“CONSTITUTIONAL CONSTRAINTS ON THE COMMUNITY ASSOCIATION – WHAT IS APPLICABLE, WAIVEABLE AND INESCAPABLE”

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I. INTRODUCTION

Community associations have certain characteristics in common: they are often creatures of statute, are typically “voluntary” mandatory membership associations, usually include restrictions imposed by covenants recorded against both individual and common properties, and are perceived as having governmental-type functions.

While it is remarked that the spread of community associations has been significant and continuing over the years, there are still alternative housing options that do not involve any type of association. Joining a community association by way of acquisition of a unit therein still remains a voluntary choice, although in some locales (particularly high density areas of population), there may be a very narrow range of choices.

Most community associations have a declaration of covenants as well as by-laws that are recorded against the real property of the association (including both the common areas and the individual units) which take on the function as the basic “constitutional” documents. Most community associations are also organized under the state corporation statutes (either as a for profit or not for profit corporation and apparently now also limited liability companies). However, there are likely some unincorporated associations, including associations organized as partnerships or trusts.

The Bill of Rights is the shorthand reference to the first ten amendments to the United States Constitution. Those rights were engrafted at the very outset of the United States’ transition to a constitutional form of government. Those rights are often viewed as “fundamental” and are viewed as essential protections of individuals and their liberties against the power of the Federal Government. In a diverse society, there is always the prospect that exercise of certain rights by an individual or a certain group may be deemed “in conflict” to the exercise of that same right by another individual or group. Thus, whether in partisan politics or the clash of religious/philosophical views, such exercise by opposing camps can be upsetting but hopefully productive in testing ideas in the market place. On the other hand, there is the natural, understandable desire of individuals to associate with other individuals having the same views and background, which preferences may confront certain societal dictates for the “common good”; for example, the laws against racial discrimination do not apply to certain owner occupied dwelling situations, thereby respecting the individuals’ right to actually exercise his/her preference in the intimacy of the home. That recognition raises the prospect as to likeminded individuals within their collective “home” having the ability to enforce their preferences upon others within that community.

Finally, there are limits as to the “rights” included within the Bill of Rights. For example, “freedom of speech” is not absolute, especially in the contexts of private property and organizations. Freedom of religion and association are also highly valued, but subject to constraints based upon public policy. It is commonplace that a right to a jury trial is waived in contractual arrangements between private parties. There really is no constitutional right which is never subject to limitation. Individuals may knowingly and voluntarily waive certain rights, whether or not that decision would be wise in the view of others.
Ultimately, there is a balance between the purpose or function of an individual right as opposed to the freedom of individuals to forego those rights, presumably to achieve an alternative desired goal.

II. **APPLICABILITY OF FEDERAL CONSTITUTIONAL GUARANTEES TO PRIVATE COMMUNITIES**

A. Tests applied

Generally, as to the applicability of the federal constitutional guarantees, it is axiomatic that private communities are not governmental entities and therefore are not subject to the limitations in the Bill of Rights. Accordingly, constitutional violations are premised on governmental or state action.

1. State action/State actor

The purpose of the Bill of Rights is to protect citizens from the power of the Federal Government. By way of the Fourteenth Amendment, such protection is applied to the State governments. It is a pre-requisite that “state action” be entailed, since purely private action is generally not the subject of the Bill of Rights. *Shelley v. Kraemer*, 68 S. Ct. 836 (1948). While it has been held that the mere potential for state action would involve the protection of the Courts, *Gerber v. Longboat Harbour North Condominium, Inc.*, 724 F. Supp. 884 (1989), vacated in part, 757 F. Supp. 1339 (M.D. Fla. 1991), it appears that the actual use of judicial (or other governmental authority) is required to trigger this test, *Quail Creek Property Owners Association, Inc. v. Hunter*, 538 So. 2d 1288 (Fla. Dist. Ct. App. 1989), *Goldberg v. 400 East Ohio Condominium Association*, 12 F. Supp. 2d 820 (N.D. Ill. 1998), and *Loren v. Sasser*, 309 F.3d 1296 (11th Cir. 2002). It has been generally stated that *Shelley* is/should be confined narrowly to racially restrictive covenants.

*Shelley v. Kraemer*
334 U.S. 1 (1948)

- Private restrictive agreement that “no part of said property or any portion shall be…occupied by any person not of the Caucasian race...” Id. at 4-5.

- “restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.” Id. at 13.

- “We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.” Id. at 20.

