

COMMUNITY UPDATE™

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Serving Florida's Communities Since 1980

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The following is an excerpt from Gary Poliakoff and Ryan Poliakoff's new book titled *New Neighborhoods: The Consumer's Guide to Condominium, Co-Op and HOA Living*.

For more information on the book and the authors, please visit www.newneighborhoodspublishing.com

In general, Americans are not really "rules" people. In fact, one way of looking at the American Revolution is that it began in response to a dictatorial board of directors (the British parliament) that declared an unfair assessment (taxes) without listening to the will of the people (a membership vote). That negative reaction to authority has been an American tradition for hundreds of years.

Further, as we discussed way back in Chapter 1, there is a long-held belief that we should be absolutely unencumbered by external rules in our own homes. But the reality is this: As soon as a family broadens into a community, whether it's a commune, a condo, a city, or a country, rules become inevitable. Even the earliest human communities decided at some point that certain things weren't such a great idea—skewering your neighbor on the end of your spear, for instance—at least not if you're the one who ends up on the pointy end of the argument. In fact, when you boil it down, all rules are a form of conflict resolution. They're an attempt by society to provide a framework for avoiding disputes or resolving them without escalating to violence. The problem is, there are dozens of different theories about how to balance rules, and whether to err on the side of fewer or greater

restrictions. Every community is different, and consequently, so is every set of rules. You'll find SOCs [Shared Ownership Communities] with very few restrictions as well as those that tell you how early you're allowed to turn on the television. Different strokes for different folks.

The vast majority of rules are designed to regulate interaction between neighbors and to ensure that each can enjoy their property as undisturbed as possible. Rules designed to protect the common elements and prevent the deterioration of property values, however, make up a very important minority. These are the rules that govern how your shutters look or what you can do to your balcony. In general, every rule belongs to one of these two categories: avoiding conflict or protecting property. And some actually do both.

It's important to remember that rules are not optional. They're not optional for the board to enforce, and they're certainly not optional for owners or their guests to follow. Don't bring your potbellied pig or bobcat into a pet-restricted condominium, thinking, "They can't possibly care—who would say anything?" They *will* care. Arbitrators and judges are inundated with hundreds of cases on just these issues, and absent disability

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or other exceptions, the rule violator is going to lose practically every time. Rules and regulations are contractual covenants. They're not permissive, and they're not suggestions—they are terms that you constructively agreed to, in writing, when you bought your unit. That makes them fully enforceable, down to specific compliance. That is, if you finished your floors with \$30,000 worth of Italian marble but your documents only allow carpet, a judge is not going to care one whit about your investment or the hardship you will incur by removing the tiles. You are going to have to remove them at your expense, under court order—no question. So again, to paraphrase a saying in the electronics industry, "RTFD: Read the (cough, cough) documents!"

Before we run through the most common rules and regulations that you'll find in an SOC, it's necessary to explain that the rules are separated into two classes, and these classes are treated very differently. For simplicity, they are referred to as Class I and Class II regulations.

A Class I regulation is a covenant, rule, or restriction that is written into the documents and recorded into the public record. This includes anything in the original documents as written by the developer, and it's safe to assume that this probably also includes any rules promulgated later by the board but also publicly recorded. Class I restrictions are clothed with a very strong presumption of validity, as owners have the opportunity to know about them before purchasing a property; if it's in the public record, you're assumed to know that it exists (remember constructive notice?). A Class I regulation will not be invalidated by a court unless the restriction is wholly arbitrary in its application, is in violation of public policy, or contradicts a fundamental constitutional right. The simplest example of an invalid Class I regulation would be a restriction against a particular race or religion buying into the community; this violates public policy, as well as various state and federal statutes. Another example might be a rule that gives the board the power, at its sole discretion and on a case-by-case basis, to regulate what unit owners wear on the common property (a case of arbitrary application). These types of rules will generally be invalidated if they are ever challenged in court, whether or not they have been recorded in the public register. But otherwise, Class I regulations are almost entirely bulletproof, so it's very important that any prospective SOC owner reviews the covenants, rules, and restrictions in the public record extremely carefully. If there's a rule that says no loud music on Tuesdays, it doesn't matter how odd or random that might appear—if

there's any explanation for the rule, then it will be presumed to be valid and it may be enforced by the board. (In fact, as we've already discussed in Chapters 5 and 6, it really *must* be enforced by the board for the directors to satisfy their duty to the owners.)

Class II regulations are those rules that have been promulgated by the board over the years but never recorded publicly. The important thing to remember about these rules is that a court may invalidate them if they are unreasonable, or if they circumvent a right granted or inferred from the recorded covenants, conditions, and restrictions.

