


# Community Up-Date

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## The Truth About CATS AND DOGS

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 It's typical, expected, and almost commonplace when community association boards of directors, managers, or residents "ignore" what is seen as harmless violations of the recorded restrictions or rules and regulations with regard to pets, only to be outraged later when a new owner or resident moves in with a 40 lb. bull terrier or a 4 foot snake. Sometimes the board's lack of action stems from its reluctance to spend money to enforce the pet restriction and/or sympathy for the long-term resident and his or her "cute little kitty" or "very quiet bird."

Then, something terrible happens. Fido moves in. Fido is observed urinating on the landscaping, shedding in the hallways and barking at all hours. Jake the snake escapes

from his cage and one of the residents almost has a heart attack out of fear of the large reptile. The community is up in arms, and the board hears things like, "Aren't pets prohibited by our documents – why don't you do something to remove Fido and Jake?"

No one even thinks about the quiet cat that lives with the long-term resident. Even if it occurs to someone, the thought is "That's okay – an 8 lb., ten year old cat is certainly different than a pit bull, right?"

Until recently, the argument that a board can't be prevented from enforcing a pet restriction against a dog owner solely because it has failed to take action to remove a cat or other animal stood a decent chance of winning in court or in the State's Arbitration Program. However, the Fourth District Court of Appeal has stated otherwise.

Anyone familiar with association operations is aware of the defense of "selective enforcement." The concept is based upon a case decided by the Supreme Court of Florida in 1979. Basically, an association cannot enforce the restrictions in the recorded documents, or those contained in the rules and regulations, in an inconsistent or arbitrary manner. This issue is addressed frequently by the arbitrators appointed by the State, and as explained in *Oceanside Plaza Condominium Association, Inc. v. Salussolia*, Case No. 96-0384 (September 23, 1996), the claim of "selective enforcement will succeed if the failure of the board to enforce documents in other instances bears sufficient similarity to the case at issue as to warrant the conclusion that to permit the enforcement in the instant case would be discriminatory, unfair, or unequal". However, the defense will not succeed if the other claimed violations are not "sufficiently similar" to the violation sought to be addressed.

Various arbitration decisions rendered by the Division of Florida Land Sales, Condominiums

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### TIDBITS Did You Know

*When and if your association finds itself in legal proceedings involving the enforcement of its governing documents, certain terms will commonly arise with which you will want to be familiar.*

- **"ARBITRATION"** is a form of alternative dispute resolution in which the parties, rather than having a trial before a court, present their dispute to an "Arbitrator" at a final hearing. Under Florida law, claims brought by a condominium association, as "Petitioner," to enforce its governing documents against an owner or resident, as "Respondent," must nearly always be submitted to arbitration. Arbitration is commenced with the filing of an "Arbitration Petition," setting forth each of the petitioner's legal claims against the respondent.
- **"LITIGATION"** is the process of adjudicating a dispute in a court of law. A lawsuit is commenced by filing a "Complaint" which sets forth each of the "Plaintiff's" legal claims against the "Defendant."
- **"SERVICE OF PROCESS"** is the formal delivery of an arbitration petition upon the respondent or of a complaint upon the defendant. While service of the arbitration petition is performed by the arbitrator, service of the complaint is often made by a licensed process server or a sheriff.

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## Cats and Dogs cont.

and Mobile Homes have held that it is appropriate to treat different types of pets differently for enforcement purposes. In *Palm Beach Hampton Condominium Association v. Masters*, Case No. 99-0942 (January 2000), the arbitrator concluded that:

"... the failure of the association to enforce its pet restriction against cats while seeking to enforce the restrictions against dogs does not constitute selective enforcement, due to the inherent differences between cats and dogs. A board may rationally decide to concentrate its enforcement resources that are larger, more nuisance-prone, generally louder, more dangerous and aggressive, with greater curbing needs, than cats."

The circuit court adopted this rationale at the trial court level in *Prisco v. Forest Villas Condominium Apartments, Inc.*, 28 FLW D1065a (Fla. 4th DCA 2003), but was overturned on appeal.

In this case, the Association created pet restrictions by amending its documents in 1979 to prohibit all pets, with the exception of fish and birds. Since there were dogs present on the property at the time of the amendment, the amendment included language that allowed the current dogs to remain, while prohibiting those owners from replacing the dogs and likewise prohibiting any new dogs

from being maintained or harbored on the condominium property.

In 1995, Loretta Prisco purchased a unit in the condominium and moved into the community with her dog. When the Association asked her to remove the dog from the property, she complained about the fact that the Association allowed several unit owners to have cats. She then refused to remove the dog, and the Association filed suit.

The trial court, following well-established tendencies in arbitration decisions, held that "cats are not the same as dogs, and the condominium allowing a cat on the premises [is] not equal to disallowing a dog" because "dogs clearly bark, cats do not, dogs need to be walked outside of their home, cats, do not." The court agreed with prior arbitration decisions in that cats and dogs are not similarly alike.