*Gerber v. Longboat Harbour North Condominium, Inc.*
Unit owner sues his Condominium Association due to restriction on display of the American flag.

“At the center of the dispute stands one American who seeks to display the flag of our nation in defiance of condominium documents which forbid such display except on designated occasions. Plaintiff, an Air Force Veteran, will not have the Defendant determine the occasions on which he expresses his deep love and respect for America.” Id. at 885.

“Applying the principles of Shelley to the situation sub judice, this court finds that judicial enforcement of private agreements contained in a declaration of condominium constitute state action and bring the heretofore private conduct within the ken of the Fourteenth Amendment, through which the First Amendment guarantee of free speech is made applicable to the states.” Id. at 886.

Quail Creek Property Owners Association, Inc. v. Hunter

Private subdivision covenants prohibited display of any signs (except for identifying owner’s name and address).

Owners filed for injunctive and declaratory relief from covenant enforcement, but never established that they ever attempted to display a “For Sale” sign or were prevented from doing so, but trial court ruled covenant to be unconstitutional.

Held: “neither the recording of the protective covenant in the public records, nor the possible enforcement of the covenant in the courts of the state, constitutes sufficient “state action” to render the parties’ purely private contracts relating to the ownership of real property unconstitutional.” Trial court reversed. Id. at 1289.

Goldberg v. 400 East Ohio Condominium Association
12 F. Supp.2d 820 (N.D. Ill. 1998)

Unit Owner sued her condominium association under Section 1983 over board’s rule prohibiting all canvassing or distributing materials to individual units other than those related to political campaigning.

Unit Owner’s reliance on Gerber v. Longboat Harbour Condominium Association, Inc.

“The problem is that there is no indication… that the condominium association actually secured any sort of judgment or order from a state court [referring to Gerber]…It is difficult to understand, then, how the court in Gerber found state action before the state acted.” Id. at 822.

“the better view is that there is no state action inherent in the possible future state court enforcement of a private property agreement” [citing Quail Creek Property Owners Association, Inc. v. Hunter]. Id. at 823.
“Demonstrating that condominiums do certain things that state governments also do doesn’t show that condominiums are acting as the state or in the state’s place.” Id.

Loren v. Sasser
309 F.3d 1296 (11th Cir. 2002)

When owner decided to sell her home due to disability accommodation issues, she was denied permission by the POA to put up a “For Sale” sign; her request was refused and after her attempt to obtain a preliminary injunction against the sign restriction failed, she nonetheless posted the sign, sold her home and moved.

“Appellant’s argument, that the threat of judicial enforcement constitutes state action, is unavailing…Shelley has not been extended beyond race discrimination.” Id. at 1303

Alternatives to Shelley’s “state action” holding – Law of Servitudes

- Public Policy
- Unreasonable restraint on alienation
- Changed circumstances
- “Touch and Concern”

2. Company Town

An alternative analysis under which constitutional protections must be respected by a private entity is the so-called “company town” situation, most notably having its genesis in the U.S. Supreme Court decision in Marsh v. State of Alabama, 326 U.S. 501 (1946) where the Court determined that for all intents and purposes, a privately owned and operated community was essentially the equivalent of a municipality, thus being governmental in character and accordingly subject to constitutional constraints on governmental entities. Especially for larger scale communities having not only a residential component but also commercial aspects and the “invitation” to public use of those commercial facilities, the potential for characterization as a “company town” is a theoretically continuing prospect. However, judicial expansion was reversed by Hudgens v. National Labor Relations Board, 424 U.S. 507 (1976). See also Saxton, “Protecting the Marketplace of Ideas: Access for Solicitors in Common Interest Communities”, 51 UCLA L. Rev 1437 (2004). However, for most small scale, purely residential associations with minimal commercial and no “public” facilities, the company town characterization will not be relevant.

Marsh v. State of Alabama
326 U.S. 501 (1946)

- A member of Jehovah’s witnesses convicted of trespass (entering another’s private property) in her distribution of religious literature.
Company-owned town “has all the characteristics of any other American town…consists of residential buildings, a system of sewers, a sewage disposal plant and a “business block” on which business places are situated” as well as having a deputy sheriff (paid by the company) serving as the town’s policeman and a U.S. post office location that is “accessible to and freely used by the public in general.” Id. at 502-503.

“In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State’s permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute. Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand.” Id. at 509.

“The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees.” Id. at 508. Trespassing conviction reversed.

3. “Symbiotic-relationship” or “entwinement” theory.

