

## Fines and Penalty Issues:

Adopted 2/8/2020

Establishing a “Fines and Penalty Schedule” requires much more than agreeing upon what the amount of a fine should be or what penalty will be assessed. State law sets requirements and specific limits on what may be included in a fine or penalty, how it is applied, how it must be noticed, how it is imposed, and how it may be collected. In the end it should be the purpose of fines and penalties to gain compliance with the Association’s Bylaws and rules to make the Park an enjoyable, safe, and sustainable resource rather than to collect money.

In order to bring the Association’s Schedule up to date there are some questions that need to be answered by the Board concerning intent, content, and methods. The eleven items and their associated recommendations contained in this document are adopted by the Board and are intended to be included in guiding the development of the Fines and Penalty Schedule, the methods by which fines and penalties are assessed and collected, and how these issues are addressed in the Collection Policy document.

### 1. What architecture, with respect to door/gate security controls and monitoring, should the Fines and Penalties Schedule and provisions of the other governing documents reflect?

- A. The architecture we currently have where key card restrictions are unenforceable?
- B. The one we envision being installed with respect to door/gate security controls and monitoring?

**Discussion:** The current key card system does not allow for the tracking of individual members and some facilities are not part of the card access system. It is not practical for the staff to attempt to limit access or definitively monitor member access to the park or various community resources at this time. This fact is brought into focus by the limited methods available to the Association to enforce its rules and sanctions. In the case of fines and penalties levied against members, penalties and late fees for non-payment and/or interest added to amounts owed are not allowed. This leaves restriction from Community resources as probably the only tool available to the Board as an incentive to get members to pay fines. This also highlights the priority that should be given to upgrading the key card access system and security video monitoring equipment of the park.

There is no harm in retaining access restriction in our governing documents and doing so at this time will allow for the eventual use of this sanction without necessitating a revision of the Associations governing documents.

**Recommendation:** B, with upgrading of the Parks card and camera security systems being given a high priority for future funded projects.

### 2. Should “refer to BOD” be included in the Fines and Penalties Schedule where a violation is called out in our schedule?

- A. Yes
- B. No

**Discussion:** This element has been a part of the past Fines and Penalties Schedule but its purpose and utility are not clear. Most consider it a “third” or “subsequent” level of sanction in the event of a continuing violation while others consider it the sanction for at the end of a string of multiple violations but in operation. In practice, a referral to the Board of Directors is an action without consequence since there is no language in the Associations governing documents that spell out authority for the Board to apply an additional and unspecified sanction where the violation is included in the Schedule.

Sanctions are required to be spelled out in the Fines and Penalties Schedule and the Schedule is required to be distributed, by a particular method, to each member in order to be valid. If the Board intends there to be an ongoing and escalating penalty for a particular violation it must be spelled out in the Schedule and supported by the governing documents.

There is no meaningful notice of the Board implied by the inclusion of this language because in this Association, all fines and penalties start with the Board when the member is provided a noticed of a violation and ends with the Board when it is finally imposed. This situation has developed over time and is different than most other associations because this Association does not have a Park Manager and the Tribunal process is no longer active as defined by its governing documents and State law. (See also the discussion of Administrative Incentives, below.)

Enforcement through the application of interest and late fees are not allowed for Fines and Penalties however fines and penalties can be repeatedly levied in the event of continuing or subsequent violations. This is correctly operationalized through methods such as fines and penalties including terms such as “per day until corrected...”, and “Per 30 day period or part thereof until corrected”. This form makes drafting a penalty a letter a matter of standardized administrative process and allows the member to calculate the cost of non-compliance.

Finally, many Associations include the “refer to BOD” language as a check so that Staff make sure the Board is kept aware of an ongoing situation for which it may want to intervene in some manner including questioning Staff about details of the situation, reaching out to the member to gain compliance, or investigate mitigating circumstances in the absence of an appeal before a situation escalates.

**Recommendation:** A (Yes), for the purposes described above excluding an implied or actual higher level of sanction.

**3. Should “refer to BOD” be included where a specific violation is not called out in our schedule?**

- A. Yes
- B. No

**Discussion:** Where a specific violation is not called out in the Schedule of Fines and Penalties the question of additional reasons for sanctions is left unaddressed. The governing documents of the Association (Bylaws in this case) call out a general authority for sanctions for unspecified serious actions against the Association. The Bylaws continue by giving examples of what could be included under the category of “serious”. This leaves the Board with the authority to review an action or possible violation against it and to levy a penalty within the limits included in the Bylaws and State law. To this end, it seems prudent to put members on notice of the potential for other fines and penalties by including a general category in the Schedule for “Other” violations with a requirement that the issue be referred to the Board for it to make a decision on the sanction.

