

owned by a sweet retiree who lives alone, they can't then attempt to enforce the same "no bird" rule against another owner, just because that other owner is a less attractive violator. If they try, the second violator may challenge the enforcement, claiming that it was "selective"—that the board selected certain residents to enforce the rule against, and not others. In most legal systems, that's not allowed. It's even a defense against many of our state and federal laws.

The second concept, waiver, is more universal. If a board ignores a rule violation that is open and obvious for a significant amount of time, they have then "waived" the right to enforce the rule against that unit owner, and then, by extension, against anyone in the community. So if the retiree with the parrot has been regularly seen with her bird walking around the grounds, and if the board has never cited the person with a rule violation, they cannot then enforce that rule against another owner, as they have waived the right to enforce that rule. And even if the violation is not open and obvious, most states have a limitation (called a "statute of limitations") that says that, after a certain amount of time, covenant violations that have been ignored cannot be enforced for any reason, even if they were not open and obvious (in Florida, that time period is 5 years).

So what's a board to do? First of all, these principles are exactly why, even though it is not always the most pleasant task, it is a board's responsibility to enforce every rule against every violator every time—or risk waiving the right to enforce the rule. If the board has any interest in enforcing a rule against any owners or residents, it must enforce that same rule every time against everyone who violates it. Only if the board absolutely knows that it NEVER wants to enforce a rule can it ignore it entirely. And, even if a board were to do so, it would arguably be violating its duty to the association to follow and enforce the covenants of the community (although, it's interesting to note that there is a movement in certain states to allow some flexibility in this practice—essentially, to allow a board to legally ignore a rule it does not want to enforce).

So let's assume, then, that a board has accidentally selectively enforced a rule, or waived enforcement of that rule, and that the board (or an entirely new board) wants to begin enforcing it again. Well, there's a procedure for doing exactly that. The board would have to announce to the entire membership that, from a point in time forward, they intend to begin strictly enforcing the rule—and then they need to start doing so. But what happens to all of the current and past violators? They would then be "grandfathered" into the rule, and allowed to violate it—at least as to the specific violation that has been occurring (but not new violations that occur in the future).

Let's look at a couple of examples of this principle. Say that a new board were to be elected in the community we discussed above, where a resident had been keeping a bird openly for many years. This new board wants to begin strictly enforcing its no-bird policy. The board would send a letter to all owners notifying them of their intention to enforce the rule, and asking anyone currently violating the rule to register their "violation" (in this case, ownership of a bird) so that it can be grandfathered. Then those people would be allowed to keep the birds they already have in their homes—but they would NOT be allowed to keep new birds, or to replace a bird that passes away. The grandfathering is only good for that specific, currently occurring violation. And people have tried to get around this rule in creative ways—in one property, a woman whose grandfathered dog passed away purchased a new dog and dyed its hair to match that of the older dog, to try to pass it off as the same dog. Didn't work.

Now, this policy applies to other types of violations as well. Let's assume that a resident has screened in his