

Understanding the Association's Governing Documents & Tools for Compliance and Enforcement



GOEDE / DEBOEST / CROSS

ATTORNEYS AND PROFESSIONAL COUNSEL





Email: INFO@GADCLAW.COM

Website: WWW.GADCLAW.COM

Phone Number: (239) 331-5100

Understanding the Association's Governing Documents & Tools for Compliance and Enforcement

Presented By:

Lee -Anne Bosch, Esq.



Goede, DeBoest & Cross, PLLC
6609 Willow Park Drive, 2nd Floor
Naples, FL 34109
(239) 331 -5100
info@gadclaw.com
www.gadclaw.com

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- The information in these slides and in this presentation is not legal advice and should not be considered legal advice.
- This presentation represents the personal opinions of the presenters.
- This presentation is offered for informational and educational purposes only.

Understanding the Association's Governing Documents



HEIRARCHY:

1. Declaration of Condominium (Condo) OR Declaration of Covenants/Restrictions (HOA)
2. Articles of Incorporation
3. Bylaws
4. Rules and Regulations & Board Policies & Architectural Guidelines

***What about Florida statutes?**



Applicable Laws

- Chapter 718 – Condominium Act
- Chapter 719 – Cooperative Act
- Chapter 720 – Homeowners' Association Act
- Chapter 617 – Not for Profit Corporations Act
- Administrative Code – Administrative Rules and Regulations of the State

Understanding the Association's Governing Documents



1. DECLARATION of Condominium or Covenants/Restrictions

- Controlling
- “Clothed with a strong presumption of validity”
- Establishes the rules, restrictions, and obligations binding properties in the community
- Governs maintenance
- Governs enforcement
- “Runs with the land” – attached to the property

Understanding the Association's Governing Documents



2. ARTICLES OF INCORPORATION

- Legally creates the not for profit entity that operates the community
- Defines the corporate structure
 - ☐ Name
 - ☐ Principal office
 - ☐ Initial Board of Directors
- Provides legal authority to enter into contracts, sue & be sued, own property, and enforce rules and regulations
- Establishes voting and membership rules

Understanding the Association's Governing Documents



3. BYLAWS

- Describe the roles, powers, and duties of the Board, Officers, and Committees
- Govern Meetings and Voting Procedures
 - ☐ How meetings are called and conducted
 - ☐ Notice procedures
 - ☐ Quorum requirements
 - ☐ Proxy rules
 - ☐ Voting rights
- Authorize rulemaking and enforcement

Understanding the Association's Governing Documents



4. RULES AND REGULATIONS

- Adopted by Board pursuant to rulemaking authority granted by the governing documents
- Supplement the broader provisions of the other governing documents
- Flexibility
- How to adopt enforceable Rules and Regulations
 - A. There must be authority to adopt rules
 - B. Rules must be “reasonable” – rationally related to a legitimate objective of the Association and not arbitrary or capricious
 - C. Rules must not conflict with the other governing documents
 - D. Rules must be clear and consistently enforced

Amending the Association's Governing Documents



Declaration, Articles, and Bylaws

- Amended in accordance with the procedures detailed therein.
- Generally requires a vote of the owners
- Piecemeal amendments vs. full restatement
- Recorded in Public Records

Amending the Association's Governing Documents



Rules and Regulations

- Amended by a majority vote at a Board Meeting where a quorum is present
- 48 Hours Posted Notice Required
 - **Exception**: 14 days mailed and posted if amending Rules regarding “parcel/unit use”

Enforcing the Association's Governing Documents

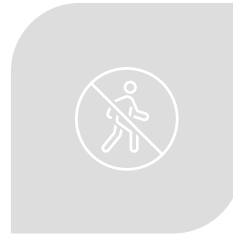
Recommended First Steps for Enforcement

- Consider establishing a Compliance Policy
- Friendly Reminder/Warning/Violation Letter(s)

Enforcing the Association's Governing Documents



FINES



SUSPENSIONS



SELF HELP
(CURATIVE
MAINTENANCE)



CODE
ENFORCEMENT &
OTHER AGENCIES



ARBITRATION /
COURT



MEDIATION /
COURT

SUSPENSIONS

What can be Suspended?

