

# Selective Enforcement Defense in Sugarhill

*FROM <https://www.orsattilaw.com/selective-enforcement-defense-against-condo-and-homeowner-associations.html>*

## Selective Enforcement Defense Against Condo and Homeowner Associations in Florida

What does selective enforcement mean? Selective enforcement is an action taken by the homeowner or condo association in order to enforce a covenant or restriction against a particular homeowner **and not against the other violators**. Additionally, **selective enforcement is prohibited by Florida law**.

The homeowner or condo association while responsible for collecting assessments revenue, is additionally required to uphold the legal standards in the community. The association enforces the covenants and restriction by filing enforcement actions against individual owners for the violations. In turn, the owner responds against the action by asserting certain defenses including the defense of selective enforcement.

Homeowner or condo association boards have a duty to enforce the community covenants and restrictions in a fair and reasonable manner. When a homeowner or condo association board breaches this duty, the homeowner is entitled to the defense of selective enforcement against the board.

Selective enforcement is a valid defense for two types of board actions. The first is when the homeowner or condo association board acts in an indiscriminate and capricious\*\* manner and enforces some covenants and not others. The second is when the homeowner or condo association board acts in an indiscriminate and capricious manner in the enforcement of a particular covenant contrarily from one homeowner to another.

## So what is Sugarhill to do about this problem?

The first thing to acknowledge is the fact there are a huge number of covenant violations that exist in Sugarhill as of 1-1-20. Our board has not allowed any **new** violations. One long time resident who was heavily involved in a covenant revision told us they counted over 40 uncorrected violations and that was 10 years ago. During the time of the current 2020 board we have blocked all new 'out of covenant' violations that did not exist prior to our control. Everything from wrong paint colors to white vinyl fences. We are currently working on covenant violations of foliage encroachment into the road right-of-way for example. <sup>9/2020</sup>

So what type of environment does this create for the board vs. neighbors, neighbors vs. neighbors? Words that come to mind are mistrust, distrust, doubt, suspicion, uncertainty, skepticism, and apprehension both for board members and neighbors. Not a pleasant environment.

What are boards to do in this situation? In the case of Sugarhill the past boards have enforced the bylaws and covenants in an irreverent manner all the way to a capriciously inconsistent way and finally to the point of hiring a management company to do the dirty work with no regard to the legal

situation created by the selective enforcement potential. None of these situations has ever created a satisfactory legal outcome for anyone in Sugarhill that was amiable to all residents.

Thinking about the Einstein quote "Insanity: doing the same thing over and over again and expecting different results." When the current board became the board we stopped litigation that was underway against a homeowner who painted portions of his house after being not approved. He didn't feel his rejection was fair because the same color already existed in Sugarhill. More than one attorney knew he could win with a 'selective enforcement defense'. Jumping back in time in Sugarhill's history, a failed litigation against a homeowner, that cost the association a huge amount of money, was over a product being used on a vast majority of homes now, Hardie Plank Siding. One of the most talked about situations in all 5 of my <sup>John Doty</sup> state certified classes devoted to HOA operations has been 'protecting the association from lawsuit'. The topic was top of the list in all the classes especially the class I did 'Protecting the Association from litigation'. We have discussed this situation with the current attorney and he agrees with the only remedy as shown in the next paragraph and in the excerpts in various articles further down the page.

The remedy, as we understand it at this time <sup>8/2020</sup>, requires a letter to be sent to all homeowners stating that "from this date forward (date of letter) all covenants will be enforced exactly as written in the Sugarhill Documents". This begs the question of retroacting enforcement onto earlier violations. As I said before, protecting the community from litigation is critical and we don't think forcing 40 or more covenant violations that exist to comply to the original covenants will garner a majority support and may cause frivolous litigation. Therefore, more work needs to be done with the Attorney for clarification. Also a survey will be done for community support with such an action before the letter is presented. We work strictly on what the majority of the community indicates they want done.

***FROM <https://kortepa.com/selective-enforcement/>***

## **Selective Enforcement Defense Against HOA**

### **Have You Been Singled Out?**

A homeowners' association has the duty to enforce the covenants of a community in a procedurally fair and reasonable manner. When a homeowners' association board breaches this duty, the homeowner is entitled to the defense of selective enforcement against the HOA.

**There are two types of selective enforcement:**

- When an Association acts arbitrarily by enforcing some covenants but fails to enforce others
- When an Association acts arbitrarily by enforcing the same covenant differently against one owner and another, typically choosing to enforce against one owner but not others.

