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To Enforce or Not to Enforce? There is no question.

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Associations must enforce their documents as written. Arizona law, under a case called, Johnson v. Pointe Community Association, holds that an association has an affirmative duty to enforce the express terms of its governing documents. The law does not provide any exceptions to this legal obligation. We have long encouraged our clients to understand that an association only has two choices: amend the governing documents or enforce them as written.

An association that chooses not to enforce its governing documents exposes the association and its board of directors to two distinct forms of risk. First, another owner in the community may file a lawsuit against the association and allege that the board has failed to enforce the governing documents. This type of lawsuit could include a personal claim against a member of the board for the board's breach of duty to the association. It is only logical that other owners purchase homes in the community with a reasonable expectation regarding the governance and look of the community. An association's governing documents set forth these expectations. If a board chooses not to enforce or abide by the governing documents, a claim can be made that the board has failed in this simple legal requirement: follow the documents.

Second, if the board chooses not to enforce the governing documents now, the Association may lose its ability to enforce certain terms of the governing documents in the future, either in individual cases or even in a broader sense. Failure to consistently enforce the governing documents exposes an association to an owner's equitable defenses such as abandonment, waiver, estoppel, selective enforcement, discrimination, and laches. These defenses are all somewhat different; nevertheless, all of these defenses can prohibit or severely restrict an association's claim against an owner to enforce the governing documents. If your association has not been enforcing its governing documents, it is never too late to start.

With this all of this in mind, we understand that budget constraints are an obstacle to enforcement. However, the law does not recognize this financial obstacle as a free pass to avoid enforcing the documents. Even in these challenging times, we have found that associations that are aggressive and consistent in enforcement are actually expending fewer funds. Being aggressive and consistent creates deterrence for other owners' violations and raises the overall outlook of the community. Owners that see violations within a community are more likely to ignore their own obligations and mimic those violations.

Stopping violations before problems spread among other owners is the key. Therefore, we encourage boards to adopt an efficient and aggressive enforcement and fine policy. Much like collections, delaying enforcement action delays compliance.

If you have any questions, please contact Josh Bolen, the firm's Director of Enforcement Litigation, or another attorney in the firm.

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