While the trial court agreed that the Association had a rational basis to enforce the pet restriction against an owner with a dog, but not against the cat owners, the appellate court did not and reversed the case.

The Fourth District Court of Appeal disagreed with the arbitrators and the lower court, stating, "the restriction was clear and unambiguous." The restriction provided that other than fish and birds, no pets whatsoever shall be allowed. "The fact that cats are different from dogs makes no difference. What does matter is that neither a cat nor a dog is a fish or a bird, so both should be prohibited." Thus, if the Board did not enforce the no-pet policy against the cat owners, it could not do so with respect to Ms. Prisco, a dog owner. The unit owner's defense of selective enforcement prevailed.

Accordingly, both boards and management must be extremely cognizant of what is occurring in the community before attempting to enforce restrictions and it is important to address these issues on an ongoing basis, keeping in mind the changed circumstances and opinions of the residents. In addition, restrictions and rules must either be republished in the appropriate fashion or amended to conform them to current practice. It is unclear to what extent this decision will impact future non-pet related enforcement actions, such as violations of architectural control provisions or exterior modification requirements. In this case, if the

## TIDBITS cont.

- **"DISCOVERY"** is a formal procedure by which the parties to a lawsuit, and sometimes arbitration, obtain relevant information from one another through written questions, oral examinations, requests for production of documents and things, or requests for admissions.
- **"DEFAULT JUDGMENT"** may be entered by the arbitrator or by the court against a party who fails to respond to a properly served arbitration petition or complaint. When a default judgment is entered, the petitioner or plaintiff wins the case (since the initial petition or complaint remained uncontested) and only the determination of the amount of damages due and owing may be reserved for the final hearing or trial.
- **"SUMMARY JUDGMENT"** may be entered by the court, in favor of either party, as to some or all of the issues being litigated, when there are no disputes over the material factual allegations and only legal issues remain. However, if any factual issue remains, whatsoever, a motion for summary judgment will be denied.
- **"EXECUTION"** of a judgment is the process by which the prevailing party collects the amounts awarded to it in the judgment. This process can include a judgment recorded in the Public Records and attaching to real property or a Writ of Garnishment attaching to an income stream.

membership did not have an objection to allowing cats but still wanted to prohibit dogs or other animals, there was ample opportunity to amend the restrictions between 1979 (the date of the first amendment) and 1995, when Ms. Prisco became a resident. Under most circumstances, acting proactively is the best way to avoid problems, including rule violations or an inability to enforce rules based upon available defenses such as selective enforcement.



## LIMITING DUAL USAGE of Your Common Facilities

By Kenneth S. Direktor, Esq.

Restrictions on dual usage address the use of the common facilities by both residents and non-residents; particularly owners who do not reside on the property whose units are leased. The common facilities of most communities include recreational facilities, like the pool or an exercise room, the available parking on the property, the clubhouse, meeting rooms, and other common areas. These facilities are typically designed to be sufficient for the anticipated number of residents in the community. Accordingly, restrictions prohibiting dual usage are important to prevent overburdening common facilities, accelerating wear and tear and pushing safety limits.



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In condominiums and cooperatives, dual usage is addressed in Sections 718.106(4) and 719.105(3), Florida Statutes, respectively. These sections allow an association to prohibit dual usage by providing that a tenant acquires the right to possess the unit and the appurtenant right to use the common elements and association property. These

sections further provide that the owner of the unit does not have the right to use the common facilities when his or her unit is leased, except as a guest, unless the tenant waives the right to use those facilities in writing.

There is no parallel statutory provision for homeowners' associations. Therefore, in homeowners' associations, dual usage can only be regulated by the governing documents. Since the same concerns would apply, namely, the risk that the common facilities will be overburdened if they are used by both resident tenants and non-resident owners, homeowners' associations should consider amending their documents to incorporate provisions similar to those set forth in the Condominium and Cooperative Acts regarding dual usage.

An association considering dual usage restrictions should base the restrictions on the capacity of the common facilities. For example, in a community with boat docks, a unit may be rented by an owner who owns a boat and wishes to continue to use the dock, while a tenant occupies the unit. Some communities might not find this objectionable, while others might find that the owner's continued access to the property creates additional demands, which may strain the available common facilities, such as parking spaces. Other communities which have golfing or tennis facilities may find the demands for available playing times unduly burdened if resident tenants and non-resident owners can both claim playing privileges.

The association's ability to enforce dual usage restrictions also faces certain practical limitations. Most non-resident owners leasing their units may not find it difficult to find a resident in the community willing to allow the absentee owner to use the facilities as a guest. The Condominium and Cooperative Acts do not specify that the owner must be a guest of another owner. This suggests that the owner could even be considered a guest of his or her own tenant.