Another alternative basis for finding “state action” is where a governmental entity and a private entity become so interdependent that they are viewed functionally as a single entity. See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) and Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Such entwinement focuses on the private entity taking on public functions (in terms of performing governmental functions and delivering governmental services), such as where governmental services have been “privatized.” Again, in the majority of situations, most residential community associations will not likely engage in the degree of entwinement that would trigger this theory being applied to them.

B. If applicable, what can be waived and how

Essentially, a person is legally allowed to knowingly, intelligently and voluntarily waive rights which would otherwise be available to him/her under the law. For example, it is fairly commonplace that individuals will waive rights to prosecute certain claims that may arise or to utilize certain forms of dispute resolution (waiver of jury trial or even waiver of the judicial process in favor of private dispute resolution such as arbitration). As for constitutional rights, “it has been pointed out that ‘courts indulge every reasonable presumption against waiver’ of fundamental constitutional rights and that we ‘do not presume acquiescence in the loss of fundamental rights.’ Johnson v. Zerbst, 304 U.S. 458, 464 (1938). “For a waiver of constitutional rights in any context must, at the very least, be clear. We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver.” People v. McClanahan, 191 Ill. 2d, 127, 137, 729 N.E.2d 470 (2000). Smith v. Freeman, 232 Ill. 2d 218, 228, 902 N.E.2d 1069, 1074-75 (2009).
Typically, the waiver is a bargained for situation, in which the individual perceives a “good” or objective that is essentially worth the waiver of a particular right or set of rights. See Levine, “This is My Castle: On Balance, the Freedom of Contract Outweighs Classifying the Acts of Homeowners’ Associations as State Action”, 36 Nova L. Rev. 555 (Summer 2012). The Courts may scrutinize a waiver but, if sustained as to knowledge, intelligence and voluntariness, the waiver will be upheld. Although waivers can be evidence by conduct or made verbally, the better practice is for a waiver to be in writing so as to eliminate the pitfalls of ambiguous conduct or undocumented recollections as to whether and to what extent a waiver occurred.

Bryan v. MBC Partners L.P.

- Developer sued unit owner in common interest community for violation of architectural controls by placing a sign (negative to the developer) in front of his home.
- Interlocutory injunction granted, from which owner appealed on basis, inter alia, of violation of public policy regarding freedom of speech.
- Assuming that owner’s sign was subject to First Amendment protection as well as Georgia state constitutional protection, “[n]evertheless, a person may waive or renounce what the law has established in his favor when he does not thereby injure others or affect the public interest. This ancient rule applies to all the private relations in which persons may place themselves toward each other, and includes the waiver of constitutional rights.” Id. at 552.
- “In our view, Bryan validly contracted to abide by the restrictive covenants mutually applicable to all lot owners, including a valid proscription on all signs whatsoever except as approved by the ACC.” Id.

C. If applicable, what cannot be waived and why

“It is true that a “right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy.” Brooklyn Savings Bank v. O’Neil, 324 U.S. 697, 704 (1945) (emphasis added). The conditional clause is essential, however: It in not true that any private right that also benefits society cannot be waived.”

There are certain fundamental (constitutional) rights that perhaps cannot be waived based upon public policy, whereby the consequences of an individual’s waiver are deemed so extreme as to essentially invalidate the waiver. For example, it may be one thing to waive the right to engage in speech (for example, not speaking in certain situations) but it is quite another thing to agree to have one’s tongue cutout for having violated that waiver. Similarly, in the context of substantial property rights, the Courts have required that a person be accorded fundamental due process before having such a loss imposed upon him/her.

Public policy limitations on or invalidation of waivers have included Title VII employee’s rights, Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974); teachers’ statutory tenure laws, Parker v. Independent School District No. 1-003 of Okmulgee County, Oklahoma, 82 F.
3d 952 (10th Cir. 1996); State securities laws, Foreman v. Holsman, 10 Ill. 2d 551 (1957); tenant’s statutory rights interest on security deposits, Wang v. Williams, 343 Ill. App. 3d 495 (5th Dist. 2003); and compliance with statutory residential real estate disclosure statute, Curtis Investment Firm, Ltd. Partnership v. Schuch, 321 Ill. App. 3d 197 (3d Dist. 2001). Essentially, an individual cannot waive the law/statute/regulation due to the public policy. Similarly, private covenants and agreements can never override the public policy as set forth in the statutes and judicial decisions.