❖ Voting Rights

- Only for delinquency 

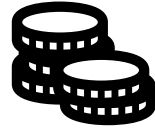
❖ Amenity Use Rights

- Delinquency
- Violations  + 

SUSPENSIONS

Voting Rights

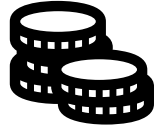
(Delinquency)



- **HOA** - An association may suspend the voting rights of an owner for the nonpayment of any fee, fine, or other monetary obligation due to the association that is more than 90 days delinquent.
- **CONDO** - An association may suspend the voting rights of a unit owner due to nonpayment of any fee, fine, or other monetary obligation due to the association which is more than \$1,000 and more than 90 days delinquent.
 - Proof of obligation must be provided to the unit owner 30 days before the suspension takes effect.
 - At least 90 days before an election, an association must notify a unit owner that voting rights may be suspended due to a nonpayment of a fee or other monetary obligation.
- No hearing required

SUSPENSIONS

Voting Rights (Delinquency)

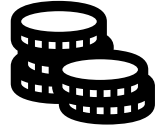


STEPS

1. Proof to Owner – 30 Days Before Suspension Takes Effect (**CONDO** only)
 2. Board Meeting – Vote to Approve Suspension
 3. Notify Owner – by mail or hand delivery
- **Suspension ends upon full payment of all obligations**

SUSPENSIONS

Voting Rights (Delinquency)



A voting interest which has been suspended shall be subtracted from the total number of voting interests in the association, which shall be reduced by the number of suspended voting interests when calculating the total percentage or number of all voting interests available to take or approve any action.

The suspended voting interests shall not be considered for any purpose, including, but not limited to, the percentage or number of voting interests necessary to constitute a quorum, the percentage or number of voting interests required to conduct an election, or the percentage or number of voting interests required to approve an action under this chapter or pursuant to the declaration, articles of incorporation, or bylaws.

SUSPENSIONS

Amenities

(Delinquency)



- ❖ **Delinquency**: If a unit owner is more than 90 days delinquent in paying a fee, fine, or other monetary obligation due to the association, the association may suspend the right of the unit owner or the unit's occupant, licensee, or invitee to use common elements/areas, facilities, or any other association property **until** the fee, fine, or other monetary obligation is paid in full.



CONDO

Suspension does not apply to limited common elements intended to be used only by that unit, common elements needed to access the unit, utility services provided to the unit, parking spaces, or elevators.



HOA

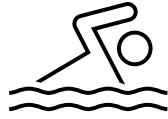
Does not apply to that portion of common areas used to provide access or utility services to the parcel. May not prohibit an owner or tenant of a parcel from having vehicular and pedestrian ingress to and egress from the parcel, including, but not limited to, the right to park.

No hearing required.

SUSPENSIONS

Amenities

(Rule Violations)



- ❖ **Violations:** An association may suspend, for a reasonable period of time, the right of an owner, or an owner's tenant, guest, or invitee, to use the common elements/areas, common facilities, or any other association property for failure to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association.



CONDO

Suspension does not apply to limited common elements intended to be used only by that unit, common elements needed to access the unit, utility services provided to the unit, parking spaces, or elevators.

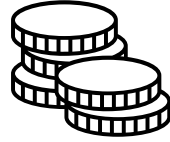


HOA

Does not apply to that portion of common areas used to provide access or utility services to the parcel. May not prohibit an owner or tenant of a parcel from having vehicular and pedestrian ingress to and egress from the parcel, including, but not limited to, the right to park.

***Hearing required – 14 Days' Notice**

FINING



WHO CAN BE FINED?

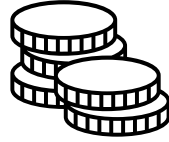
CONDO

Section 718.303(3) - the owner of the unit or its occupant, licensee, or invitee for failure to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association.

HOA

Section 720.305(2) - any member or any member's tenant, guest, or invitee for the failure of the owner of the parcel or its occupant, licensee, or invitee to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association.

FINING



CONDO (Chapter 718)

- Fines not to exceed \$100 per violation, per day or \$1,000 in aggregate for a continuing violation

Continuing in nature?

- Fine may not result in a lien
- Hearing Required – Due Process

HOA (Chapter 720)

- Fines not to exceed \$100 per violation or \$1,000 in aggregate “unless otherwise provided in the governing documents”

Continuing in nature?