Although the association can restrict guest usage to avoid or, at least, limit abuses, such rules must be narrowly drafted to accomplish and remain consistent with the statutory objectives of preventing dual usage. For example, in the case of *Massey v. Destin Gulfgate Owners Association, Inc.*, Arb. Case No. 97-0391, Final Order (May 27, 1997), the tenant issued a written waiver of the right to use a limited common element parking space appurtenant to the unit. Therefore, a rule prohibiting the owner from using the limited common element parking space did not withstand challenge. On the other hand, a rule that limits guest usage of common facilities which does not otherwise conflict with the Declaration and is based upon a realistic assessment of the demands on the common facilities would be an appropriate means of controlling dual usage by non-resident owners.

Restrictions prohibiting dual usage of the common facilities serve a legitimate interest in communities that allow leasing and have valid concerns about overcrowding and overburdening the common facilities.



## When is a SIGN NOT A SIGN?

In the case of *Wilson v. Rex Quality Corporation*, 839 So. 2d 928 (Fla. 2nd DCA 2003), the court was presented with an issue of whether signs painted on small commercial vehicles violated the "no signs" provision contained in the subdivision's restrictive covenants.

One of the residential owners in the subdivision parked a Chevrolet Astro Van with the words "Enjoy Coca Cola" painted on its sides in his driveway, and another residential owner parked a Chevrolet S10 Pickup Truck with the words "Precision Termite and Pest Control" and "679-BUGS" painted on its sides in his driveway. The homeowners association (Rex Quality Corporation) advised these owners that the parking of their commercial trucks in the subdivision and the display of the signage on the parked trucks were prohibited by the restrictive covenants.

Paragraph 8 of the restrictive covenants provides, "No sign of any kind shall be

displayed to the public view on any lot, except one professional sign not more than one (1) square foot, one sign of not more than five (5) square feet advertising the property for sale or rent, or signs used by a builder to advertise the property during the construction and sale period." In addition, Paragraph 14 provides, "No noisy automobiles, trucks, motorcycles, dirt bikes or other similar type vehicles shall be permitted, and no commercial trucks (except small pickup trucks) shall be permitted."

The association filed a complaint alleging that the parking of a commercial truck at a residence within the subdivision was a violation of the provisions of Paragraph 14 of the restrictive covenants and that the display of signage on any vehicle within the subdivision was a violation of the provisions of Paragraph 8.

The appellate court held that the restrictive covenants did not prohibit the signage on the vehicles since the language prohibited the display of signs "on any lot." By giving the words their ordinary meaning, the court

concluded that the words referred only to signs posted on the lots and not to signs painted on vehicles parked in the residential driveways. The court further held that Paragraph 14 of the restrictive covenants did not prohibit all commercial vehicles since an exception was made for small pickup trucks, and that the owners' vehicles were not commercial vehicles as that term was used in the restrictive covenants.

It is a well-settled principle of law that restrictive covenants are to be strictly construed in favor of the free and unrestricted use of real property [See: *Moore v. Stevens*, 106 So. 901, 903 (Fla. 1925)]. The lesson presented by this case is that the courts will strictly construe restrictive covenants and give the words their ordinary meaning in order to carry out the supposed intent of the drafter. Prior to seeking enforcement of a particular restrictive covenant, the language should be examined by competent legal counsel to determine its meaning and enforceability.

## INDISPENSABLE Parties

In the case of *Sheoah Highlands, Inc. vs. Daugherty*, et al, 837 So.2d 579 (5th DCA 2003), the Fifth District Court of Appeal held that a Court is without jurisdiction to issue an injunction which would interfere with the rights of those who are not parties to an action. Mr. Daugherty, a condominium owner brought an action against his association to enforce a provision of the condominium declaration, which prohibited unit owner alterations of the common elements.

The trial court found that certain screen enclosures were built on the common elements of the association. Under the terms of the declaration, the association

was responsible for the maintenance and operation of the condominium common elements and, hence, the trial court concluded that the association was responsible for removal of the two screen enclosures. However, the Fifth District Court of Appeal held that a Court is without jurisdiction to issue an injunction which would interfere with the rights of those who are not parties to the action. Therefore, the trial court could not order the association to remove the two screen enclosures since the association was not the owner of the screen enclosures. The Court held that Daugherty should have named the unit owners, who erected the screen enclosures, in his complaint for injunctive relief.

Another issue of contention for the Court was whether or not the statute of limitations to enforce the provision of the condominium declaration is a five-year limitation or a one-year limitation period for specific performance. The Court held that in an action to enforce a provision of the condominium declaration, a five-year limitation period exists for legal or equitable action on a contract, rather than a one-year limitation period for an action for specific performance of a contract. Therefore, in an action to enforce the declaration of condominium, the association and/or unit owner may bring an action as long as it is within the five-year timeframe in which the infraction to the declaration occurred.