WORKSHEET · HAMILTON MIKES, P.A.

Selective Enforcement Review Worksheet

What to Establish Before You Enforce an Old Restriction

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Applies to: Condominiums · HOAs · Cooperatives

Association _____ Completed by _____ Date _____

Selective enforcement is not a statutory defense. It comes from Florida case law, and it is the defense that beats associations most often, because it does not require the owner to prove the restriction is invalid. It only requires the owner to show that others were left alone. Complete this worksheet before the first letter goes out on a provision the association has not been enforcing.

Fill it in by hand at the meeting, or have the manager complete it and bring it to the board. Keep the completed form with the enforcement file. If the honest answers make the board uncomfortable, that is the worksheet working: it is far cheaper to find out here than in a deposition.

Nothing on this form is a substitute for advice on a specific file. Where the answers point toward abandonment or waiver, send it to counsel before any notice is sent.

1 1. The provision

Provision relied on (document, article and section)

Exact text of the provision, quoted

Is it a recorded covenant, a bylaw, or a board-adopted rule?

Date recorded or adopted

If a rule: date of the adopting meeting, and where the notice and minutes are filed

Has it been amended? Amendment dates and recording information

Does the provision as written actually prohibit the conduct complained of, in plain words?

- [ ] Read the provision out loud at the board meeting before answering the last field.

  Boards enforce what they remember the rule saying. The text often says something narrower.

- [ ] Confirm the provision was not superseded by a later amendment that nobody recorded or circulated.

- [ ] Confirm the association has authority to enforce this provision at all, rather than it being a developer reservation or a matter for a master association or sub-association.

2 2. Enforcement history

How long has the association had this provision?

When was it last enforced against anyone, and how do we know?

Number of notices sent on this provision in the last five years

Number of hearings held on this provision in the last five years

Number of fines confirmed by the committee on this provision

Who searched the files, and what did the search cover (letters, emails, minutes, manager's log)?

Is there any period during which the association knowingly allowed the condition?

- [ ] Search the manager's correspondence, not only the association's formal violation log.

  Most tolerated violations live in emails between a manager and an owner, and those are the documents that surface in discovery.

- [ ] Check the architectural or modification approval file for approvals that are inconsistent with the provision.

  An approval the association granted is worse for the association than a violation it ignored.

- [ ] Check board minutes for any decision not to enforce, or any discussion where the board declined to act.

3 3. Who else is or was in violation

List every unit or parcel the board is aware of, including ones where the condition has since been removed. If the list is longer than this page, that is itself the answer.

Unit or parcel 1, condition, when it began, current status

What the association did about it, and when

Unit or parcel 2, condition, when it began, current status

What the association did about it, and when

Unit or parcel 3, condition, when it began, current status

What the association did about it, and when

Unit or parcel 4, condition, when it began, current status

What the association did about it, and when

Additional units or parcels (attach a continuation sheet)

Of the comparable violations listed, how many received a notice? How many reached a hearing?

Is the owner we are about to notice the only one, or the first one, in this group?

- [ ] Ask whether any comparable violator is a current or former director, an officer, or a relative of one.

  If the answer is yes and that one was not pursued, this file is not ready to leave the room.

- [ ] Ask whether the conditions really are comparable, and write down the distinction if the board thinks they are not.

  "Theirs is smaller" and "theirs has been there longer" are distinctions a court may or may not accept. Write the reasoning down now, while it is honest.

- [ ] Ask whether the owner about to be noticed is in a protected class, has made a complaint, or has recently opposed the board.

  Retaliation and disparate treatment claims arise under fair housing law — 42 U.S.C. § 3604, § 3617; §§ 760.23, 760.37, Fla. Stat.

4 4. Abandonment, waiver and estoppel

Has the condition become so widespread that the general plan of development has changed?
Did the association, by act or silence, lead this owner to believe the provision would not be enforced?
Did this owner spend money or change position in reliance on that?
Was the condition present when this owner bought, and was it disclosed or visible?
Has the association enforced other provisions in the same document consistently?
Counsel consulted? Name and date

- [ ] Understand what the association has to show: that the restriction serves a legitimate purpose and has been reasonably and evenly applied.

