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PROPERTY RESTRICTIONS AND THE RELIGIOUS USE OF PROPERTY

Currently, over sixty million people live in communities with homeowners's associations.[1] Various features attract people to these communities, such as higher property values, amenities (e.g., pool, lawn care, etc.), and the visual appeal of the neighborhoods. In some communities, however, homeowners's associations wield significant power over individual property rights.[2] Nonetheless, purchasing property within these communities requires sacrificing certain property rights in exchange for the community's benefits. The property owner surrenders these rights through a legal concept known as servitudes.

Servitudes "are interests of potentially long duration that affect successive land owners and occupiers." RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.7 (2000). Put simply, servitudes are contracts that attach to a property at the time of development, which each subsequent buyer must agree to as a condition of purchase. Ultimately, property restrictions within communities exist "to promote the health, happiness, and peace of mind of the majority . . . ." *Id.* To accomplish this worthwhile goal, however, "each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property." *Id.* By purchasing or renting property in a common-interest community, the individual voluntarily subjects herself to certain restrictions that benefit the community as a whole.

Generally, "the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution," *Chicago, Burlington & Quincy R.R. v. McGuire*, 219 U.S. 549, 566 (1911), and it includes the right to contractually restrict or give up constitutional rights. *See, e.g.*, *Midlake on Big Boulder Lake, Condo. Ass'n v. Cappuccio*, 673 A.2d 340, 342 (Pa. Super. Ct. 1996).

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[1] Cmty. Assns. Inst., *Industry Data: National Statistics*, http://www.caionline.org/info/research/Pages/default.aspx (last visited Dec. 10, 2012).

[2] *See* Michael Pollan, *Town-Building is no Mickey Mouse Operation*, N.Y. TIMES MAGAZINE (Dec. 14, 1997), *available at* http://www.nytimes.com/1997/12/14/magazine/town-building-is-no-mickey-mouse-operation.html?pagewanted=all&src=pm (discussing the controversial rules in Disney's community, Celebration, Fla.).

However, the right to contract is not absolute. *See McGuire*, 219 U.S. at 567 ("There is no absolute freedom to do as one wills or to contract as one chooses."). *Id.* Limitations to this right protect citizens from "the evils which menace the health, safety, morals and welfare of the people." *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937). Similar limitations apply to servitudes that are arbitrary, spiteful, or capricious; burden fundamental constitutional rights; or are simply unconscionable. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 (2000). Furthermore, in the context of servitudes, the right to contract is in tension with the right to use property freely. In fact, servitudes that restrict the free use of land are disfavored by courts. *See, e.g.*, *Double Diamond Props., LLC v. BP Prods. N. Am. Inc.*, 277 Fed. Appx. 312, 316 (4th Cir. 2008). Despite the law's distaste for servitudes, "such agreements are valid and will be enforced, provided they are deemed reasonable under the particular circumstances." *Ferrellgas, Inc. v. Dean*, 887 F.2d 1086, *2 (6th Cir. 1989). "If a rule is reasonable the association can adopt it; if not, it cannot. It is not necessary that conduct be so offensive as to constitute a nuisance in order to justify regulation thereof." *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 4th Dist. 1975). An association derives its authority to restrict personal property primarily from the declaration, which gives an association power to make rules by simple majority vote of participating homeowners. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7(3) (2000) ("Absent specific authorization in the declaration, the common-interest community does not have the power to adopt rules, other than those [dealing with common property], that restrict the use or occupancy of, or behavior within, individually owned lots or units."). Therefore, reasonable restrictions agreed to under the declaration, covenants, and restrictions are usually enforceable.[3] The Fair Housing Act imposes some limits, however, on the kinds of restrictions that can be imposed by Homeowners' Associations.

Fair Housing Act Protections

The Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2006), prohibits housing discrimination on the basis of race, color, religion, sex, national origin, disability, or familial status. These housing protections apply to discrimination in the sale or rental of housing, and also apply to the "terms and conditions" of the sale or rental of housing. For instance, §3604(a) makes it illegal "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. 3604(a) (emphasis added). Additionally, § 3604(b) makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." Regulations established by the Department of Housing and Urban Development interpret this statute to prohibit "[l]imiting the use of privileges, services or facilities associated with a dwelling because of . . . religion . . . ." 24 C.F.R. 100.65(b)(4) (2010). Thus, if people are permitted to put decorations on their apartment doors, religious individuals should be able to put

[3] Judicial enforcement of a covenant or restriction that violates constitutional or statutory rights, however, may constitute state action in some circumstances and become unenforceable. *See Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that by enforcing a racially discriminatory restriction, the association becomes a state actor stating, "[t]he Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." *Id.* at 22.). Other protections may exist to protect private homeowners's religious displays on private property. *See, e.g.*, FLA. STAT. § 718.113 (2011) (protecting condo owners' right to display a flag and religious decoration of a particular size). See also the discussion infra of the Fair Housing Act.