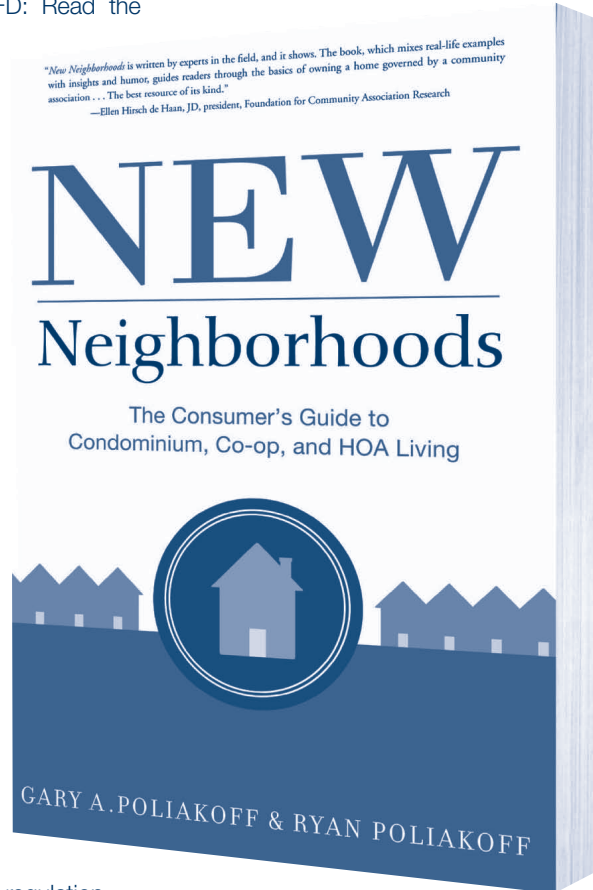
For example, assume that a board of directors wants to pass a rule that no pet snakes are allowed in a condominium. Living in the community is famed herpetologist Sssimon Sssschwartz, and he has an entire menagerie of reptiles living in his home—including more than one hundred snakes. The board passes the regulation, and Simon sssues.

If this had been a Class I restriction existing in the public record our friend Simon would be ssscrewed. He would have to find new homes for all of his snakes—or a new condominium for himself. But as a Class II restriction, the court must first determine whether the rule is reasonable. Simon certainly wouldn't think so, but the test for reasonableness is only to determine whether the rule has some legitimate and explainable basis for existence. In this case, the board was worried that the snakes would escape, get into the walls, and breed, requiring a major and expensive eradication effort—and that's certainly enough

of a basis to be deemed reasonable. For a rule to be found unreasonable it would have to have absolutely no basis in policy, and that's relatively rare.

However, there's another hurdle for the board to face: Does the rule circumvent a right granted or inferred from the recorded documents? The documents are silent on pets, which at first glance might seem to mean that the board is free and clear. But what it actually means is that, since there are no restrictions on pets, they are presumptively allowed. Assuming that they aren't illegal breeds, Simon has a right to keep the snakes in his home, and the board can't promulgate a rule restricting this preexisting right. Simon wins in court.

Assume, however, that the owners feel extremely strongly about this issue and decide to pass the rule by member vote, using whatever percentage is required to amend the documents.



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They still can't restrict those pets that Simon already has in the building. His snakes will be "grandfathered" into the rule, or permitted because the violation existed before the rule was initiated. As long as they're alive, Simon's snakes can stay. However, Simon will be prevented from replacing his snakes, and new owners will not be allowed to bring new snakes into the building. Of course, the grandfather provision can be very hard to enforce. What is to prevent Simon from clandestinely replacing his dead pets with lookalikes and claiming that they have never passed on? At least one pet lover has attempted to skirt the issue by purchasing a new poodle of identical size and weight, and even dying its hair to match the look of her original pet. People do crazy things for their animals.

There are a couple of defenses, however, that owners can raise to *lawfully* prevent an SOC from enforcing a rule: estoppel and selective enforcement. Here's how they work.

As a general principle, the law requires any rule to be enforced within a reasonable amount of time; otherwise, the violator may assume that the rule is not going to be applied. In the case of contractual covenants, this rule is called *estoppel* or *waiver*. In essence, if the board does not act in a timely manner to enforce a regulation, it will be *stopped* from doing so altogether. Take our friend Simon again. Assume that his condo *had* a no-pet restriction, and Simon was in the habit of walking his snakes every day, on dozens of tiny leashes, out in plain view on the property. Despite this, the board of directors failed to notify Simon that he was in violation of the community rules. If a significant amount of time has passed, when Simon is taken to court he is going to argue that the board is estopped from enforcing the rule, because he was openly violating it while the directors ignored it. And Simon is probably going to win the argument. The only way for an SOC to correct a situation where it has neglected a rule is to notify all owners, in writing, that from this point forward it intends to enforce the rule—but anyone who has been violating up until that point will be allowed to continue to do so. This is why it is critical for a board to enforce every rule and regulation, unless the directors are darned sure that they *never* want to enforce the rule (that is, that they are essentially abandoning it).