It should be noted that the action of the Board in such “Other” cases may be limited to declaring an event to be a violation, to direct that it be added to the Schedule, to notice the member, and to require the member to comply, but the actual levy of a fine may have to wait for the member to fail to comply or for a second/subsequent violation to take place before a fine may be imposed.

**Recommendation:** A (Yes), with the Bylaws and Rules Committee seeking additional advice from legal counsel. Also see “Catchall” topic in this document for further information.

**4. Can there be a “catchall” category for serious violations not enumerated in the Fines and Penalties Schedule? How must this be documented?**

- A. Yes
- B. No

**Discussion:** Current Bylaws, Section 10.1(a) thru (i), layout such an authority with examples to help define what a “serious” offense may include (see “refer to BOD” discussion, above). It is impossible to anticipate all acts that could, and should, constitute a violation, and therefore a threat, to the

Association and the wellbeing of its members. While this authority and its associated examples make sense, its application presents a somewhat more complicated challenge for the Board. From the discussion above, it may not be possible to levy a fine or sanction in the first instance of such an action but it does provide the basis for issuing a warning and a cease and desist directive from the Board to end an ongoing or subsequent event. While this delayed basis for the levy of a fine might be a point of frustration it should be remembered that the purpose of enforcement is to gain compliance, not collect fines.

**Recommendation:** A (Yes), with the Bylaws and Rules Committee seeking additional advice from legal counsel.

**5. How should continuing administrative incentive for a member to respond to an uncorrected cited violation be maintained?**

- A. Implementation of restriction from community facilities and services until corrected?
- B. Imposing a subsequent fine at the first level is levied for each period, or part thereof, for continued noncompliance?
- C. Imposing a subsequent fine is levied at the second or higher level as specified in the schedule?
- D. Wait until next year and recite the member?

**Discussion:** To understand this topic it is important to clearly separate uncorrected violations from being delinquent in the payment of a fine, fee, or assessment and to know that the rules applied to annual and special assessments are very different from those that apply to fines and penalties. While much is included in State law and our governing documents about setting fines and penalties, the only clearly defined methods to deal with uncorrected violations is restricting a member from access to the Park's community resources, imposing another fine after some reasonable period of time, and collecting the fine.

The Board's intent for including "second" level fines in the current Fines and Penalty Schedule notwithstanding, it is assumed by some that they are intended to be imposed as a method of incenting a member to pay a delinquent fine and for ongoing uncorrected violations. While the second fine may be the second amount levied it is can be applied for the ongoing failure of the member to correct a problem rather than for a "second" event.

Conceptually, where there isn't a second violation event the increased amount reflected in the "second" fine is in fact a punitive measure that is intended to compel action and that makes it tantamount to a fine-upon-a-fine in thinly veiled disguise which is not allowed. If a violation has been determined to be of sufficient import to warrant a particular dollar value, it doesn't necessarily follow that the violation increases in import/value simply with the passage of time. In such a case, the "second" event is really the recalcitrance of the member that doesn't change the established "value" of the offense. The clearest logic, notwithstanding the limits imposed by the law, would see the fine being set at a level that reflects the seriousness of the violation and then repeatedly applying it at the original level on an appropriate set interval until compliance is obtained.

Of the various well established Association's governing documents we have been able to review, this problem is most often addressed by simply re-imposing the original fine for continued noncompliance on a regular schedule by including language such as, "for each additional day/week/month or part thereof" until compliance is obtained and/or until a different follow-on penalty is applied such as "towing at owners expense" after the passage of some period of time/number of repeated fines for a parking violation.

The Association has recently attempted to deal with this issue when considering a member's ongoing failure to comply with the requirement to register their vehicles/trailers with the California Department of Motor Vehicles. In some cases members have failed to register their vehicle and then simply waited until the next year and paid the fine again to avoid ever having to comply with the registration requirement. The current Schedule includes first, second, and third offense fines at \$50, \$100, and

Referred [sic] to BOD respectively. As noted in the discussion of “Refer to Board of Directors” above, the final category is not supported as an actionable penalty and after paying \$150 the situation can persist.

**Recommendation:** A and B with a review of the Schedule for the appropriateness of the fine amount and for appropriate lengths of time for repeat fines for each category included in the Fines and Penalty Schedule.

**6. What is the effect of a second violation of the same type committed after resolution of a first violation?**

- A. It is considered a “new” violation and is fined at the first level specified in the schedule?
- B. It is considered a second violation to be fined at the first level specified in the schedule?
- C. It is considered a second violation to be fined at the second level specified in the Schedule
- D. Other

**Discussion:** Current governing documents are not clear on this point. Much attention has been paid to uncorrected violations and the Fines and Penalty Schedule has been widely interpreted to apply second level fines to continuing failure of a member to comply for an action which is obviously not a second violation. The “Second” level specified, when used for a continuing, unresolved violation is in fact an attempt to force the member to comply.

