

# “‘Drawing a Line in the Sand’ by Reviving Previously Unenforced Restrictions,” FCAP Managers Report

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The previous boards failed to enforce the parking restrictions in the community, and now parking has become a nightmare. The new board would like to remedy the solution, but can the board begin to enforce a restriction that has not been enforced in the past?

Generally, the association may lose its right to enforce a restriction if it does so inconsistently, unevenly, or arbitrarily. This is known as “selective enforcement,” and when selective enforcement is shown, the association may be estopped from enforcing a given restriction.

However, all is not lost. A previously unenforced restriction may be “revived” with notice from the board that it will enforce the restriction going forward. Essentially, the board draws a line in the sand, which lets owners know that from this point forward, the board will actively and evenly enforce the restriction in question. The process for reviving a provision comes from the case of *Chattel Shipping and Investment, Inc. v. Brickell Place Condominium Association, Inc.*, 481 So.2d 29 (Fla. 3rd DCA 1985). In *Chattel Shipping*, the association’s declaration of condominium prohibited unit owners from enclosing their balconies without prior approval from the board. Multiple owners, nevertheless, enclosed their balconies without the requisite approval. The board, prompted by a letter from the city that the enclosures violated the city’s zoning ordinance, informed the owners that it would enforce the restriction and prohibit future balcony constructions. After this announcement, one unit owner, *Chattel Shipping and Investment, Inc.*, enclosed its balcony. When the association secured a mandatory injunction requiring the removal of the balcony enclosure, the unit owner sought a reversal on the ground that the association had failed to require the dismantling of the other existing enclosures and thus was unequally and arbitrarily enforcing the restriction.

The Court rejected the owner’s argument, holding that the association could adopt and implement a uniform policy under which a building restriction will be enforced only prospectively without the enforcement of the same being deemed selective and arbitrary. Thus, the *Chattel Shipping* case stands for the proposition that an association can revive the enforcement of a restriction despite previous non-enforcement by notifying the members of the board’s intent to prospectively enforce the restrictions.

The purpose of properly notifying owners of prospective enforcement is to dispel the arguments and even appearance of unequal and selective enforcement that may be raised by owners. To prove selective enforcement, an owner needs to show that there are instances of similar violations of which the board had notice, but has refused to act. The Florida Administrative Code provides that the owner shall indicate the unit(s) to which each example pertains, the unit owner(s), how long the violation has existed, and shall indicate whether the board knew of the existence of the violation(s).

In drawing this line in the sand, the restriction is “reset.” This works well for temporary violations, such as a parking restriction, but what about violations with more permanent consequences, such as pet violations?

If the previous boards have turned a blind eye to house cats or has not enforced the one-dog policy and now a number of owners have pets in violation of this restriction, the board cannot reasonably expect that following the date of a resolution all owners with pets in violation will move or get rid of their pets.

In that case, in addition to a *Chattel Shipping* resolution, the board may also determine that it's best to adopt a “grandfather clause” as part of the restriction. “Grandfathering” allows owners or residents who are already doing something to continue doing so, even if they would be in violation of the new (or newly enforced) restriction. Over time, there will be fewer and fewer exceptions to the restriction as grandfathered owners move away or pass away. And eventually, the restrictions will apply to all owners and residents of the community, as subsequent purchasers in the community will be buying the units under constructive notice of the community's restrictions.

In adopting the restriction and providing for grandfather status, the language should be drafted carefully with the guidance of association counsel. The association should request that owners who seek to be grandfathered provide a written request to the association by a certain deadline. The deadline allows the association to clearly determine whether a violation existed prior to or after the passage of restriction in the event of a challenge. With a written request, the association can also evaluate each request and have a written record of which owners and/or what (i.e., which vehicle, which pet, etc.) has been granted grandfather status. For example, if the association seeks to restrict oversized vehicles or pickup trucks, the association will request that those owners who currently have oversized vehicles or pickup trucks register their current vehicle, including details such as the model, make, color, and year. This specific vehicle will be granted grandfather status, which means that if the owner exchanges his pickup truck for a different or newer truck, his new vehicle will not be grandfathered in and if the new vehicle is oversized, he will be in violation of the new restriction.

There are times when grandfathering owners or a *Chattel Shipping* resolution may not be appropriate. For example, if a new restriction to balcony enclosures is adopted by the association due to a need to protect the structural integrity of the building, the prior right to place items on the balcony will need to yield to the overriding safety considerations of the new rule. In such a case, the board should obtain documentation of the overriding safety concerns, such as from an engineer's report, before requiring owners to change structures that were previously allowed. Another example is if certain items are no longer code compliant, even if the equipment would ordinarily be entitled to grandfather

status, the equipment should be brought up to code, if possible, or removed if rendered inoperable.

If your association is facing an enforcement problem, association counsel can assist in reviving a restriction.

To read the original FCAP Managers Report article, please [click here](#).

**Karyan San Martano** is a member of Becker's Community Association practice and regularly provides legal counseling to the officers and directors, as well as the property manager, on the operation of condominiums, cooperatives, and homeowners associations. To learn more about Karyan, please [click here](#).