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INTRO TO COVENANT ENFORCEMENT 101

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The single topic which generates the most questions, concerns, and potentially even litigation for associations is perhaps Rule and Covenant Enforcement. Therefore, together with your collection policy, there may be no other area where consistent, timely and uniform enforcement is more critical to an association. Proper covenant enforcement not only should help to preserve and protect the association's property values, but also should help to maintain the association's (i.e., the Board's) credibility with the membership. We find that it is very easy for associations and their boards of directors to loose credibility and very difficult to recapture it. In fact, some of the most frequent criticisms we hear from owners regarding their boards of directors are:

1. The Board is too wishy-washy.
2. There is no uniform enforcement.
3. There is no timely enforcement.
4. There are far too many exceptions to enforcement.
5. The board of directors plays favorites.
6. The board of directors has not adequately apprised the membership of what is expected.
7. The association has no backbone.
8. The association refuses and fails to take into account special circumstances (i.e., it has no heart).
9. The Association is too picky.
10. The Association is too hard.
11. The Board is acting for personal gain or benefit.
12. The Board is acting as a gestapo.

As you can see, regardless of the approach a Board takes (i.e., enforce or not enforce), it will probably be criticized. Nevertheless, what is most difficult for members to deal with is the situation where they neither understand nor appreciate what is expected of them with respect to the association's covenants and rules. Therefore, associations should have very distinct and clear policies and procedures with regard to covenant enforcement.

Often associations use a two-letter approach before the matter is referred to an attorney to compel an owner's (s') compliance (i.e., the association sends two demand letters requesting compliance before involving an attorney). There is nothing necessarily wrong with more or fewer letters from the association prior to the matter being turned

over to an attorney to compel compliance. Nevertheless, it is our experience that when associations send out three or more letters demanding compliance, the unit owners cease to take the association seriously, as the association is viewed as having no backbone. Therefore, generally, we recommend only two request or demand letters from the association before the matter is turned over to an attorney to compel a violating owner's compliance with the Governing Documents.

Additionally, the association should strive to make the letters, as well as the time-frames for compliance, uniform. More specifically, if the association wants to request compliance within 30 days of its first letter, then it should give all owners the same 30 day time period. Similarly, if the association wanted to allow only 15 days in the second letter, then it should only allow 15 days for all owners.

The first letter should delineate to the violating owner that the owner will only receive one more notification (i.e., letter) from the association prior to the matter being turned over to the association's attorney to compel compliance. In fact, we recommend that the association's enforcement procedure be set forth in both of the letters (i.e., delineate to the violating owner how many notices he or she will receive and when the matter will be turned over to its attorney).

Additionally, we suggest the association set forth in both letters that if the matter is turned over to the attorney, then the law firm shall seek to collect from the violating owner(s) all the attorney fees and costs associated with compelling the owner's compliance with the governing documents. Nevertheless, it needs to be understood that the association may or may not ultimately collect its attorney fees and costs. In fact, such costs and fees generally would only be awardable at the culmination of a successful trial.

Once the matter has been turned over to the association's counsel to compel the violating owner to comply with the Governing Documents, then generally, it is a good idea for all of the board members, as well as the manager, to direct all conversations, correspondence, inquiries and discussions to its law firm. This should help to reduce the amount of miscommunication between the various parties. Similarly, the association's attorney needs to be involved in every step of the process. In fact, if the association is discussing this matter or committing to items without its attorney's involvement, then, quite frankly, the association may be waiving certain rights and/or precluding its ability to obtain a better resolution, including potentially recovering its costs and attorneys fees.

Speak with your counsel regarding when he or she would recommend that matters be turned over to their office. Board members do not get paid for their services. As such, these volunteers should not be subjected to the day after day criticism and abuse by their neighbors who are violating the documents. One of the best ways to avoid this result is by the board members being able to tell the violating owner that upon advice of counsel:

1. The matter has been referred to the association's attorney;

2. All communications, correspondence, etc., must be directed to the law firm; and

3. The board member is no longer authorized to deal with this matter.

In fact, the board members may want to point out that:

1. He or she wishes that the violating owner had dealt with this matter previously; and

2. If the violator had come to the board earlier (i.e., before the matter had be turned over to counsel), a quicker, cheaper and better resolution most likely could have been obtained.

(Note, the above statements should work equally well for your manager.) Understand the association is paying its law firm in part to remove, to the degree possible, the potential abuse and problems associated with compelling an owner('s) compliance. Therefore, once transferred to an attorney, both the manager and the Board should endeavor

not to discuss the matter with the violating owner which hopefully will curtail the abusive owner.

