

Requirements for Due Process Rules Enforcement Procedures for Condominium and Homeowners Associations

By Jim Strichartz, Revised August 2014

1. INTRODUCTION

As a result of the Washington Condominium Act (RCW Chapter 64.34) (hereinafter referred to as the “WCA”) which became effective on July 1, 1990 and the Homeowners Association Act (RCW 64.38) (hereinafter referred to as the “HOAA”) which became effective July 1995, condominium and homeowner’ associations have been given an alternative to judicial enforcement of their covenants, conditions and restrictions and their internal rules and regulations. Each of these pieces of legislation gives the associations subject to their jurisdiction the opportunity to adopt internal procedures for enforcement of association governing documents, including the imposition of statutorily authorized fines. The challenge is to ensure that the procedures and the association's implementation of the procedures comply with the requirements for procedural fairness which the statutes do not clarify in detail.

2. PRE-WCA AND HOAA ENFORCEMENT

Prior to July 1, 1990, the condominium legislation in effect in the State of Washington was the Horizontal Property Regimes Act, codified in RCW Chapter 64.32. This law did not contain any authorization to impose fines for violations of association governing documents. It only allowed lawsuits for damages or injunctive relief. The Horizontal Property Regimes Act in RCW 64.32.060 provides as follows:

Each apartment owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in the declaration or in the deed to his apartment. Failure to comply with any of the foregoing shall be ground for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the manager or board of directors on behalf of the association of apartment owners or by a particularly aggrieved apartment owner.

To the extent that associations adopted internal procedures for rules enforcement prior to the effective dates of the WCA and the HOAA, they had to look to the specific authorizing language in their declarations of covenants, conditions and restrictions. It was extremely unlikely that the language provided by developers’ lawyers in documents of pre-1990 vintage contained authorization for any alternative to judicial enforcement. It was also pretty rare for owner controlled associations to adopt amendments containing such language.

3. STATUTORY AUTHORIZATION TO FINE

Recognizing that the judicial system is not a particularly suitable mechanism for the resolution of many of the lifestyle related problems which arise among residents of community associations, the Legislature adopted a new approach in the WCA, and then applied it to non-

condominium homeowners' associations in the HOAA. Among the provisions which were made applicable to both "Old Act" and "WCA" condominiums alike were the following portions of Section 3-102 of the WCA, now codified in RCW 64.34.304:

64.34.304 UNIT OWNERS' ASSOCIATION POWERS. (1)

Except as provided in subsection (2) of this section, and subject to the provisions of the declaration, the association may:

(a) Adopt and amend bylaws, rules, and regulations; . . .

(d) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium;

. . .

(f) Regulate the use, maintenance, repair, replacement, and modification of common elements; . . .

(k) Impose and collect charges for late payment of assessments pursuant to RCW 64.34.364(13) and, after notice and an opportunity to be heard by the board of directors or by such representative designated by the board of directors and in accordance with such procedures as provided in the declaration or bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule thereof adopted by the board of directors and furnished to the owners for violations of the declaration, bylaws, and rules and regulations of the association;

. . . (Emphasis added.)

This language was mirrored in the HOAA in RCW 64.38.020(11). The highlighted portion above is the so-called "due process rules enforcement procedure." A careful reading of this provision reveals several distinct elements which are required for internal rules enforcement efforts. They are:

1. Notice;
2. A prior opportunity for a hearing;
3. Procedures for conduct of the hearing; and
4. A previously published schedule of reasonable fines.

The intent of RCW 64.34.304(1) (k) is explained by the legislative history of the WCA. Official Comment 5 to this section makes the following observations:

5. The powers granted the association in subsection (k) to impose charges for late payment of assessments and to levy reasonable fines for violations of the association's rules reflect the need to provide the association with sufficient powers to exercise its "governmental" functions as the ruling body of the condominium community. The power to impose sanctions for violations of the association's governing documents is subject to a requirement of minimum "due process" for the accused violator. These due process procedures include notice of the alleged violation and an opportunity for a hearing before either the board of directors or another person or body which has been designated by the board of directors to conduct the hearing. This section also requires that the procedures for enforcement be set forth in the association's governing documents and that the board of directors has previously adopted a fine schedule and communicated it to the owners. The powers granted under this subsection are intended to be in addition to any rights which the association may have under other law.

