



# FRANSCHÉ HOEK

AGRICULTURAL ESTATE

## Fransche Hoek Estate

### Penalty Guidelines

#### 1.0 Introduction

In making rules and regulations which include the raising of fines when rules are infringed the Board relies on inter alia the following:

#### 1.1 In terms of the articles of association

a. Clause 6 headed **OBJECTS**

*i. Article 6.1 reads as follows:*

*“It shall be a principal object of the company to ensure the smooth and efficient running of FHAE on behalf of its members so that they may benefit from the quiet enjoyment of a well run, high class, low density, and private residential estate in attractive and secure well-maintained agricultural surroundings.”*

*ii. Article 6.2 reads as follows:*

*“Without detracting from the aforestated principal object, the company shall have as it objects:*

*6.2.11 to set out and enforce conduct rules for the members and for visitors to FHAE.*

b. Clause 15 headed **FUNCTION, POWERS AND DUTIES OF DIRECTORS**

*i. Article 15.6 reads as follows:*

*The board may make regulations and rules not inconsistent with these articles or any regulations or rules prescribed by the members in general meeting:*

*15.6.1 for the resolution of disputes generally.*

***15.6.2 for the furtherance or promotion of any of the Objects of the company.***

*15.6.3 for the management of the affairs of the company.*

***15.6.4 for the advancement of the interests of members.***

*15.6.5 for the conduct of meetings of the board and meetings of the members.*

## 1.2 In terms of the rules of the Estate

### a. Rule 2 headed **INTRODUCTION**

ii. Rule 2.4 reads as follows:

*“The Board also has the right to impose financial penalties (fines) to be paid by those members who fail to comply with the Rules. Fines, where imposed, shall be deemed to be a part of the levy due by the Owner. Further, the Board may enforce provisions of any rule by application to the courts.”*

### b. Clause 24 headed Fines and Penalties

*“24.1 The Association shall investigate (in such manner as it deems fit) written complaints received from residents relating to the behaviour and/or conduct of other residents and persons on or about the Estate and shall take such steps with regard thereto as it may deem fit. The Association shall be entitled on its own initiative to investigate the conduct of any person or persons and to take such action as it may deem fit, whether or not complaints are received.”*

*“24.2 If any person contravenes or fails to comply with any of the provisions of these rules or any conditions imposed by the Board or given by the Association in terms of these rules, the directors shall be entitled (without limiting any other rights afforded to them in terms of these rules) to impose such fines as may be approved by the Association from time to time on the person concerned. If the person concerned is a family member, guest, tenant or other invitee of a member, that owner will be liable for payment of such fine. Any fine imposed on an owner and/or his family members, tenant, guest or other invitee may be added to the owner’s levy and shall be deemed to be a debt due and payable by the owner concerned to the Association forthwith on demand.”*

## 1.3 In terms of the Builders Code of Conduct

### a. The preamble includes

*“Strict adherence to all aspects of the rules is required and expected at all times and in all respects, and penalties may be imposed by the Estate in the event of non-compliance.”*

### b. Clause 20 headed **BREACHES**

*“In the event of any breach not specifically stated in the Building Contractors Code of Conduct the Contractor or owner/employer may be subject to a fine as determined by the HOA but no less than R1 000 per offence committed or such other sanction as the HOA sees fit to impose. Such other sanctions may*

*include, but shall not be limited, to building stop orders. Any such action will be at the sole and absolute discretion of the HOA.*

*The HOA will appoint a representative who will make unannounced site visits at any time to inspect the site and the operations. He will be empowered to issue non conformance notices in respect of this code of conduct as well as the Estate rules and architectural guidelines. He may also issue directives to correct deviations and non conformances and may if required issue “stop work” notices. All deviations and non conformances will be reported to the Board or its responsible sub-committee who may levy fines and take other corrective actions as such board or committee in its sole opinion may deem necessary.”*

The above establishes the legality for the Board to make rules which include fines aimed at assisting the Board to enforce those rules

## 2.0 Guidelines

The following guidelines should apply in setting fines;

- a. Wherever possible the infringer must first be notified of the infringement and provided with an opportunity to correct behaviour etc which gave rise to the infringement unless the Board deems it so serious that a penalty is to be imposed immediately.
- b. Where a rule or code includes the value of the fine for infringement that value should be used.
- c. All other penalties should have two components to it:
  - i. The first component will be a penalty for infringing. (**Infringement Penalty**)
  - ii. The second component will be applicable where the infringement is capable of being corrected in which case it should be applied if the infringer after due notice fails to correct the infringement for example continues with unacceptable behaviour, fails to make good within a specified time etc. (**Infringement Correction Penalty**)
- d. Infringement Penalties should be based on the following considerations
  - i. Where a specific benefit was derived by the infringer for infringing the value of that benefit should be estimated by the Board or obtained by other means and the fine should be that value plus 30% of such value as administration fee to compensate the estate for time and effort and administration.
  - ii. Where damage has occurred to property of the estate or to another member's property the value of such damage should be established by the Board and the fine should be based on such value plus 30% administration fee.

