

Selective Enforcement ~ #3

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AVOIDING THE SELECTIVE ENFORCEMENT DEFENSE WHEN ENFORCING CONDOMINIUM*** ASSOCIATION RULES AND REGULATIONS

An association attempting to enforce a covenant or restriction against one unit owner, while allowing another unit owner to violate the same restriction without consequences constitutes selective enforcement under Florida law. See *White Egret Condo., Inc. v. Franklin*, 379 So.2d 346 (Fla. 1979). In *White Egret Condo., Inc.*, the association was an age restricted community that did not allow children under the age of twelve. Franklin, who had children under twelve, purchased a unit and the board sought to enforce the age restriction covenant against him. *Id.* at 348. The problem for the association was that at the time Franklin purchased his unit at least six other children under the age of twelve were living within the condominium complex. The Florida Supreme Court held that “this constituted unequal and arbitrary enforcement of the restriction . . . and the [association] is estopped from selectively enforcing the age restriction.” *Id.* at 352. The selective enforcement defense has given association boards a fit ever since.

While a powerful defense, the selective enforcement defense is not automatic for unit owners, and boards should be aware of when the defense has been unsuccessful. A court ruled the defense did not apply when the unit owner claiming the defense was the first to violate the restriction at issue. *Schmidt v. Sherrill*, 442 So.2d 963 (Fla. 4th DCA 1983). In *Schmidt*, other unit owners had enclosed their balconies with hurricane shutters and cloth sun-screens, but the defendants were the first to enclose their balcony with sliding glass windows. *Id.* at 994. The defendants put forth a selective enforcement defense because the association had permitted the other types of enclosures but not their glass enclosure. However, glass enclosures were specifically against the rules and the defendants could not show another instance where the association had allowed a glass enclosure. *Id.* at 966. Because the defendants were the first to violate the rules in this way, the court held the selective enforcement defense failed.

The important question is what can an association do to begin enforcing a certain restriction again where **prior member-run boards failed to enforce**? There is a relatively simple fix to correct this situation. The association must provide written notice to all members, informing them that on a certain future date the association will begin enforcing the restriction once again. In other words, the association must draw a line in the sand, place its members on notice and then consistently and uniformly enforce that restriction going forward.

...if the proper notice is provided, the association can enforce the restriction against future violators without fear of the selective enforcement defense. If the restriction at issue involves parking violations or amenity use, for example, then the association can simply begin enforcing that restriction uniformly after the reset date once the proper notice is provided.

*** Condo law and HOA law are the same when referencing Selective Enforcement