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SELECTIVE ENFORCEMENT AND OTHER PROBLEMS IN ENFORCING ASSOCIATION GOVERNING DOCUMENTS

One of the most important duties of any community association's board of directors is the enforcement of the association's governing documents, including its declaration and all promulgated rules and regulations. Well written, clear and objective restrictions can greatly help to provide a harmonious community and enhance property values. However, the failure to have such well written and clear documents may create many problems for an association in enforcing its governing documents.

All governing documents are not well written. Attempting to enforce provisions that are vague or ambiguous can be problematic and may expose the association to potential legal liability. If your covenant restrictions are open to multiple meanings, then those provisions will likely be difficult to enforce. Under such circumstances, it may make sense to propose amendments to the association governing documents or, in the case of rules and regulations, to have the board of directors promulgate additional rules clarifying the restrictions. Rules and regulations may often be amended by a vote of the board of directors alone, at a duly called board meeting upon proper notice. Changes to the Association's declaration and other covenant restrictions usually requires the affirmative vote of a super-majority of association members.

A second problem with enforcing association governing documents is the defense of selective enforcement. Oftentimes, restrictions may have lasted several years without being vigorously enforced. Many times, a new board of directors comes to power and decides it wants to be more aggressive in enforcing the association's governing documents. However, where the association has been previously lax, the association may be subject to the defense of selective enforcement if it attempts to enforce a restriction that has previously not been properly enforced. As such, the most practical way for a new board to begin enforcing restrictions that it has ignored in the past is to send what's commonly referred to as a "clean-the-slate" letter to all of the owners. In such a letter, the board will basically republish the restriction, concede that the restriction was not previously enforced for a certain period of time, and provide the owners with a date certain when the board will begin to enforce the restriction again. Existing violations could be grandfathered but the association would then be in a position to enforce the restrictions from that point forward.

It is recommended that the association board of directors review its rules and regulations and covenant restrictions to determine if there are any potential problems with having vague or ambiguous restrictions. Any such restrictions should be amended in order to avoid being determined unenforceable. Further, to the extent that an association has, in years past, been lax in enforcing its governing documents, we recommend republishing the association's rules and regulations in order to "clean-the-slate" to enhance the association's ability to enforce its documents in the future. We suggest that an association facing either of these situations consult with association counsel in determining the proper course of action to enforce the association's documents.

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