There have been, and will continue to be, situations where a clearly “second” instance of a violation is committed. In such cases it could be argued that the member has been put on notice with respect the act being a violations and they have been sanctioned for it. There is some perceived sense that the member is absently or purposely continuing to break Association rules and that the penalty for this violation should be set at a higher stating point.

Absent any further guidance or clarification, one may interpret a fire pit violation near the end of the summer to be a second event where the member had a similar violation early in the spring. In this case the fine for the end of summer event could arguably start at the higher, Schedule-listed, “second” amount.

As related in Bylaws Section 10.3, a fine should take into consideration many factors that would make the first and second fire pit violation have an equal starting value and therefor one could argue that the “second” event was simply another “first” event to be fined at the starting or lower rate. This does not address the Board’s legitimate concern for applying increasing incentives for compliance and addressing patterns of behavior.

~~Recommendation: D (Other), Treat the event as a new violation. While an imperfect solution, setting a fine amount to reflect the perceived level of threat to the Association in the first place and then adopting of the practice of repeating the fine on a reasonable interval if not corrected is the most consistent with the Association’s governing documents and the limits set by State law.~~

**Recommendation:** C, treat the event as a second occurrence and start the fine at the second or higher amount, repeating the fine on a reasonable interval if not corrected with the rationalization that once warned a higher base fine is justified. It is important to note that repeating a violation is but one of the factors that are set out as the basis for determining the reasonableness of a specific fine or penalty amount.

After discussion with the Committee members and the Board, the original recommendation was replaced with the alternative one, “C”

**7. What is the effect of a different but categorically related violation during the resolution of the first violation?**

- A. It is considered a new violation subject the first or lowest specified fine level?
- B. It is considered a second violation to be fined at the second specified level in the schedule?
- C. It is a second violation and the fine should start at the second or higher level

**Recommendation:** A, Treat the event as a new violation and avoid disputes based upon “this isn’t the same thing: arguments. While an imperfect solution, setting a fine amount to reflect the perceived level of threat to the Association in the first place and then adopting of the practice of repeating the fine on a reasonable interval if not corrected is the most consistent with the Association’s governing documents and the limits set by State law.

**8. Should citations be included in the Fines and Penalties Schedule?**

- A. Yes
- B.
- C. No

**Discussion:** Reviewing the governing documents of other successful Associations it has been determined that listing the citation for violations in the Fines and Penalties Schedule is a common practice that is intended to inform members, reduce confusion, and reduce the number of issues to be dealt with should a member appeal a decision of the Board.

**Recommendation:** A (Yes) it is customary to do so and this will assist members in understanding the Association rules and reduce questions.

**9. What are the Board’s options for collecting unpaid fines and penalties?**

- A. Implementation of restriction from community facilities and services until corrected?
- B. Refer for collection through Small Claims Court?
- C. Both of the above”

**Recommendation:** C (Both A and B), based upon restrictions on what can, and can’t, be done with unpaid fines and penalties, as differentiated from “Assessments”, restrictions from community resources should be imposed for 30 days at a time with renewal of restrictions for additional periods of 30 days until paid. Unpaid amounts should be referred for collection through Small Claims Court when the amount and length of the delinquency reaches limits set by the Board. Only fines that involve damage to Association property create a lien against a member’s site and membership. This process must be the same for all members, for all types of fines and penalties. This process must be spelled out in a “Fines and Penalty Policy that the Association does not currently have.

**10. What will the Association attempt to recover in the event of uncollected fines and penalties?**

**Discussion:** The Association may be constrained by both State law and the authority of the Small Claims Court. A fine or penalty does not, in almost all cases, create a lien, and interest and penalties on fines and penalties appear to be barred. Our attorney does not believe that Fines and Penalties can’t be subject to penalties and interest when delinquent but his view has not been tested. It is his opinion that money owed the Association may not, “at some interval” be added into an “assessment” on the member with collection of reasonable legal fees, costs of collection, and customary interest added as is the case with delinquent annual assessments. Thus it appears that in the case of delinquent fines and penalties the Association would seek to recover only the amount of said fines and penalties.

**Recommendation:** Collect the amount of accumulated fees when the Board considers the amount sufficient to justify the cost of collection.

**11. What should the process be for collecting unpaid annual/special assessments?**

**Discussion:** The process for collection of these amounts are clearly spelled out by State law and are referenced in our bylaws and need no further explanation or Association specific rules.

**Recommendation:** Comply with most current State laws and legal decisions.