties that may be assessed for those violations, which must be in accordance with authorization for member discipline contained in the governing documents. For practice tips on drafting a schedule of fines and monetary penalties, see §7.25A. For a sample schedule, see §7.25B.

The association's fine or penalty schedule must be distributed to the members by personal delivery or first-class mail. CC §1363(g). Once a proper distribution has been made, however, the association is not obligated to make any further distributions of the fine or penalty schedule unless the schedule is changed. CC §1363(g). After January 1, 2004, changes to the fine schedule are subject to the member review provisions of CC §§1357.110-1357.140. Note, however, that the fine schedule will constitute part of the association rules and thus constitute a governing document that must be provided by any seller of a separate interest in a common interest development as soon as practicable before transfer of title to the interest. See CC §1368(a)(2).

Civil Code §1363(g) does not address the situation in which the association has failed to adopt a policy granting authority to impose fines. A conservative approach suggests that the declaration, bylaws, or board-adopted resolution should provide for such a policy and that the association should follow the requirements of CC §1363(g) for distribution.

Civil Code §1363(g) also does not state whether an association disciplinary policy is valid if it confers discretion on the board or its duly appointed hearing body to determine the amount of a fine or penalty following proper notice and a hearing. Such a practice should be permissible if the policy clearly identifies the specified range of penalty response the board or hearing body can impose.

Finally, it is unclear whether the law requires that all fees be disclosed or only fees that are penalties. The prudent practice would be to list all fines, fees, and penalties that the association intends to impose for any purpose.

With the exception of those monetary penalties referenced in CC §1367(b) (for liens recorded through December 31, 2002) and 1367.1(d) (for liens recorded after December 31, 2002), and late payment penalties imposed for delinquent assessments (CC §1367(c) for liens recorded through December 31, 2002, and 1367.1(e) for liens recorded after December 31, 2002),

a monetary penalty imposed by the association as a disciplinary measure for failure of a member to comply with the governing

by any method that is reasonably calculated to provide actual notice to the accused member, although notice given by mail must be given by first-class or registered mail sent to the last address of the member as shown in the association's records. Accordingly, if the accused member is a nonresident property owner and has given the community association a mailing address that is different from the address of the owner's separate interest in the development, notice must be sent to the specified mailing address. Mailing a copy of the notice to the address of the separate interest or leaving a copy of the notice with a tenant at that address would not comply with this requirement.

Civil Code 1363(h) additionally requires that when a board meets to consider or impose discipline on a member, the board shall notify the member in writing, by either personal delivery or first-class mail, at least 10 days before the meeting. The notification must contain, at a minimum:

- The date, time, and place of the meeting;
- **The nature of the alleged violation for which a member may be disciplined;** and
- **A statement that the member has a right to attend and may address the board at the meeting.**

Furthermore, if the board imposes discipline on a member, it shall provide a notification of the disciplinary action by either personal delivery or first-class mail to the member within 15 days after the action. **Disciplinary action is not effective against a member until the board satisfies the notice requirements of CC §1363(h).**

§7.29 **(3) Executive Session Required**

Civil Code **1363(h)** requires the board to meet in executive session **if requested by the member** when a member is subject to disciplinary proceedings and **a member is entitled to attend any executive session at which his or her discipline is being discussed. Thus, it is not proper for the board to excuse the accused member after receiving his or her testimony to determine an appropriate penalty.** Although the statute does not mention board-appointed disciplinary committees, the prudent practice would be for such committees to comply with these requirements.

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§7.30 (4) Affected Member's Appeal Rights and Remedies

To challenge a community association's disciplinary action, including a claim that notice was defective, the affected member must file a legal action within one year after the date of the expulsion, suspension, or termination. If the member's action is successful, the court may order any relief, including reinstatement, that it finds to be equitable under the circumstances. Corp C §7341(e). The court may not, however, set aside a vote of the members or of the board of directors solely because the member was excluded from voting. Negation of such a vote may be a component of the ordered relief only if the court finds that the wrongful expulsion, suspension, or termination was imposed in bad faith and for the purpose of wrongfully excluding the member from the vote or from the meeting at which the vote took place to affect the outcome of the vote. Corp C §7341(e).

§7.31 (5) Substantive Grounds for Disciplinary Action

Corporations Code §7341 governs only the procedures required for the expulsion, suspension, or termination of a member, and not the substantive grounds for the disciplinary action. Any disciplinary action that is based on substantive grounds that violate the member's property rights, or that is otherwise unlawful, cannot be validated by compliance with the requirements of Corp C §7341. Corp C §7341(f). An attempt by a community association to expel a property owner permanently would violate the owner's real property rights. Furthermore, because an owner would remain obligated to pay assessments to an association under threat of foreclosure, permanent expulsion from an association would probably constitute an unreasonable restriction and thus be unenforceable under CC §1354.

§7.32 c. Suspension of Ownership Rights and Privileges

As a disciplinary measure, a community association may suspend certain privileges that are not strictly membership privileges (see §7.26) but are rights or privileges that are appurtenant to the owner's real property interest in the development. The principal example of such an appurtenant right is the right to use and enjoyment of,

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