  The mechanism in White Egret was estoppel. The court found the restriction "reasonably related to a lawful objective" and still held the association "estopped from selectively enforcing" it. Estoppel is fact bound and defeats enforcement against the particular owner; it leaves the restriction itself intact.

  White Egret Condominium, Inc. v. Franklin, 379 So. 2d 346 (Fla. 1979) — a condominium restriction "does not inherently violate a fundamental right and may be enforced if it serves a legitimate purpose and is reasonably applied." The court's formal two-part test, reasonableness and whether the restriction is discriminatory, arbitrary or oppressive in its application, is stated for age restrictions attacked on due process or equal protection grounds.

- [ ] Understand that a scattered handful of unaddressed violations is usually not abandonment, and a community-wide pattern usually is.

  The line is a question of degree, and it is fact specific. Do not assume either answer.

- [ ] Do not rely on a waiver-of-waiver clause in the declaration as the end of the analysis.

  Boards treat "no failure to enforce shall constitute a waiver" as a complete answer. Courts treat it as one factor.

- [ ] Where the answers point to abandonment, decide whether the better course is to amend the document rather than to enforce it.

  An amendment adopted by the owners is harder to attack than a board's decision to start enforcing an abandoned covenant.

5 5. Re-establishing enforcement prospectively

Where a provision has gone unenforced, Florida law recognizes that an association may announce it will enforce the provision going forward without pursuing the pre-existing conditions. Doing it properly is a short list, and skipping any item on it defeats the purpose.

- [ ] Take the decision at a properly noticed board meeting and record it in the minutes as a policy decision, not as a discussion.

  The date of the decision is the date everything else is measured from.

- [ ] Fix a clear effective date in the future, far enough out that owners can reasonably respond.

  Prospective-only enforcement after a period of nonenforcement — Chattel Shipping & Investment, Inc. v. Brickell Place Condominium Ass'n, 481 So. 2d 29 (Fla. 3d DCA 1985)

- [ ] Send the notice to every owner, by the method the documents require, not only to the owners currently in violation.

  A notice sent only to violators is a notice of enforcement against them, not a community-wide policy.

- [ ] State plainly that existing conditions in place before the effective date will not be pursued, and that anything arising after it will be.
- [ ] Say what the provision means in practice, in one or two sentences, so owners know what compliance looks like.
- [ ] Decide in advance how the association will treat an existing condition that is later modified, replaced or expanded, and say so in the notice.
- [ ] From the effective date forward, enforce it against everyone, in order, without exception.

  One exception granted quietly restarts the whole problem, and this time the file shows the board knew.

- [ ] Keep the minutes, the notice and proof of mailing together. This packet is the association's proof in the first contested case.
- [ ] Calendar a review at six months to confirm the policy is actually being applied.

6 6. The decision

Decision: enforce against this owner now / enforce prospectively community-wide / take no action / amend the document
Reasons for the decision, in the board's own words
If enforcing against this owner now, what distinguishes this file from the comparable violations listed in section 3?
Directors voting in favor / opposed / abstaining
Date of the board meeting at which this was decided
Prepared by
Date

> A board is allowed to start enforcing a provision it has let slide. What it is not allowed to do is start with one owner. Announce the policy to everyone, give a future effective date, leave the pre-existing conditions alone, and then enforce it against every owner in order. The worksheet exists so that the board does that in the right sequence, before the first letter rather than after the first answer.

Statutes and authorities referenced

- § 718.303(1) , Fla. Stat. (condominium actions for failure to comply; prevailing party attorney fees)
- § 719.303(1) , Fla. Stat. (cooperative actions for failure to comply)
- § 720.305(1) , Fla. Stat. (HOA actions for failure to comply; attorney fees)
- § 720.311(2)(a) , Fla. Stat. (HOA presuit mediation for covenant enforcement disputes)
- § 718.1255 , Fla. Stat. (condominium dispute resolution)
- § 760.23 , § 760.37 , Fla. Stat.; 42 U.S.C. § 3604, § 3617 (discrimination and interference in housing)

Talk to association counsel

When the checklist turns up a question about what a statute or your documents require, ask association counsel before the board acts. **Hamilton Mikes, P.A.** represents condominium, HOA and cooperative associations, clubs and marinas throughout Southwest Florida. **239-594-7227 · HamiltonMikes.com**

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