COMMUNITY COUNSEL

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DOES YOUR ASSOCIATION NEED REHABILITATION?

Here is the premise: There has been a history of non-enforcement of a clear restriction and now a member has taken a step that the Board finds intolerable. Unfortunately, if you commence enforcement of a restriction that has been ignored in the past, without first taking additional actions, you will be subject to the defense known as "selective and arbitrary enforcement" (as well as other defenses, such as waiver, estoppel and laches). This defense is by far the most common and the most troublesome for associations to overcome. If it is raised in a case, failure to prevail can cost the association payment of the owner's attorney's fees and costs.

The duty of the Board is to enforce all restrictions uniformly against all owners. Failure to do so creates two separate problems. One is the ability of the owner to claim selective and arbitrary enforcement defense. The second is the potential for suit against the Board for breach of fiduciary duty by owners desiring to see enforcement of the as-written provision. The only "safe harbor" for the Association is to enforce the documents against known violations.

SEND A NOTICE TO ALL MEMBERS AND THEN START ENFORCEMENT ON ALL NEW VIOLATIONS

In situations where the association has a history of non-enforcement, the association needs to first **rehabilitate** its right to enforce the previously ignored restriction(s), and remove the ability of the owner to claim selective enforcement.

The recipe for rehabilitating the ability to enforce is found in the case of Chattel Shipping and Investment, Inc., v. Brickell Place Condominium Association, Inc., 481 So.2d 29 (Fla. 3rd DCA 1986). In that case the trial court declined to allow the association to enforce its documents to prevent installation of an unauthorized balcony enclosure due to past failure to enforce the pertinent restrictions. On appeal however, with regard to the issue of selective enforcement, the court said:

We reject this position upon the holding that ***the adoption and implementation of a uniform policy .... under which, for obvious reasons of practicality and economy, a given building restriction will be enforced only prospectively cannot be deemed "selective and arbitrary"***..... (Emphasis supplied)

In so holding the Court also noted:

In accordance with its announcement, the association has in fact taken action against each of the several enclosures which were erected after June 17, 1981.

Thus, this case stands for the proposition that you may not enforce provisions after failing to do so, but that you may also rehabilitate the right to enforce previously unenforced restrictions. To do so you must first give the members written notice of your intention to do so, and then you must take uniform and vigorous enforcement action against each new violation occurring thereafter.

Unfortunately, this means that the owner who went a step too far - whose conduct brought the lack of enforcement to the fore and the need for enforcement to a head - probably will be permitted to keep the offending condition, since his violation pre-dates the new enforcement notice. While this may not seem very fair, it is unavoidable.

Recent Cases

- **Appellate court orders enforcement of recorded restrictions placed on lots to preserve view from another lot, where a prior owner owned all of the lots and imposed the restrictions.**
- **Where 77 of 78 lots in HOA had one of two types of fences, attempt by owner who installed a third type of fence without approval to argue selective enforcement was rejected by the court.**

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RECENT CASE SUMMARIES

In **Fiore vs. Hilliker, et al.,** 33 Fla. L. Weekly D702b (Fla. 2nd DCA March 7, 2008), Fiore brought suit to enforce a restrictive covenant prohibiting the construction of a structure on their neighbor's property which partially blocked the Fiore's view of the river. At one time, a prior owner owned three adjacent parcels of property overlooking the Caloosahatchee River. This owner built his home on one of the parcels and ultimately decided to sell the remaining two parcels. As part of those sales, in order to preserve his view of the river, the owner put into the public records certain restrictions that any structure built on the other two parcels not be over a certain height nor that any structure be built closer than twenty-nine feet from the river. This owner ultimately sold his home to the Fiore and advised the Fiore of the restrictions which benefited the view of the river. Hilliker purchased one of the restricted parcels and immediately commenced major renovations, including the construction of a gazebo. Fiore notified Hilliker of the restrictions, but Hilliker proceeded with the construction anyway. Ultimately, the trial court granted summary judgment to Hilliker on the basis that there is no mutual or reciprocal benefit or relationship running to the adjacent parcels currently owned by the parties. On appeal, the Second District Court of Appeal reversed the trial court. Specifically, the appellate court noted that a restrictive covenant does not have to be reciprocal when the division of property was not made pursuant to a general scheme or plan. Instead, the instant covenant is more in the nature of a negative easement or equitable servitude on the property which is contractual in nature. As such, the appellate court remanded the case to the trial court for further proceedings.

In **Foonberg vs. Thornhill Homeowners Association, Inc.**, 33 Fla. L. Weekly D676b (Fla. 4th DCA March 5, 2008) Owners purchased a new home with a perimeter fence which had not been approved as required by Association's governing documents. Association filed suit for declaratory and injunctive relief for the removal of the fence. Association's covenants and restrictions contained provisions that no fences or other improvements could be placed upon the lots until the plans and specifications showing the nature, kind, shape, height, materials, color and location shall have been submitted to and approved by the Association. Owners' builder submitted plans to Association for approval which did not include a perimeter fence. After obtaining approval, the builder, at the Owners' request, installed a white aluminum fence around the perimeter of the property, which was not submitted to Association for approval. Before the home was conveyed to the Owners, the builder was informed by letter that this type of fence was not allowed, but the fence, which was 300 to 400 feet long was not removed. After Owners closed, Association notified them that the fence had not been approved and was not in compliance with the rules. Association informed Owners that only two types of fences on the perimeter were allowed, wood shadow-box fences or stucco covered concrete fences. Of the seventy-eight lots which had fences, seventy-four were wood and there were three stucco fences. There were no white aluminum perimeter fences, although one homeowner had such a fence around a pool, and another home had a white aluminum gate, attached to a perimeter fence which was either wood or stucco. Association did not regulate pool safety fences, because they are controlled by the building code. Owners testified that they had a special needs child which required them to have both a pool safety fence and a perimeter fence. Owners selected the white aluminum fence because they had been advised that it was less likely to be damaged by a hurricane, and Owners did not want a wood fence, because wood contains arsenic. Association's president testified that wood fencing without arsenic was readily available. The trial court found as a matter of fact that the aluminum fence had not been submitted to and approved by Association. The trial court also found that Association had been consistent in applying its long-standing policy regarding the type of fences which were approved. On appeal, Owners argued that because there was evidence that Association would not have approved the white aluminum fence if there had been a proper application, the trial court did not consider their selective enforcement defense. Owners argued that the law does not require one to do a useless act, such as submitting an application in this case, and that the trial court erred in not considering owners' claims of arbitrary enforcement. On appeal, the Fourth District Court of Appeal found that there was substantial competent evidence to support the findings of no selective enforcement. As such, the appellate court affirmed the rulings of the trial court.

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