4. DUE PROCESS REQUIREMENTS

There are two aspects of the due process requirement, procedural due process and substantive due process. Although no court in the state of Washington has expressly ruled on the issue, there is authority in other jurisdictions for the proposition that both are applicable to the association rules enforcement situation. Procedural due process of law means an exercise of established powers under safeguards necessary for the protection of individual rights. To be valid, the exercise of those powers must be by a tribunal competent to pass upon the subject-matter of the proceeding. If the proceeding involves the determination of personal liability of the person being charged with a violation of the law (the "Respondent"), the Respondent must be brought within the jurisdiction of the tribunal by service of process or by his voluntary appearance. Due process implies the right of the Respondent to be present before the tribunal which pronounces judgment and imposes the fine, since this is a deprivation of property, the right to be heard by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. This includes the right to confront and cross-examine one's accuser. If any question of fact or liability is conclusively presumed against the Respondent, this is not due process of law.

Fundamental fairness in every aspect is the hallmark of due process. Due process of law also requires that a rule or law shall not be arbitrary, capricious or unreasonable, and that the means which is selected to obtain the desired end, no matter how reasonable or laudable that end may be, must likewise bear a reasonable and substantial relationship to the object being sought. This latter concept is the essence of the second aspect of due process referred to above, known as substantive due process. The Washington Court of Appeals first enunciated the requirements of due process applicable to a homeowners' association in *Fairwood Greens Homeowners v. Young*, 26 Wn. App. 758, 614 P. 2d 219, 223 (1980) as follows:

The essence of procedural due process is notice and the right to be heard. The notice must be reasonably calculated to apprise a party of the pendency of proceedings affecting him or his property, and must afford an opportunity to present his objections before a competent tribunal.

In a more recent case dealing with what constitutes due process in a quasi-judicial setting, *Conard v. University of Washington*, 62 Wash. App. 664, 814 P.2d 1242 (1991), reversed on other grounds, 119 Wn.2d 519, 834 P.2d 17 (1992), the Court further explored the essential elements of procedural due process:

The next question is how much process is due. [Citations omitted] We must balance competing interests of an efficient and reasonable administrative process with the [respondent's] right to a meaningful hearing. [Citation omitted] Clearly, at least notice and an opportunity to be heard are required. In addition, the [respondent] must be given a written copy of any information on which the . . . recommendation is based in time to prepare to address that information at the hearing. The [respondent] should be given the opportunity to present and rebut evidence, and the hearing must be conducted by an objective decisionmaker. The [respondent] has the right to be represented by counsel and to have a record made of the hearing for review purposes. Finally the [respondent] has the right to a written decision from the hearing board setting forth its determination of contested facts and the basis for its decision. [Citations omitted]

When the necessity for a hearing such as this does arise, the hearing must be conducted with the minimum due process safeguards outlined above. Otherwise, the opportunity for a hearing can be meaningless.

5. RELEVANT ASSOCIATION ENFORCEMENT CASE LAW

Just because a rule has been adopted by the board or a restriction appears in the declaration does not mean that it is enforceable. In 2000 the Washington Supreme Court, released its opinion in *Shorewood West Condominium Ass'n v. Sadri*, 140 Wn. 2d 47 (2000)). This opinion reviewed and relied on decisions from other jurisdictions, to determine the proper standard for reviewing association enforcement actions and found that, for "Old Act" condominiums, restrictions on leasing must be contained in Declarations or their amendments and cannot be made through rule changes.