- Fines of \$1,000 or more can result in a lien
- Hearing Required – Due Process

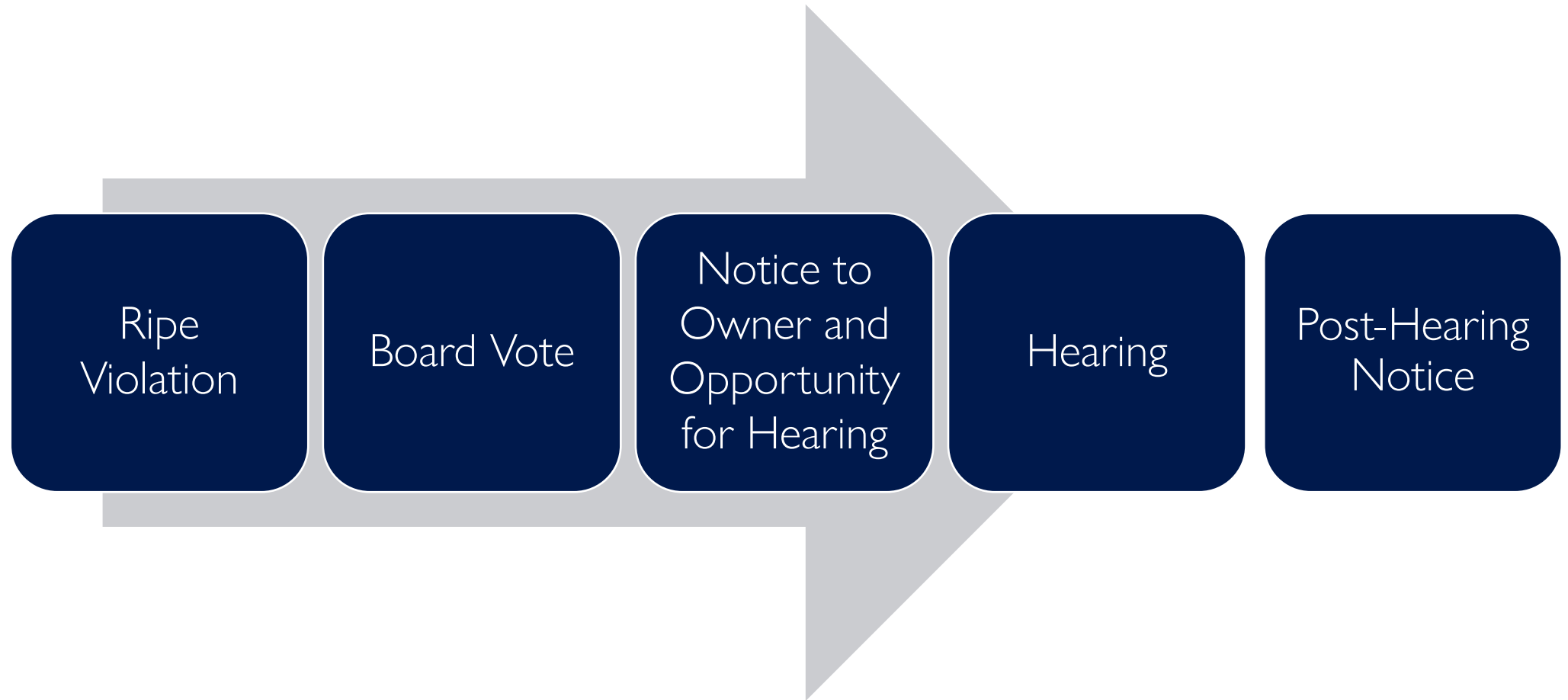
What is Due Process?

Due Process is fair treatment accordingly to established rules and principles.

- In fining/suspension context:
 - a) Open Board meeting
 - b) Providing Notice to Owner
 - c) Hearing before panel of impartial owners (Committee)

Failure to Provide Due Process Will Cause Fines to Fail

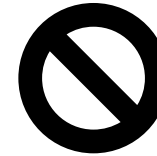
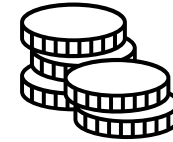
Hearing Procedure



APPOINTMENT OF THE COMMITTEE

- The Committee members are appointed by the Board of Directors.
- Sections 718.303 and 720.305, Florida Statutes, provide that the Committee must be made up of other owners who are **neither** board members nor persons residing in a board member's household. The Committee must be composed of at least three (3) members appointed by the Board, who are not officers, directors, or employees of the Association or the spouse, parent, child, brother or sister of an officer, director, or employee.
 - **Goal: Impartial Committee**
- If the Committee does not approve the proposed fine or suspension by majority vote, then the fine or suspension may not be imposed. Therefore, the Board can and should choose the members carefully and pick people that generally support enforcement of violations.
- **Practice Tip: Appoint more than three (3) Committee members to allow for substitutions when one Committee member is unavailable.**

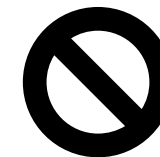
FINING + Suspensions



Special Rules - HOA (Chapter 720)

- Within **7 days after the hearing**, the committee shall provide written notice of the committee's findings related to the violation, including any applicable fines or suspensions that the committee approved or rejected, and how the owner may cure the violation or fulfill a suspension, or the date by which a fine must be paid.
- If a violation has been cured before the hearing or in the manner specified in the hearing notice or committee findings notice, a fine or suspension may not be imposed.
- If a violation is not cured and the fine or suspension is approved by the committee by a majority vote, the committee must set a date by which the fine must be paid, which date must be at least 30 days after delivery of the committee findings notice.