Example: Illinois Condominium Property Act

Sec. 18.4 Powers and Duties of Board of Managers. The board of managers shall exercise for the association all powers, duties and authority vested in the association by law or the condominium instruments except for such powers, duties and authority reserved by law to the members of the association. The powers and duties of the board of managers shall include, but shall not be limited to, the following:

* * *

(h) To adopt and amend rules and regulations covering the details of the operation and use of the property, after a meeting of the unit owners called for the specific purpose of discussing the proposed rules and regulations…However, no rule or regulation may impair any rights guaranteed by the First Amendment to the Constitution of the United States or Section 4 of Article I of the Illinois Constitution including, but not limited to, the free exercise of religion, nor may any rules or regulations conflict with the provisions of this Act or the condominium instruments. No rule or regulation shall prohibit any reasonable accommodation for religious practices, including the attachment of religiously mandated objects to the front-door area of a condominium unit. (emphasis supplied)

* * *

(i) To impose charges for late payment of a unit owner’s proportionate share of the common expenses, or any other expenses lawfully agreed upon, and after notice and an opportunity to be heard, to levy reasonable fines for violation of the declaration, bylaws, and rules and regulations of the association. (emphasis supplied)

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Example: Illinois Common Interest Community Association Act

Sec. 1-30 Board duties and obligations; records.

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(g) The board shall have the power, after notice and an opportunity to be heard, to levy and collect reasonable fines from members or unit owners for violations of the declaration, bylaws, and rules and regulations of the common interest community association. (emphasis supplied)

Example: Illinois General Not for Profit Corporation Act of 1986

Sec. 103.30 Homeowners’ association; American flag or military flag.

(a) Notwithstanding any provision in the association’s declaration, covenants, bylaws, rules, regulations, or other instruments or any construction of any of those instruments by an association’s board of directors, a homeowners’ association incorporated under this Act may not prohibit the outdoor display of the American flag or a military flag, or both, by a homeowner on that homeowner’s property if the American flag is displayed in a manner consistent with Sections 4 through 10 of Chapter 1 of Title 4 of the United States Code and a
military flag is displayed in accordance with any reasonable rules and regulations adopted by the association. An association may adopt reasonable rules and regulations, consistent with Sections 4 through 10 of Chapter 1 of Title 4 of the United States Code, regarding the placement and manner of display of the American flag and an association may adopt reasonable rules and regulations regarding the placement and manner of display of a military flag. An association may not prohibit the installation of a flagpole for the display of the American flag or a military flag, or both, but the association may adopt reasonable rules and regulations regarding the location and size of flagpoles.

(b) As used in this Section:

“American flag” means the flag of the United States (as defined in Section 1 of Chapter 1 of Title 4 of the United States Code and the Executive Orders entered in connection with that Section) made of fabric, cloth, or paper displayed from a staff or flagpole or in a window, but “American flag” does not include a depiction or emblem of the American flag made of lights, paint, roofing, siding, paving materials, flora, or balloons, or any other similar building, landscaping, or decorative component.

“Homeowners’ association” includes a property owners’ association, townhome association, and any similar entity, and “homeowner” includes a townhome owner.

“Military flag” means a flag of any branch of the United States armed forces or the Illinois National Guard made of fabric, cloth, or paper displayed from a staff or flagpole or in a window, but “military flag” does not include a depiction or emblem of a military flag made of lights, paint, roofing, siding, paving materials, flora, or balloons, or any other similar building, landscaping, or decorative component.

III. ALTERNATIVE APPROACHES

Several commentators have suggested alternative approaches with which constitutional rights could (and should) be preserved in the community association context.

The Restatement of Servitudes enumerates other means of achieving constitutional protections under servitude law by resort to public policy, unreasonable restraint on alienation, charged circumstances and “touch and concern” concepts, as well as a “homeowner bill of rights.”

An early commentator simply considered constitutional protection to be essential and that “illiberal” residential associations should not be permitted to avoid them. See Note, “The Rule of Law in Residential Associations”, 99 Harv. L. Rev. 472 (December 1985).