When a board of directors truly *doesn't* want to enforce a rule, this presents an interesting twist. A proposed amendment to the Uniform Act would allow boards to essentially "decriminalize" certain rules by officially stating that they will not be enforced for policy reasons. This would give boards a tool to fix unusually restrictive rules that were inserted into the documents by the developer, or that are no longer needed due to changes in the community.

The second defense, *selective enforcement*, plays out exactly as it sounds. Just like our own government, an SOC cannot enforce a rule against one resident but intentionally ignore another similar violation. When Simon is taken to court, perhaps he can demonstrate that there's an eighth grader in the building with a pet turtle, and that the board is aware of the violation but failed to enforce it. If so, Simon is going to be allowed to keep his menagerie because the rule was enforced selectively rather than universally. It's a case of "what's good for the goose is good for the gander"; rules are to be applied either universally or not at all.

The wrinkles involved in community rules and regulations can actually be rather difficult for the majority of SOC owners to grasp. Society encourages cooperation and reasonable application of laws. "I know dogs have to be on a leash," a pet owner will say, "but not my dog! He's the best boy ever!" But that owner is going to be the same person who hits the roof when her dog is attacked by a less friendly animal that is also breaking the rules. Unit owners will plead for the board to "be reasonable," and often, because of the complex social interactions involved in SOC service, the directors relent. But wavering on rules opens the doors to valid claims of estoppel and selective enforcement, even when application of the rule might be extremely important to protect either the property or the residents. So, as difficult as it may be to accomplish, it's very important to enforce every rule, every time. ■



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EMPLOYMENT LAW

ASSOCIATION AS EMPLOYER: APPLICABILITY OF FAIR LABOR STANDARDS ACT

By: Jamie Dokovna
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Q: Is Florida increasing its minimum wage for employees?

A: No, but federal law is increasing its minimum wage on July 24, 2009.

Q: What is the new federal minimum wage?

A: The new federal minimum wage is \$7.25 per hour.

Q: How much do we have to pay our employees?

A: Under federal law, employers are required to pay the higher of the federal minimum wage or any applicable minimum state wage. Currently, federal law requires an employer to pay a minimum of \$6.55 per hour and Florida law requires an employer to pay \$7.21 per hour. Therefore, as a Florida employer, you are required to pay your employee a minimum of \$7.21 per hour. However, effective July 24, 2009, the federal minimum wage is being increased to \$7.25 per hour. Accordingly, all Florida employers paying a minimum wage of \$7.21 per hour are required to raise the wages of those affected employees to \$7.25 per hour commencing July 24, 2009.

Q: Is there a minimum number of employees an employer must have before the new wage limits will apply?

A: The answer depends; however in most instances, you are only required to employ one to two persons for the wage limits to apply. Florida law defines an employer as any private individual, firm, partnership, institution, corporation or association that employs ten or more persons. Federal law defines an employer as any person acting directly or indirectly in the interest of an employer in relation to an employee. Under federal law, there are two types of coverage: enterprise or individual. For enterprise coverage to apply, the employer must have at least two employees.

Individual coverage will apply where the person is engaged in interstate commerce, engage in the production of goods for commerce, closely related process or occupation directly essential to production, or the person is engaged in domestic service. Almost every employee in the United States is covered by the Fair Labor Standards Act ("FLSA") which requires payment of minimum wage.

Q: We use a professional employer organization ("PEO"), are we still considered an employer under the law?

A: It depends, joint employer status may exist where two or more businesses/employers exercise some control over the work or working conditions of the same employee, or group of employees. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. A joint employer relationship will typically exist where: (1) there is an arrangement between the employers to share an employee's services or to interchange employees; (2) one employer acts directly or indirectly in the interest of the employer in relation to the employee; or (3) the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

Q: If we are sued by an employee for violation of the FLSA, are we covered by our Director and Officer's Insurance Policy or some other type of insurance policy maintained by the Association?

A: Although each insurance policy is different, generally, insurance policies do not cover wage and hour claims brought under state or federal law. Wage claims can be quite costly for an employer. Employers found to be liable for violating such wage and hour laws, can be required to pay the amount of overtime pay, liquidated damages in an amount equal to the amount of overtime wages, interest, costs, and attorney's fees for the employee (as well as the employer's own attorney's fees and costs).

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