FINING + Suspensions



Special Rules - HOA (Chapter 720)

An HOA may not levy a fine or impose a suspension for any of the following:

- a) Leaving garbage receptacles at the curb or end of the driveway within 24 hours before or after the designated garbage collection day or time.
- b) Leaving holiday decorations or lights up longer than indicated in the governing documents, unless such decorations or lights are left up for longer than 1 week after the association provides written notice of the violation to the parcel owner.

Commonly Asked Questions

QUESTION 1

Can the owner who appears before the Committee bring a witness or their attorney to the hearing?

Yes. An owner's attorney should be allowed to attend the hearing on the owner's behalf.

The Association can require advance notice of an owner bringing their attorney so that the Association also has the option to invite its attorney.

Commonly Asked Questions

QUESTIONS 2 & 3

Must the Association provide the owner with the right to speak at the hearing?

YES. The owner should be allowed to present the arguments why they do not believe the fine or suspension should be imposed. The owner does not control the meeting, but has the right to speak for a reasonable period of time. An owner's witnesses should also be afforded a reasonable time to address the committee.

Is it the Committee's role to defend or justify the Board's decision to levy a fine or suspension?

No, the Fining Committee does not have to justify or defend the Board's actions. The only role of the committee is to listen to the evidence presented by both sides and determine if the fine or suspension should be upheld or rejected.

Commonly Asked Questions

QUESTIONS 4 & 5

May the Committee ask questions?

Yes, the committee members may ask questions to get a better understanding of the facts.

Does the Committee need to deliberate, decide, and advise the owner of its decision at the hearing or can the Association notify the owner after the hearing?

It depends on how the Association's governing documents address committee meetings.

If the committee hearing is required to be open, then any deliberations must be open, whether at the original hearing or an adjourned meeting on a later date.

**What if fining, suspension, and
other remedies don't work?**

DISPUTE RESOLUTION

Pre-Suit Requirements

Certain disputes are required to go to arbitration
or mediation (condo) or mediation (HOA)
before they go to Court

WHAT IS A “DISPUTE” FOR CONDOMINIUMS and CO-OPS?

718.1255(1) – A dispute is any disagreement between two or more parties that involves:
The authority of the Board under Chapter 718 or the Association documents to:

Require any owner to take any action, or not take any action,
involving that owner’s unit or the appurtenances thereto

Alter or add to a common area or common element

719.1255 F.S. says look at 718.1255 F.S.

WHAT IS A “DISPUTE” FOR CONDOMINIUMS and CO-OPS?

718.1255(1) – A dispute is also any disagreement between two or more parties that involves the failure or a governing body, when required by Chapter 718 or an association document, to:

1

Properly conduct Elections

2

Give adequate NOTICE of meetings or other actions

3

Properly conduct meetings

4

Allow inspection of books and records

WHAT IS NOT A “DISPUTE” FOR CONDOMINIUMS & CO-OPS??

718.1255(1) – The following disagreements are NOT disputes pursuant to Chapter 718 if they primarily involve:

- 1 Title to any unit or common element
- 2 Interpretation or enforcement of any Warranty
- 3 The levy of a Fee or Assessment
- 4 The collection of assessment levied against a party
- 5 The eviction or other removal of a tenant from a unit
- 6 Alleged breaches of fiduciary duty by one or more Directors
- 7 Claims for damages to a unit based upon alleged failure of the association to maintain the common elements or condominium property

CONDO - If the disagreement **IS** a dispute,

Before Litigation:

1. Non-Binding Arbitration
OR
2. Pre-Suit Mediation

Exception: Election and Recall Disputes are not eligible for mediation and must go through arbitration or litigation.

Speak to your legal counsel regarding these options in order to determine which best accomplishes the Association's goals.

If the disagreement **IS NOT** a dispute,
the aggrieved party may immediately pursue legal
action in state court.

Arbitration decisions are available online at:
www.myfloridalicense.com/dbpr/lsc/

“DISPUTES” in HOAs – 720.311

The “aggrieved party” must make written offer of pre-suit mediation if the dispute involves:

- 1 Use of, or changes to, parcel or common areas
- 2 Covenant enforcement disputes
- 3 Amendments to association documents
- 4 Meetings of the board and committees
- 5 Membership meetings *(not including election meetings)*
- 6 Access to official records.

REQUIREMENTS FOR PRESUIT MEDIATION DEMAND SET FORTH IN 720.311(2)

Recipient has 20 days to respond and
agree to mediator

If NO response, implied refusal to mediate and
aggrieved party may immediately file in state or
federal court and attorneys' fees and costs are
not recoverable by refusing party if successful

What is the biggest driver of disputes today?

Emotional Governance and the Association's Owner Relations

- Be consistent in enforcement
- Document everything
- Avoid informal legal responses to owners
- It is better to involve Association counsel early (not after escalation)
- Ensure the governing documents are up to date

Q & A





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