religious items or decorations on their doors, such as a Jewish mezuzah or a cross. For example, in *Bloch v. Frischholz,* 587 F.3d 771 (7th Cir 2009), a Jewish family was barred from maintaining a mezuzah on the doorpost of their condominium. The court held that the Fair Housing Act applies to discriminatory condominium rules, and that there could be a violation of the Fair Housing Act if a general rule was applied inconsistently because of religious animus. Similarly, when condominiums or apartments have a common room that can be reserved by residents for private activities like parties or book studies, federal regulations require that residents seeking to hold a Bible study or other private religious activity may not be discriminated against.[4]

Finally, §3617 makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by section 803, 804, 805, or 806 [42 U.S.C.S. §3603, 3604, 3605, or 3606]." *See also* 24 C.F.R. §100.400(c)(2) (2010). "'Interference' is more than a 'quarrel among neighbors' or an 'isolated act of discrimination,' but rather is a 'pattern of harassment, invidiously motivated.'" *Bloch*, 587 F.3d at 783. Thus, owners and renters are protected from an association or landlord that interferes with their enjoyment of any right protected by the FHA, provided the pattern of harassment is invidious. In *United States v. Altmayer,* a man in a Chicago suburb harassed his neighbors and their children, because of their Jewish religion and because they were of Israeli and Mexican origin. The Civil Rights Division of the Department of Justice reached a consent decree requiring the defendant to pay $15,000 in damages and to attend fair housing training. The decree also barred him from harassing his neighbors in the future.[5]

Those who believe they have been discriminated against in violation of the Fair Housing Act may file a complaint with the Civil Rights Division Housing and Civil Enforcement Section of the Department of Justice.

The Religious Land Use And Institutionalized Persons Act (RLUIPA)

Property owners may also face land use restrictions from local zoning ordinances that conflict with certain religious activity conducted on their property. *See Church of Universal Love & Music v. Fayette Cnty.*, 2008 U.S. Dist. LEXIS 65564 (W.D. Pa. Aug. 26, 2008) (challenging a zoning ordinance restricting the owners from using their 150 acre private property tract for religious services because it was zoned for agricultural use). Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), which prohibits any governmental agency from imposing or implementing "a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person." 42 U.S.C. § 2000cc (2011). Congress passed RLUIPA after conducting hearings which revealed that some local land use authorities actively discriminated against churches. Congress also found that, as a whole, religious institutions were treated worse than comparable secular institutions.

Zoning regulations can sometimes can interfere with churches' ability to carry out their mission of serving the religious needs of their members. Section 2(a) of RLUIPA bars zoning restrictions that impose a "substantial burden" on the religious exercise of a person or institution,

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[4] See Civil Rights Division, Combatting Religious Discrimination and Protection Religious Freedom *available at* http://www.justice.gov/crt/spec_topics/religiousdiscrimination/ff_housing.php

[5] See http://www.justice.gov/crt/about/hce/documents/altmayersettle.pdf.

unless the government can show that it has a "compelling interest" for imposing the restriction and that the restriction is the least restrictive way for the government to further that interest. RLUIPA does not protect against insignificant costs or inconveniences, such as compliance with setback requirements. The burden must be "substantial."

For example, suppose a church applies for a variance to build an extension to it facilities to house a Christian education wing for Sunday school classes, and demonstrates that the addition is necessary to fulfilling its religious mission, that there is adequate space on the lot, and that there would be a negligible impact on traffic and congestion in the area. Suppose the municipal zoning authorities deny the church's request for a variance. In this case, the church could likely show a substantial burden on its religious exercise. If the municipality's reason for denying the church's request for the variance is not compelling, it may be held in violation of RLUIPA.

Suppose further that the zoning authority above had recently granted a variance to a secular organization that made very similar improvements to its building, with a similar negligible impact on traffic and congestion. The "equal terms" provision of RLUIPA, § 2(b)(1), provides that religious assemblies and institutions must be treated at least as well as nonreligious assemblies and institutions. Because the zoning authority has favored a secular organization over religious organization, this example would be a violation of 2(b)(1).

Suppose instead that the church in the hypothetical above was nondenominational, and that the zoning authority had previously granted a variance to a similarly situated Presbyterian Church requesting similar building improvements. Section 2(b)(2) of RLUIPA bars discrimination "against any assembly or institution on the basis of religion or religious denomination." If the zoning authorities denied the nondenominational church's request because they favored only mainline churches in the town, that would be a violation of §2(b)(2).

RLUIPA also forbids zoning ordinances that seek either to completely exclude or limit churches and synagogues within the locality. Section 2(b)(3)(A) of RLUIPA provides: "No government shall impose or implement a land use regulation that totally excludes religious assemblies from a jurisdiction." Section 2(b)(3)(B) of RLUIPA provides: "No government shall impose or implement a land use regulation that unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."

Religious institutions and individuals whose rights under RLUIPA have been violated may bring a private civil action for injunctive relief and damages. The Department of Justice also can investigate alleged RLUIPA violations and bring a lawsuit to enforce the statute.