

# Avoiding Selective Rules Enforcement For Condo Associations

May 22, 2019 by [Charles B. Jimerson, Esq.](#)

One of the most challenging aspects of effectively running and operating a condominium association is the constant turnover in board membership and the inconsistency this creates concerning rules enforcement. Most association board seats are up for reelection every one to two years. When members decide to run for the board, they often do so because they feel the current board is not properly running the association or enforcing its rules. However, due to the prior board's failure to act, a newly-elected board attempting to right the ship by enforcing the association's bylaws and rules and regulations may find itself having to respond to selective enforcement defenses. This creates a unique problem. Board members have a fiduciary duty to enforce the association's governing documents but cannot do so effectively. Fla. Stat. § 718.111(1)(a) (2018). There must be a solution. This article discusses how a board can avoid the selective enforcement defense when enforcing community association rules and regulations.



## Raising the Selective Enforcement Defense

Under Florida law, 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. See [White Egret Condo., Inc. v. Franklin](#), 379 So.2d 346, 352 (Fla. 1979). In *White Egret Condo, Inc.*, the association managed an age

restricted community that did not allow children under the age of twelve. *Id.* at 348. Franklin, who had children under the age of twelve, purchased a unit, and the board sought to enforce the age restriction against him. *Id.* 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. *Id.* 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. Since the Court’s holding in *Franklin*, the selective enforcement defense has caused problems for association boards attempting to enforce previously-unenforced restrictions.

Over the years, the selective enforcement defense has been successfully used by unit owners in a variety of situations. For example, one association was prevented from enforcing a “no pets” restrictive covenant against a unit owner who owned a dog because the association had failed to enforce that same pet restriction against cat owners. [\*Prisco v. Forest Villas Condo Apartments, Inc.\*](#), 847 So.2d 1012, 1015 (Fla. 4th DCA 2003). Similarly, another association was prevented from forcing a unit owner to remove terrace railings that did not conform with the association’s bylaws because the association had previously allowed other unit owners to install similar non-conforming terrace railings. [\*Plaza Del Prado Condo Ass’n, Inc. v. Richman\*](#), 345 So.2d 851, 852 (Fla. 3d DCA 1977).

## **Limitations of the Selective Enforcement Defense**

While powerful, the selective enforcement defense is not an automatic victory for unit owners, and boards should be aware of situations where the defense has been unsuccessful. The Fourth District Court of Appeal ruled the defense did not apply when the unit owners claiming the defense were the first to violate the restriction at issue. [\*Schmidt v. Sherrill\*](#), 442 So.2d 963, 966 (Fla. 4th DCA 1983). In *Schmidt*, the association’s constitution prohibited structural alterations to the outside walls of the condominium. *Id.* at 965. While other unit owners had enclosed their balconies with hurricane shutters and cloth sun-screens, the defendants were the first to enclose their balcony with sliding glass windows. *Id.* at 966. The defendants claimed a selective enforcement defense because the association had permitted other types of enclosures but not their glass enclosures. However, the court determined that hurricane shutters and cloth sun-screens did not constitute structural alterations to the outside walls and thus, did not violate the restriction. *Id.* Further, the defendants could not show another instance where the association had allowed a glass enclosure. *Id.* Because the defendants were the first to violate the rules in this way, the court held the selective enforcement defense failed. *Id.*

A few years later, the Fourth District Court of Appeal concluded the defense also failed when it was used against a member-run board where the defendants argued the developer failed to enforce the restriction at issue when the board was developer-controlled prior to turnover. [\*Estates of Fort Lauderdale Property Owners’ Ass’n, Inc. v. Kalet\*](#), 492 So.2d 1340, 1342 (Fla. 4th DCA 1986). Specifically, the court held the laxity of a developer in enforcing a certain restriction does not constitute selective and arbitrary enforcement by the association if the association consistently enforced the rule once the board was turned over to the unit owners. *Id.*

## **The Solution**

The important question is how can an association begin enforcing a certain restriction where prior member-run boards failed to enforce that restriction? There is a relatively simple fix to correct this problem. The association must provide written notice to all members, informing them that, on a certain future date, the association will begin enforcing the restriction. *See Chattel Shipping & Inv., Inc. v. Brickell Place Condo. Ass'n*, 481 So.2d 29, 30 (Fla. 3d DCA 1985) (holding the selective enforcement defense failed where a board notified unit owners it would not take action with respect to existing violations but would not permit any subsequent violations). 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 restriction at issue involves permanent or semi-permanent matters, such as balcony enclosures or pet ownership, then prior violators must be grandfathered in as the selective enforcement defense would still apply to them. *Id.* However, if the proper notice is provided, the association can enforce the restriction against future violators without fear of the selective enforcement defense. *Id.* In contrast, if the restriction at issue involves temporary matters, such as parking violations or amenity use, then the association can simply begin enforcing that restriction uniformly after the reset date and once the proper notice is provided. *Id.*

## **Conclusion**

The selective enforcement defense can cause problems for newly-elected boards attempting to improve the community by enforcing the association's previously overlooked rules and restrictions. However, the defense is not without limitation. If the board provides proper notice to members and consistently, and uniformly, enforces that restriction going forward, the association can overcome the selective enforcement defense. If your association is concerned as to whether it is interpreting or enforcing its rules and regulations properly, please contact our firm for consultation.