

Fines, Late Fees and Limits on Co-op and Condo Board Authority

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Condominiums and cooperatives are, in the words of the New York Court of Appeals, “quasi-government[s]...little democratic sub societ[ies] of necessity.” *Levandusky v. One Fifth Ave. Apartment*, 75 N.Y.2d 530, 536 (1990). Just as governments need to deter misconduct and punish rule-breaking, co-ops and condos rely on fines and late fees to keep their houses in order.

Fines and late fees may be important—even essential—tools of co-op and condo self-governance, but there are limits which must be respected. This article explores three potential limits on the use of fines and late fees by co-op and condo boards. First, the authorization to issue fines and late fees should be expressly grounded in the co-op or condominium governing documents. Second, the rule that the board is

seeking to enforce must itself be a valid and enforceable rule. Third, the fines or late fees issued by the board must not be unconscionably large or otherwise against public policy.

Whether Governing Documents Permit Fines or Late Fees

The first step in analyzing whether a fine or late fee is within a co-op or condo’s authority is to look at the relevant governing documents—generally the proprietary lease for co-ops, and the by-laws for condominiums.

While co-op and condo boards function similarly in many ways, fines are treated very differently. In condominiums, because the board does not own (and only has limited control over) the apartment units themselves, they do not have the power, as co-op boards do, to evict a misbehaving owner from the building.

Thus, fines, to the extent they are able to be imposed, take



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on an outsized importance for condo boards and, leaving aside an injunction granted under RPL §339-j, are probably the most potent tool in the board’s arsenal to compel obedience with building rules. Condos literally cannot afford to do without the ability to issue fines, and almost every set of condo by-laws will grant condo boards express authority to issue fines and late fees.

In contrast, cooperatives will sometimes have the authority to issue fines and late fees written into the proprietary

lease, but not necessarily. Perhaps because co-ops can deal with misbehaving shareholders by issuing a notice to cure or objectionable conduct letter (thereby putting the shareholder's interest in the apartment at risk), co-op boards generally rely on fines less than condo boards do.

That is not to say that co-op boards never issue fines or late fees. Indeed, co-op boards sometimes take the position that because they have authority to set cash requirements and issue house rules (which are incorporated by reference into the proprietary lease), they have the inherent authority to levy fines in the event that shareholders break the rules.

That position is not entirely without support in the case law. For example, in *Sweetman v. Board of Managers of Plymouth Village*, the Supreme Court, Appellate Term, held that a condominium could issue fines for violation of the condominium's leasing policies even without express authorization to do so: "While the better practice would be to expressly enumerate this power in the By-Laws, nonetheless such power may be implied under...the By-Laws..." 1998 WL 1112655 (Sup. Ct. App. Term 1998) (citation omitted).

A more typical scenario, however, is exemplified in *North Broadway Estates v. Schmoldt*, where the board unilaterally adopted a house rule giving itself the power to issue late fees for delinquent maintenance payments rather than trying to amend the proprietary lease (which required supermajority approval of the shareholders).

The court found that without a "specific provision" in the proprietary lease granting the power to issue late fees, the board "exceeded its authority in attempting to change the type of penalty by the procedure of adopting a house rule rather than amending the proprietary lease," and thus invalidated the late fee. See 147 Misc. 2d 1098, 1101-2 (N.Y. City Ct. 1990).

Whether the Rule the Board Is Trying to Enforce Is Itself Unenforceable

Co-op and condo boards are often accused of micromanaging and overreaching by enacting house rules that go beyond the four corners of the governing documents. Occasionally, when boards seek to punish rule-breaking with fines or late fees, the aggrieved shareholders or unit owners will argue that the board never had the authority to enact the (broken) rule in the first place.

For example, in the case of *Yusin v. Saddle Lakes Home Owners*

Association, the board passed a rule, enforced by a \$50 fine, prohibiting owners from walking their pets in the grassy areas of the common areas, but the court struck down the rule because the by-laws expressly permitted homeowners to walk their pets throughout the common areas. See 902 N.Y.S.2d 139 (2d Dep't 2010). No fines were collected from the rebellious dogwalkers.

A colorful variant of this sort of challenge was described in *Lee v. Parkview Estates Condominium*, in which a unit owner challenged a rule prohibiting her from feeding stray cats in the common areas of the condominium by arguing that the rule contradicted an obscure provision of the Agriculture and Markets Law that purportedly made it a criminal offense to "deprive any animal of necessary sustenance, food or drink." See 49 Misc. 3d 1213(A) (Sup. Ct. Richmond Cnty. 2015). In an opinion filled with amused literary and pop cultural references, the court ultimately upheld the board's rule, though as a consolation, reduced the amount of fines owed by the unit owner.

A weightier rules dispute was recently decided in *Mangold v. Board of Managers of Meadow Court Condominium*, Index No. 451463/2021 (Sup. Ct. N.Y. Co. April 29, 2024), in which the court invalidated a condo

board's master plan to upgrade and replace all of the 100-year-old building's windows, because in this situation the declaration and by-laws made clear that the unit owners, not the board, owned those windows. Once the replacement plan was struck down, the fines for noncompliance with the plan went as well.

Whether Fines or Late Fees Are an Unenforceable Penalty

Finally, boards cannot charge fines or late fees that are inconsistent with public policy. This inquiry plays out differently depending on whether the assessment is a fine or a late fee. Although fines and late fees each can be described as "charges levied by the board for nonperformance of a contractual obligation," the difference is that broken monetary obligations (e.g., failure to pay common charges on time) result in late fees, and broken non-monetary obligations (e.g., failure to comply with the building's guest policy) result in fines.

In the case of fines, it is difficult to determine whether a fine is so large and unreasonable as to "shock the conscience," but caselaw gives some guidance as to what some courts will

consider too much. In *Gabriel v. Board of Managers of Gallery House Condominium*, for example, the Appellate Division, First Department, held that fines of \$500 per day for violations of the building's guest policy were so "hefty" as to be "confiscatory in nature." 130 A.D.3d 482 (1st Dep't 2015).

In *Board of Managers of the Westbury Terrace Condominium v. Roberts*, the court noted that late fees of \$100 per month, plus 9% interest and attorneys' fees, "seem[ed] excessive," and directed that further hearings take place to determine whether the board would be entitled to them.

In the case of late fees, there are at least potential bright lines to avoid. One is the 25% per annum interest rate for criminal usury. Although late fees are not interest rates on loans, courts have consistently referenced the criminal usury statute by analogy to invalidate late fee provisions that exceed 25% per annum. See, e.g., *ESRT 501 Seventh Avenue v. Regine*, 206 A.D.3d 448 (1st Dep't 2022) (invalidating 5% per month late charge); *Board of Managers of Park Avenue Court Condominium v. Sandler*, 20 N.Y.S.3d 291 (Sup. Ct. N.Y. Cnty

2015) (monthly late charges of up to \$800 on monthly common charges of less than \$1,300 were unenforceable).

It should also be noted that co-ops are subject to further restrictions under the amended Housing Stability and Tenant Protection Act (HSTPA), which prohibits late fees greater than 8% of the co-op's monthly maintenance charge. See N.Y. Real Property Law §238-a.

Conclusion

Because board members have a mandate to govern, fines and late fees will always be attractive options, but co-op and condo boards must avoid the temptation to overreach. Boards must first analyze their governing documents to determine if, and to what extent, fines and late fees are permitted. Boards must also be careful not to exceed the scope of their authority by issuing fines for violations of rules that are themselves unenforceable. Finally, boards must avoid implementing fines and late fees that could be found to be so excessive as to constitute an unenforceable penalty.

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