Generally, once the matter is referred to the association's counsel, the law firm will more than likely write its own covenant enforcement letter demanding compliance by the violating owner. If the violating owner thereafter does not come into compliance within the designated time period set forth in the attorney's demand letter, then ostensibly the attorney will point out various options to the association, including proceeding with a covenant enforcement action in the circuit courts, or arbitration with the Bureau of Condominiums. Provided the association wants to proceed with a suit or arbitration, the board should seriously consider passing a formal motion at a board meeting wherein it directs its counsel to proceed with litigation in the courts and/or arbitration with the Bureau of Condominiums. By utilizing this procedure, the association ostensibly will have demonstrated in its official records that no one board member or officer determined that this matter should go to litigation, etc., but rather the entire board at a duly noticed and called board meeting voted to proceed. Your counsel can help you with respect to setting up the requisite procedures and motions regarding such matters. In fact, we generally draft the motion for the board of directors which simplifies this matter for the association.

The problem with an association failing to enforce its documents, including its rules and regulations, is that its failure to compel compliance today may preclude its ability to compel compliance in the future. Unfortunately, there can be significant costs associated with covenant enforcements. As such, it is imperative that the Association's credibility be fostered and that the violating owner be made perfectly aware of the following:

1. The violation.

2. The basis of the violation.

3. The fact that the violation contravenes the Governing Documents as well as the Florida Statutes (i.e., either FS 617 or 718).

4. The association has the ability under both the Florida Statutes as well as the Governing Documents to compel compliance.

5. Under both the Governing Documents and the Florida Statutes, the association may be able to obtain its costs and attorneys' fees (at least if the association is victorious at trial or at arbitration), etc.

As the costs of the covenant enforcement procedure can become expensive, every effort should be made to obtain the earliest compliance by the violating owner. Additionally, the Association and its counsel should generally seek to recoup its reasonable attorney fees and costs (at least if the association is victorious at trial or arbitration). However, an association which obtains voluntary compliance (even after the matter has been transferred to its counsel) should seriously consider whether it should cease pursuing the matter, (i.e., cease pursuing the matter if the only remaining issue is the Association's claim to recover its costs and attorneys' fees). Oftentimes we encounter associations who, even after the owner has complied, insist upon pursuing the matter to recover their costs and attorneys' fees. Ultimately, as set forth above, generally such funds are only awarded at trial or at arbitration. Therefore, there is risk to associations which pursue these matters in an attempt only to recover attorneys' fees. Moreover, the case may be determined by a court to be moot once the violation has been corrected (i.e., the association could be precluded from recovering any fees).

Ultimately, an association's approach to covenant enforcement is critical. The association should insure that it timely, consistently and uniformly enforces its documents, including the covenants and restrictions. Understand the failure to timely, uniformly and consistently enforce the documents, subjects the association to defenses which could preclude enforcement both with respect to the individual case at hand as well as future cases. As such, an association which postpones or allows deviations from the requirements of its documents, is putting itself and its future enforcement actions in jeopardy. Many associations fail to realize that significant defenses can arise by virtue of their failure to enforce their documents timely, uniformly and consistently. Such defenses include, but are not necessarily limited to the following:

1. Laches - which in layman terms means simply by virtue of the passage of time, the association's rights may become stale and unenforceable (i.e., if the association fails to timely enforce a provision, it may lose its right to enforce it);

2. Selective Enforcement - which in layman terms means the association should be precluded from enforcing against Mr. Jones that which it does not enforce against Mr. Smith;

3. Waiver - which in layman terms means a relinquishment of a known right (i.e., the association must have a right and knowingly and voluntarily relinquish the right); and

4. Estoppel - which in layman terms means in fairness, in equity, the association should be precluded from enforcing a provision by virtue of some previous action or potentially some inaction.

As you can see, it is easy for the above defenses to set in. Therefore, associations need to guard their rights closely and implement the requisite covenant enforcement procedures. As set forth above, we even recommend our associations adopt a specific covenant enforcement procedure via a motion at a board meeting. Moreover, such covenant enforcement procedure needs to be uniformly, timely and consistently enforced regardless of the violation and regardless of the violator.

The attorneys in our firm hate to ever lose a case. As such, we desire the best cases possible. We endeavor to curtail the number of defenses which we must overcome. Ultimately, the shorter the period of time which exists between learning of the violation and proceeding with attempting to compel compliance with the Governing Documents, the better.

While you can expect to encounter one or more of the above defenses in almost every covenant enforcement case, that does not mean that the association loses. However, it does present a risk and obstacle for the association to be avoided, if possible. Ultimately, if you want to ***STOP*** violations, proceed now, do not wait. In general, the defenses will only get stronger. However, if the above defenses exist, discuss them specifically with your counsel and have him speak to you about rehabilitating your governing documents.☜