One of the fundamental criteria for testing the validity of a condominium association regulation is the test of reasonableness. The seminal case in this area is the 1975 Florida District Court of Appeals case of *Hidden Harbor Estates, Inc. v. Norman*, 309 So. 2d 180. In that case the condominium board had adopted and the association had ratified a rule prohibiting the consumption of alcoholic beverages in certain of the common areas. The trial court struck down the rule because it did not bear a reasonable relationship to the protection of life or property. The

Court of Appeals reversed the trial court in an opinion that was quite perceptive in its recognition of the nature of community association living.

The Court of Appeals stated, “It appears to us that inherent in the condominium concept is the principle that to promote health, happiness and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub-society of necessity more restrictive as it pertains to the use of condominium property than might be existent outside the condominium organization.”

The *Norman* court went on to state, “Certainly, the association is not at liberty to adopt arbitrary or capricious rules bearing no relationship to the health, happiness and enjoyment of life of the various unit owners. On the contrary, we believe the test is reasonableness. If a rule is reasonable the association can adopt it; if not, it cannot. It is not necessary that conduct be so offensive as to constitute a nuisance in order to justify regulation thereof. Of course this means that each case must be considered upon the peculiar facts and circumstances thereto appertaining.”

In another case involving the same association, *Hidden Harbor Estates v. Basso*, 393 So. 2d 637 (Fla. App., 1981), the court went on to distinguish two categories of cases in which a condominium association attempts to enforce use restrictions. The first category, those restrictions contained in the declaration, the court found to be “clothed with a strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right.” The court went on to observe that because of the need of an owner to rely on restrictions contained in the declaration, such restrictions may have a certain degree of unreasonableness and yet withstand attack of the courts.

The *Basso* court however distinguished this first category from a second category of cases involving the validity of rules adopted by the association's board of directors and those cases involving the board's exercise of a power to grant or deny a particular use. The Florida court held that in the second category of cases the requirement of reasonableness is “designed to somewhat fetter the discretion of the board of directors. By imposing such a standard, the board is required to enact rules and make decisions that are reasonably related to the promotion of the health, happiness and peace of mind of the unit owners. In cases like the present one where the decision to allow a particular use is within the discretion of the board, the board must allow the use unless the use is demonstrably antagonistic to the legitimate objectives of the condominium association, i.e., the health, happiness and peace of mind of the individual unit owners.”

The court in the *Basso* case held that the board had failed to “demonstrate that its denial was reasonably related to the fulfillment of the desired and laudable objectives” which it cited as the basis for its decision.

Shorewood West, a Washington case, addressed the enforcement of an amendment to the bylaws of a condominium association created under the Horizontal Property Regimes Act, RCW Chapter 64.32. The amendment restricted the leasing of any units not already leased at the time of adoption, but gave owners the right to petition the board of directors for a waiver for reasons such as job relocation, extended vacation, disability, weak real estate market or “any other circumstances the Board deems appropriate.” The amendment was properly adopted by a 60% supermajority of owners. The units that were leased on the date of adoption of the amendment were “grandfathered” for as long as the current owners continued to own them.

The association brought suit against the owners of a unit for injunctive and declaratory relief. The owners had owned and occupied their unit at the time of adoption of the amendment, but had subsequently rented the unit out. At purchase the owners had received a resale certificate stating that there were no restrictions on rentals. The trial court held that the association could amend its bylaws to restrict renting, but could not apply that restriction to owners who had purchased their units before the date of the amendment. The Court of Appeals disagreed, finding that the Bylaws amendment was a reasonable and enforceable restriction.

The Supreme Court reversed the Court of Appeals’ decision. The Supreme Court held that leasing restrictions may be adopted and enforced against existing owners if they are in accordance with the Horizontal Property Regimes Act (the “Act”).”

In reaching its decision, the Court recognized that condominiums are a statutorily-created form of real estate, and that the rights and duties of condominium owners differ from those of owners of more traditional forms of real estate. It agreed with courts in Massachusetts and Florida that, “Central to the concept of condominium ownership is the principle that each owner, in exchange for the benefits of association with other owners, ‘must give up a certain degree of freedom of choice which he {or she} might otherwise enjoy in separate, privately owned property.’”