More recent commentators discussed the essential inapplicability of the freedom of contract principles to the waiver of constitutional rights. See Boyack, “Common Interest Community Covenants and the Freedom of Contract Myth,” 22 J. L. & Pol’y 767 (2014); but see Levine, “This is My Castle: On Balance, the Freedom of Contract Outweighs Classifying the Acts of Homeowners’ Associations as State Action”, 36 Nova L. Rev. 555 (Summer 2012). One commentator has suggested on “updated,” modern approach to the state action analysis to be applied to community associations. Gott, “Ticky Tacky Little Governments?”, 40 Fla. St. U. L. Rev. 201 (Fall 2012). Another commentator has concluded that a variety of approaches (community bill of rights, state legislation and judicial non-enforcement of covenants) be

IV. SPECIFIC RIGHTS ADDRESSED

A. Speech

Freedom of speech includes both the right of the individual to speak as well the right of the individual to hear the speech of others. Also, the publication of speech in written form, including signage (both political and commercial) is implicated. It is likely that constitutional principles will not be applicable under the Shelley state action/state actor analysis nor the Marsh company town or similar approach. Nonetheless, is not unusual that a community association will treat the subject as if constitutional scrutiny were applicable, thus imposing reasonable (and only to the extent necessary) restrictions on time, manner and place, but not content.

HYPO: Can a community association prohibit “bad language” (such as vulgarity, racial epithets, sexist/gender derogatory remarks) that may offend other members of the community? In the common areas? In the units if overheard in adjoining units or common areas?

Can a community association prohibit commercial use of its hospitality room (such as sales promotional activity)?

Can a community association include the recitation of the Pledge of Allegiance as part of the Board of Directors’ meeting agenda?

Can a community association require a “moment of silence” to recognize some event (9/11?)

Can a community association prohibit door to door solicitation, by residents and/or non-residents?

B. Religion

Freedom of religion includes religious practices.

HYPO: Can a community association adopt religious-based practices (such as requiring head coverings for modesty) when in the common areas?

Can a community association prohibit “blasphemy” (malicious revilement of a religion)?

Can a community association post a copy of the Ten Commandments in its Hospitality Room?

Can a community association prohibit any religious-themed Holiday displays in a Unit (but visible from the building exterior)?
Can a community association prohibit an owner from installing a small religious object on the exterior doorframe of his/her unit?

C. Association

The right to associate or socialize with others is inherent in the nature of community, as well as its counterpart being the right not to associate with others.

HYPO: Can a community association prohibit gatherings that promote opposition the association’s policies, rules and actions?

Can the community association prohibit owners/residents from having certain persons visit them (such as convicted felons/drug dealers/child sex offenders, habitual speeders, and obviously homeless individuals)?

D. Jury Trial and Due Process

Individuals are accustomed to access to the judicial system and its related rights and protections. “Fundamental” due process is accorded (sometimes expressly in statute) to internal disciplinary proceedings.

HYPO: Can a community association require that all disputes be submitted to binding arbitration, and not to traditional litigation?

Can a community association require that both the owner and the association waive a jury trial for any judicial proceedings in which they are adverse parties?

Can a community association require that a unit owner contribute his/her own labor to common tasks or else be charged the cost of “replacement” labor?

E. Cruel and Unusual Punishment

Excessive fines, penalties and other forms of punishment are not permitted. Of course, there is no bright line demarcation of the amount deemed “excessive” or the type of punishment deemed “cruel and unusual.”

HYPO: Can a community association add a “punitive” factor to any fine imposed (e.g. repeat offenders)?

Can a community association require an owner delinquent in assessments to parade or stand in the common area with a sign stating “I am a mooch”?

Can a community association require a habitual delinquent (as to payment of assessments) to post an escrow deposit of one year’s amount of assessments?

F. Firearms

The right to keep and bear arms in the Second Amendment has received renewed attention in recent U.S. Supreme Court rulings regarding an individual’s right to keep a handgun in his/her
home for self-protection.

HYPO: Can a community association prohibit a resident from bearing a weapon (loaded or unloaded) in the common areas?

Can a community association prohibit a resident from keeping a handgun in his/her own unit?

Can a community association require a resident to keep his/her handgun/rifle in a gun safe, have a trigger lock or be unloaded when in his/her unit?

V. CONCLUSION/PRACTICE POINTERS

Is there any risk of “state action/state actor” treatment or equivalence to a municipality or entwinement treatment? If not, then consider the public policy issue as to imposition of constitutional standards on private conduct as a matter of property/servitude law. Then consider practical basis of the restriction – what legitimate association purpose is to be served? Finally, is the issue/matter really that important or crucial to the association’s fundamental objectives?

Perhaps at the end, is it an outcome determinative process? In other words, are constitutional rights (some or all) so fundamental that their applicability should be imposed on community associations, and the task is simply to identify the methodology of that application?
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