### **Common Areas of Selective Enforcement**

- Pet restrictions
- Architectural restrictions
- Fencing restrictions
- Parking restrictions
- Age restrictions

### **HOA Enforcing Rules That Have Never Been Enforced**

Boards may try to enforce rules that have long been ignored by prior boards by providing written notice to all members, informing them that on a certain future date the association will begin enforcing the restriction once again. In other words, the association must draw a line in the sand, place its members on notice and then consistently and uniformly enforce that restriction going forward. See *Chattel Shipping & Inv., Inc. v. Brickell Place Condo. Ass'n*, 481 So.2d 29 (Fla. 3d DCA 1985) (The court found the selective enforcement defense failed where a board notified unit owners it would not take action with respect to existing violations but any subsequent violations would not be permitted.) If the restriction involves permanent or semi-permanent matters, such as balcony enclosures or pet ownership, then prior violators must be grandfathered in as the selective enforcement defense would still apply to them.

HOAs are responsible for enforcing the covenants in a **fair and equal manner that does not single out one homeowner over another**. In some cases, an HOA effectively singles out a specific homeowner and targets them with violations and fines while allowing other owners in the community to commit the same violations without repercussion. The declarations and covenants state the specific duties with regards to the maintenance and upkeep of each property within the association. If your HOA is failing to uphold these legal requirements, you are allowed to demand compliance and take legal action.

***FROM <https://www.jimersonfirm.com/blog/2014/10/avoiding-selective-enforcement-defense-enforcing-condominium-association-rules-regulations/>***

## **AVOIDING THE SELECTIVE ENFORCEMENT DEFENSE WHEN ENFORCING CONDOMINIUM\*\*\* ASSOCIATION RULES AND REGULATIONS**

An association attempting to enforce a covenant or restriction against one unit owner, while allowing another unit owner to violate the same restriction without consequences constitutes selective enforcement under Florida law. See *White Egret Condo., Inc. v. Franklin*, 379 So.2d 346 (Fla. 1979). In *White Egret Condo, Inc.*, the association was an age restricted community that did not allow children under the age of twelve. Franklin, who had children under twelve, purchased a unit and the board sought to enforce the age restriction covenant against him. *Id.* at 348. The problem for the association was that at the time Franklin purchased his unit at least six other children under the age of twelve were living within the condominium complex. The Florida Supreme Court held that “this constituted unequal and arbitrary enforcement of the restriction . . . and the [association] is estopped from selectively enforcing the age restriction.” *Id.* at 352. The selective enforcement defense has given association boards a fit ever since.

While a powerful defense, the selective enforcement defense is not automatic for unit owners, and boards should be aware of when the defense has been unsuccessful. A court ruled the defense did not apply when the unit owner claiming the defense was the first to violate the restriction at issue. *Schmidt v. Sherrill*, 442 So.2d 963 (Fla. 4th DCA 1983). In *Schmidt*, other unit owners had enclosed their balconies with hurricane shutters and cloth sun-screens, but the defendants were the first to enclose their balcony with sliding glass windows. *Id.* at 994. The defendants put forth a selective enforcement defense because the association had permitted the other types of enclosures but not

their glass enclosure. However, glass enclosures were specifically against the rules and the defendants could not show another instance where the association had allowed a glass enclosure. *Id.* at 966. Because the defendants were the first to violate the rules in this way, the court held the selective enforcement defense failed.

The important question is what can an association do to begin enforcing a certain restriction again where **prior member-run boards failed to enforce**? There is a relatively simple fix to correct this situation. The association must provide written notice to all members, informing them that on a certain future date the association will begin enforcing the restriction once again. In other words, the association must draw a line in the sand, place its members on notice and then consistently and uniformly enforce that restriction going forward.

...if the proper notice is provided, the association can enforce the restriction against future violators without fear of the selective enforcement defense. If the restriction at issue involves parking violations or amenity use, for example, then the association can simply begin enforcing that restriction uniformly after the reset date once the proper notice is provided.

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\*\*\* *Condo law and HOA law are the same when referencing Selective Enforcement*

\*\* **capricious:** *changeable , inconstant , erratic , arbitrary , volatile , fickle , uncertain , unpredictable , variable , temperamental , petulant , perverse , fanciful , fantastic , whimsical , freakish , impulsive , odd*