- iii. Where an infringement has merely caused a nuisance to other members such as noise, nuisance etc the value should be 30% of the monthly levy for each and every occurrence. The 30% admin fee must also be applied and for every reoccurrence the penalty must be increased by 15%.
  - iv. Where an infringement has health and safety implications the Board must decide a penalty which is severe enough in its view to ensure immediate correction. The 30% admin fee must also be applied.
  - v. Where an infringement has no immediate nuisance value or causes no threat to life or limb or property no infringement penalty will be imposed but Infringement correction penalty may be imposed (see below).
  - vi. In all other instances the Board reserves the right to on an ad hoc basis in its sole discretion to determine Infringement penalties based on criteria it judges applicable
- e. Infringement Correction penalties should be based on the following considerations
- i. Where a benefit is being derived by the infringer the value of the benefit, if time based must be estimated by the Board and applied on a weekly basis or part of a week once the correction has not occurred in the period specified by the Board for correction backdated to the date of the infringement. The 30% admin fee must also be applied.
  - ii. Where the benefit is a once of benefit but is capable of being corrected a penalty of 50% of the value estimated by the Board of the cost of correction must be applied per week or part of a week once the correction has not occurred in the period specified by the Board backdated to the date of the infringement. The 30% admin fee must also be applied.
  - iii. Where damage has occurred to estate property or to other member's property a penalty of 50% of the value of the correction of such damage estimated by the Board must be applied per week or part of a week once the correction has not occurred in the period specified by the Board backdated to the date of the infringement. The 30% admin fee must also be applied.
  - iv. Where an infringement has no immediate impact the value of correction must be estimated by the Board and a penalty based on the Board's sole judgement must be applied. In coming to a decision the penalty must be severe enough to ensure that the infringer will be motivated to correct the infringement. Such penalty may be applied after giving reasonable time for correction and then backdated to the date of the infringement.
  - v. In all other instances the Board reserves the right to on an ad hoc basis in its sole discretion to determine Infringement Correction penalties based on criteria it judges applicable
- f. In considering all of the above mentioned factors the board may take into consideration mitigating circumstances.

The above obviously does not cover each and every possible situation and the Board reserves the right to adjust and to make rules etc as necessity dictates including deciding on ad hoc fines.

### **3.0 Appeals**

Should a member feel aggrieved following a finding of a violation and the imposition of a fine or other sanction the member may as an alternative to the prescribed dispute resolution process lodge an appeal with the manager instead (See clause 25.2 of the rules). There are two types of appeals which can be raised. The appeal can either be against the finding which gave rise to the decision that a member infringed and the resultant penalty/fine which was imposed or the appeal can be against the severity of the fine/penalty which was implemented.

#### **3.1 Objection to the Finding**

- a. In order to succeed the member must provide either new evidence which, had it been considered by the board would have led to a different finding or in fact a no infringement finding.
- b. Alternatively, the member must provide a motivation based on the facts presented to the board which make it clear that the board had misdirected itself or had interpreted the evidence incorrectly.
- c. The board is obliged to consider such new evidence or motivation and if it agrees with the member must withdraw the finding and exonerate the member or alter its finding in accordance with such new evidence presented.

#### **3.2 Objection against severity of Fine/Penalty**

- d. In this case the member should provide mitigating circumstances which may not have been considered by the board in setting the quantum of the original fine/penalty.
- e. Alternatively, the member must provide evidence indicating that the board had either exceeded its authority or had misdirected itself in setting the penalty/fine to high or in fact in imposing a penalty/fine at all.
- f. The board is obliged to consider such representations and must, having applied its mind either:
  - i. Maintain the original imposed penalty/fine
  - ii. Maintain the original finding against the member but reduce the fine/penalty to take cognisance of the representations received but may include conditions applicable to such reduction, it, in its sole judgement considers appropriate in the light of the representations received.
  - iii. Maintain the original finding against the member but suspend the penalty/fine in its entirety on conditions it in its sole judgement considers appropriate in the light of the representations received.

### 3.3 Special Circumstances - Guidelines

A member may also appeal on the basis that his infringement and fine must be set aside on the following grounds:

- a. A member may present evidence indicating that conditions existed and applied to the member at the time of the infringement that should be considered in terms of compassion

or

- b. A member may present evidence indicating that a Force Majeure situation prevailed at the time of the infringement which prevented him or her from complying with the rules

or

- c. A member may present evidence or argument that indicates that a board decision/s or board action/s placed him or her in a discriminatory or unfair position relative to some or all other members who but for the board decision would have resulted in them infringing also or who in terms of such decision received better terms or relaxed conditions under which to comply or was excused from complying.