The Court acknowledged that owners are required to comply strictly with the bylaws and rules of the association, as they may be lawfully amended. Notwithstanding this, the Court concluded that since the association amended its bylaws but did not amend its declaration, the leasing restriction in this case was invalid. The Supreme Court based this conclusion on the fact that the Act (in RCW 64.32.090(7)) requires that the declaration contain, “A statement of the purposes for which the building and each of the apartments are intended and restricted as to use.”

The Association argued that the declaration only needed to contain “the general outline of prohibitions, with specific provisions being contained in the bylaws and rules and regulations.” The Supreme Court rejected this argument, reading the statute to mean “that all restrictions on use [and not just general categories of use restrictions such as residential use or commercial use] must be contained in the declaration’s statement of purpose.”

The declaration for Shorewood West contained the following statement of purpose:

With the exception of the guest rooms located upon Floors 1 through 5, which are common areas and facilities, the property, units and limited common areas as described herein are restricted

and intended to be utilized solely for residential purposes, and no rental or lease shall be permitted for less than a 30day term. The daily rental and the terms and conditions governing the use of the guest rooms shall be determined by the Board of Directors in accordance with the Bylaws. Each unit and limited common area is restricted to single-family residential occupancy, and none of the common areas and facilities or limited common areas shall be utilized other than in service for and consistent with the units themselves and their stated purpose.

The Court pointed out that the declaration, “implicitly permits [leasing] for terms of longer than 30 days and explicitly allows daily rentals of guest rooms, subject to Board policy.” The Court concluded, therefore, that “The statute does not allow an association of apartment owners to restrict leasing in a bylaw where the declaration itself permits leasing.”

In reversing the decision of the Court of Appeals, the Supreme Court reserved for the future the questions of what standard the courts should use to review condominium association rules, and whether the restriction on leasing, with its grandfathering of existing landlords, was equally applied.

This author has the following comments on the Supreme Court’s decision. The Court could have decided this case strictly on the fact that the provision in the bylaws restricting leasing was inconsistent with the statement in the declaration implicitly allowing leasing for more than 30 days. If it had done so, it could have avoided reaching the issue of whether a use restriction needs to be contained in the declaration rather than in the bylaws or rules of the association. This is particularly true since, as pointed out by the Court of Appeals, the declaration allowed bylaw amendments to enforce “rules and regulations for the use, occupancy and management of the property not inconsistent herewith.”

That the Supreme Court did not do so raised the troubling question of whether use restrictions in the bylaws or rules will be found to be valid if they go further than the declaration or deal with issues not covered in the declaration.

In 2004, the Washington Court of Appeals, in an unpublished case, *Hardy v. Fairwood Greens, HOA*, determined that while *Sadri*, required new restrictions in Old Act condominiums to be by amendment of Declarations, non-condominium homeowners associations governed by RCW 64.38 could pass reasonable restrictions that did not conflict with their Declarations by Board adopted rules. There, the Court affirmed a trial court finding that rules restricting recreational vehicles were enforceable where they did not conflict with Declarations.

In 2013, the Washington Court of Appeals, in an unpublished opinion, *Kawawaki v. Academy Square Condominium Association*, held that, under the WCA, changes in rental restrictions had to be made through declaration amendments and not through rules “interpreting” the existing Declaration. Following *Shorewood West*, it restricted the ability of associations to impose restrictions by rules.

These cases point out that to ensure that a court will enforce a restriction on use, rental or occupancy, associations should consider amending their declarations to include all such restrictions now appearing in their rules or their bylaws.

