

## **Fines and Enforcement: What does “opportunity to be heard” mean?**

“Opportunity to be heard,” as it applies to Washington Community Associations<sup>1 2</sup> means a meaningful right to a hearing in front of an objective Board or hearing panel where the owner can present evidence to support her position and confront evidence against her position. Before an Association may take any action against an owner’s interest,<sup>3</sup> the Board must give the owner the option to request some kind of hearing (the Board must provide the owner with notice<sup>4</sup> that the owner has the option to request a hearing).

This phrase is most often used for enforcement actions. Before an Association can deprive an owner of a property right or assess fines against them, the Association must satisfy due process.<sup>5</sup> There are two aspects of due process that Associations must satisfy: procedural due process<sup>6</sup> and substantive due process.<sup>7 8</sup>

The Washington Court of Appeals has held that a meaningful opportunity to be heard includes giving an owner an opportunity to present objections to a competent tribunal before the Association can take an action that adversely affects the owner’s property rights.<sup>9</sup> Other states have also clarified what “opportunity to be heard” means. The Minnesota Court of Appeals held “opportunity to be heard” is determined by an Association’s governing documents.<sup>10 11</sup> The Connecticut Court of Appeals held “opportunity to be heard” means providing a hearing, either formal or informal (as provided in the Association’s governing documents), that is fair.<sup>12</sup>

It is important to remember that an “opportunity to be heard” does not necessarily require an Association to give an owner a hearing before the Association takes an action. “Opportunity to be heard” merely requires an Association to notify an owner that the owner

has the option to request a hearing before the Association can take an action that deprives the owner of a property right. A hearing is necessary only if the owner, upon receipt of timely notice, requests one.<sup>13</sup>

“Opportunity to be heard” may be satisfied even if the owner fails to appear at the hearing. There are no Washington cases that address this specific issue, and the issue has not been addressed by other states. However, other states have addressed whether due process is satisfied if a party fails to appear at the hearing. The Indiana Court of Appeals has held that when a party does not attend a hearing, due process is satisfied if the party had notice of when and where the hearing was to be held and the party did not have good cause for missing the hearing.<sup>14</sup>

An Association will probably satisfy the “opportunity to be heard” requirement if, before it takes an action that could be considered a deprivation of a property right, the Association provides the owner with an option to request a hearing, complies with the hearing procedures in its own governing documents, and the hearing is reasonable. This determination is fact specific.

Washington courts will probably find that an owner had an “opportunity to be heard” where no hearing is held if the Association offered the option for a hearing, but the owner failed to request a hearing. Similarly, Washington courts will probably find that an owner had an “opportunity to be heard” where the owner is not present at the hearing if the owner had notice of when and where the hearing was to be held, and did not have a good reason for missing the hearing.

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<sup>1</sup> RCW 64.34.304(k) (Unit owners' Association — Powers) provides:

. . . [An Association may] . . . , after notice and an opportunity to be heard by the Board of directors or [a representative of the Board of directors,] . . . levy reasonable fines in accordance with

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a previously established schedule adopted by the Board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the Association . . .

<sup>2</sup> RCW 64.38.020(11) (Association powers) provides:

. . . [An Association may] . . . , after notice and an opportunity to be heard by the Board of directors or [a representative of the Board of directors,] . . . levy reasonable fines in accordance with a previously established schedule adopted by the Board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the Association . . .

<sup>3</sup> Examples of deprivations of a property right include levying fines, and limiting or restricting use of the property.

<sup>4</sup> See chapter entitled: "Notice: What does 'notice' mean?"

<sup>5</sup> *Evans v. Newton*, 382 U.S. 296 (1966) (private groups or individuals that are granted power(s) and functions by the state which are governmental in nature, are agencies or instrumentalities of the state and subject to constitutional limitations including due process).

<sup>6</sup> Procedural due process requires that the tribunal or committee making a determination on a matter must be competent to pass judgment on the matter. Owners have a right to be present before the committee or tribunal making the determination on the matter. Owners have a right to give testimony on the matter. Owners have a right to controvert, by proof, every material fact which bears on the matter.

<sup>7</sup> Substantive due process requires that a rule must not be arbitrary, capricious, or unreasonable, and the tribunal or committee making the determination on the matter must use adequate inquiry and use of objective information, and which bears a reasonable and substantial relationship to the matter. See, *Riss v. Angel*, 131 Wn.2d 612 (1997).

<sup>8</sup> Washington courts have not expressly ruled that substantive due process and procedural due process are applicable to the enforcement of an Association's rules, but other states have. See, e.g., *Majestic View Condo. Ass'n v. Bolotin*, 429 So. 2d 438, 438 (Fla. Dist. Ct. App. 1983) (the Association satisfied the requirements for enforcement of restrictive covenants because the homeowner was on notice of the regulation, received notice from the Association of the violation, and the homeowner had a reasonable opportunity to be heard).

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<sup>9</sup> *Fairwood Greens Homeowners Asso. v. Young*, 26 Wn. App. 758 (Wash. Ct. App. 1980) (a homeowner was allowed to park a motor home on the property despite a restrictive covenant that prohibited motor homes because an earlier covenant did not restrict parking a motor home on the lot, and the homeowners bought the motor home in reliance on the covenants in place when they bought their lot).

<sup>10</sup> *Southview Greens Condominium Asso. v. Finley*, 413 N.W.2d 554 (Minn. Ct. App. 1987) (a condo Association's assessments on an owner were invalid because the Association did not provide the owner with the requisite opportunity to be heard, as required by its bylaws, before levying the assessments).

<sup>11</sup> Minnesota case law does not control in Washington, but it may be persuasive to Washington courts.

<sup>12</sup> *Congress Street Condominium Association Inc. v. Anderson*, 156 Conn. App. 117 (2015) (The requirement for a hearing is not a mere formality, and the unit owner hearing must occur before fines can be imposed. "Due process of law requires not only that there be due notice of the hearing but that at the hearing the parties involved have a right to produce relevant evidence, and an opportunity to know the facts on which the [Association] is asked to act, to cross-examine witnesses and to offer rebuttal evidence.").

<sup>13</sup> There are no Washington cases that have ruled on this specific issue, but courts in other states have concluded "opportunity to be heard" only requires providing the option to request a hearing. See, *Thorndale Beach N. Condo. Ass'n v. Berar*, 2014 IL App (1st) 123587-U (2014) (the court affirmed fines levied by an Association on an owner because the Association notified the owner about the violations (and fines) and gave the owner an opportunity to be heard, but the owner did not request a hearing).

<sup>14</sup> *S.S. v. Review Bd. of the Ind. Dep't of Workforce Dev.*, 941 N.E.2d 550 (Ind. Ct. App. 2011) (Party who missed a hearing for a dispute of unemployment benefits was not deprived due process because she had notice of when and where the hearing was to be held, and she did not have a good cause reason for missing the hearing).