

Avoiding Defense of Selective Enforcement

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By: John Stratton



A common defense raised by owners who find themselves on the wrong side of a covenant enforcement action is to allege an association's failure to enforce the covenant at issue against all violators and instead only selectively enforcing it. The defense of selective enforcement is based upon a case decided by the Supreme Court of Florida in 1979. Essentially, an association cannot enforce the

restrictions in the recorded documents or those contained in the rules and regulations in an inconsistent or arbitrary manner. The issue is addressed by the courts and arbitrators frequently and as explained in *Oceanside Plaza Condominium Association, Inc. v. Salussolia*: the claim of "selective enforcement will succeed if the failure of the Board to enforce documents in other instances bears sufficient similarity to the case at issue as to warrant the conclusion that to permit the enforcement in the instant case would be discriminatory, unfair, or unequal."

Nevertheless, even if certain provisions were not uniformly enforced in the past the association is not without options if it determines that such provisions should be enforced going forward. The process for "reviving" a provision that has not been previously enforced is derived from a condominium case called *Chattel Shipping and Investment, Inc. v. Brickell Place Condominium Ass'n, Inc.* In *Chattel Shipping*, the association's declaration of condominium prohibited enclosing balconies without prior association approval. Despite this prohibition, multiple unit owners enclosed their balconies before the association announced its intent to prohibit future balcony enclosures. After the announcement, one unit owner, *Chattel Shipping and Investment, Inc.*, enclosed its balcony and the Association thereafter demanded removal of the enclosure and sought injunctive relief to enforce the restriction. The trial court granted the injunction in favor of the association, and *Chattel* appealed. *Chattel Shipping* argued that in light of the association allowing other enclosures in the past, the association's demand to remove *Chattel's* enclosure constituted unequal and arbitrary enforcement of the restriction in violation of the principle of selective enforcement. The court rejected *Chattel Shipping's* argument, holding that enforcing a uniform policy, under which a given building restriction will be enforced prospectively is not selective and arbitrary. The court noted that enclosures built before the association made its announcement protected other owners who had built their enclosures in reliance on the status quo, whereas *Chattel Shipping* had erected its enclosure following the association's specific notice that subsequent violations would not be tolerated. Ultimately, the court affirmed the trial court's holding in favor of the association.