With the legalization of marijuana possession, associations face new issues regarding passing rules with possible restrictions on smoking. Most associations do not have an existing complete ban on smoking. Rather, they may have bans on common area smoking and prohibitions against “noxious or offensive” activities or activities that are an “annoyance or nuisance.” Unfortunately, for those who wish to impose special restrictions on marijuana use in units, court decisions in other states have generally found that those general restrictions do not allow associations to stop tobacco use. In like manner, associations may have trouble convincing courts that marijuana use is noxious, offensive, an annoyance or a nuisance. Whether associations can discriminate against marijuana by passing rules or amending declarations to allow tobacco smoking but not marijuana is an open question.

6. ELEMENTS OF INTERNAL RULES ENFORCEMENT PROCEDURES

A due process procedure which would meet the requirements of the WCA and the HOAA for imposition of fines on residents is not likely to be a short or simple document. Because of the need to provide guidance to lay board members, who are not likely to have any training or prior experience in quasi-judicial hearing procedures, it is prudent to attempt to set out with as much detail as possible the procedures which should be followed for each complaint. I would suggest the following issues should be considered and addressed in such procedures which may be adopted by the owners as part of the declaration or bylaws or by the Board as part of the rules and regulations:

- Establishment of an independent impartial hearing board to hear and determine complaints regarding violations;
- Composition and method of selection of hearing board members. Hearing board members may be either:
 - Non-board members who are independent, impartial respected members of community, either elected by board of directors or by the membership at the annual meeting, or
 - Board of directors members, or
 - An experienced outside arbitrator familiar with the conduct of trial-type hearings. An arbitrator may be an individual designated by the board in advance, or selected by the parties, or appointed by an established service such as the American Arbitration Association or the Judicial Arbitration and Mediation Service, from the members of a panel of arbitrators, or
 - A hearing board set up to hear the disputes of a number of associations under the auspices of a master association formed by amendment to declaration under RCW 64.34.276 with hearing board members drawn on a rotating volunteer basis

from members of the boards of directors of the member associations which were not involved in the dispute;

- Authority of the hearing board to levy fines or impose other sanctions after notice and a hearing and to require the non-prevailing party to reimburse the association for its costs in connection with proceedings;
- Requirement of mandatory preliminary informal face-to-face dispute resolution procedure between the person with the complaint (the "Complainant") and the alleged violator (the "Respondent");
- Requirement of a written complaint to be filed by the Complainant with the hearing board if informal resolution not successful;
- Requirement that the secretary of the hearing board shall cause a copy of the complaint, a notice of the Respondent's rights and of the hearing and a copy of the rules enforcement due process procedures to be served on the Respondent;
- Mechanism for rescheduling of the hearing under certain circumstances;
- Mechanism for objections to the complaint and amendments to the complaint;
- Mechanism for entry of a default based on a *prima facie* showing of the violation against a Respondent who fails to appear at the hearing;
- Mechanism which allows certain limited discovery by the parties;
- Requirement that each member of the hearing board be impartial in the matter before the board or disqualify himself or herself;
- Specification of the procedure for conduct of the actual hearing, i.e., the order of presentation, recording by tape or stenographer, etc.;
- Provision for liberal and informal rules regarding admissibility of evidence;
- Provision allowing the hearing board to accept a written assurance of voluntary compliance from the Respondent in lieu of holding a hearing and rendering a decision;
- Statement of the standards to be followed by the hearing board in issuance of a decision;
- Procedures for appeal of the hearing board's decision, if any;
- Procedures for judicial review or enforcement of the hearing board decision.

7. CONCLUSION

Given the legal complexity of the due process procedure, it is recommended that associations work closely with their attorneys in setting up a mechanism which will withstand judicial scrutiny and will provide a fair hearing for all accused violators. The association attorney

should also be prepared to provide training to board members who will need to administer the rules enforcement process as well as advice in any particular rules enforcement case to come before the board, especially in the early days of implementation. Although the process may seem cumbersome at first, experience has shown that it works. What needs to be emphasized by the practitioner, and by the board members applying the process, is that the end sought is not to be punitive. It is to gain compliance with the reasonable restrictions of the community that are designed to protect the expectations and investments of the majority of owners while respecting the rights of the minority.