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A Mandatory Topic of Conversation-Time to Talk Covenant Preservation

FRANK A. RUGGIERI

IN 2018, THE FLORIDA LEGISLATURE MADE PERHAPS ONE OF THE MORE IMPORTANT AND POSITIVE CHANGES TO CHAPTER 720 THAT I'VE SEEN IN MY 20 YEARS OF REPRESENTING COMMUNITY ASSOCIATIONS.

Specifically, the legislature made it mandatory that Homeowners Association Boards discuss preservation of the community covenants at the first Board meeting excluding the organizational meeting, which follows the annual meeting of the members. (F.S. 720.303(2)(e)). Pursuant to Florida's Marketable Record Title Act, covenants must be preserved through the filing of a statutory preservation notice within 30 years of the "root of title" which is typically the recording date of the original declaration of covenants. HOA Board members must now discuss preservation of the covenants at the first Board meeting after the election and subsequent organizational meeting of the Board of Directors.

This has led to many questions, and in my opinion the need for a gentle reminder that all communities subject to covenants which may expire under the Marketable Record Title Act must discuss this issue even if the covenants have already been preserved. The following are a couple of the more common questions which arise:

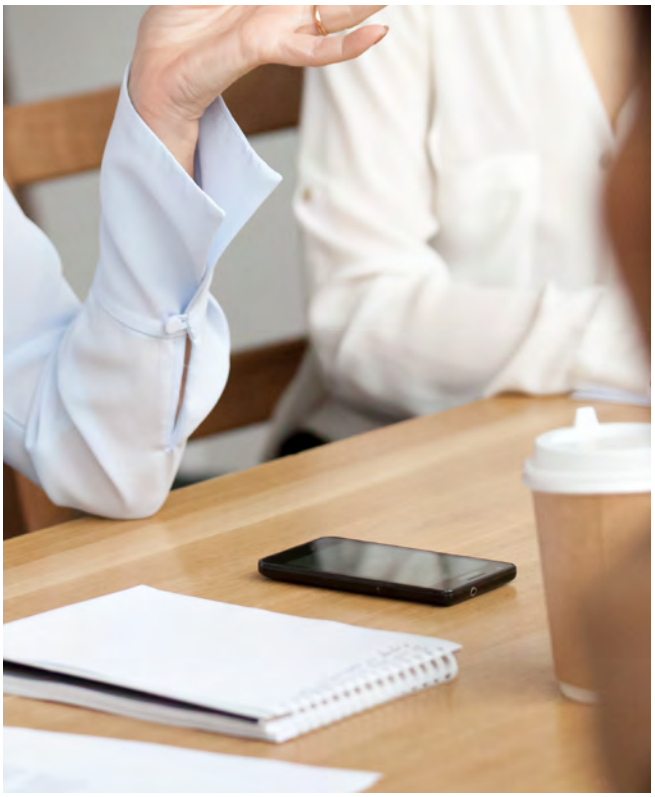
- Must we still discuss preservation of the covenants if we've already completed and recorded the required preservation notice?

- Can we combine this with other items on the agenda at the first Board meeting after the election?

The statute makes no exceptions to this new requirement. Even if the Association has already recorded the required preservation notice, the subject must still be discussed. The Board should include a reference to the discussion in the minutes of the meeting.

Second, the statute is also clear that the discussion must take place at the first Board meeting after the organizational meeting. The statute does not prohibit conducting multiple, back to back Board meetings. Many communities would like to address this matter at or in conjunction with the organizational meeting or the annual meeting itself. Should the Association wish to "multitask", I suggest scheduling a separate Board meeting to take place immediately after the organizational meeting which follows the election for purposes of discussing the preservation notice and any other issues the Board wishes to address. The main point here is that the statute does require that the discussion take place at the first Board meeting after the organizational meeting. This seems to clearly prohibit addressing the matter at the organizational meeting itself and can only happen at a subsequent Board meeting.

As always, consult your Association counsel with any specific questions related to your community and its covenants. ■



The United States Constitution and Your Declaration of Covenants

ANTHONY T. PARIS, III

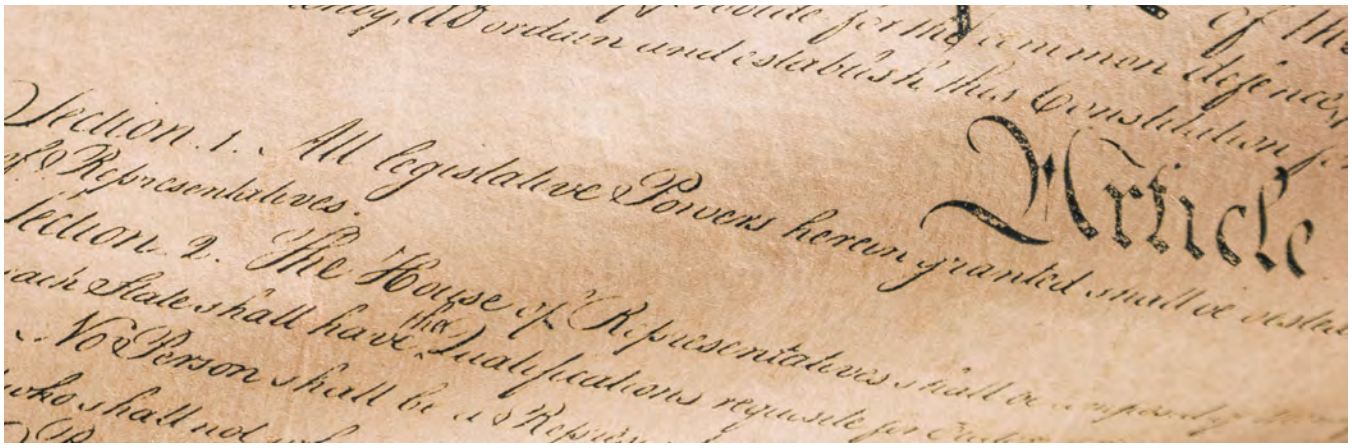
THE LANDMARK CASE OF *SHELLEY V. KRAEMER* WAS ARGUED EXACTLY SEVENTY-TWO YEARS AGO AS OF THE DATE OF THE WRITING OF THIS ARTICLE.

It is a case taught in virtually all law school curriculums and involved a restrictive covenant which was meant to keep African Americans and Asian-Americans out of a particular neighborhood. The Supreme Court of the time ruled that while such covenants do not violate the Equal Protection Clause of the Fourteenth Amendment in and of themselves, their enforcement by the judicial system does, rendering them unenforceable. For the time period in which it was authored this was a progressive decision to be sure; notwithstanding, to this day it is possible to stumble upon racially discriminatory covenants on your County Clerk's website. Although unenforceable, such covenants serve as a monument to the times in which such discriminatory practices were the norm.

To address the presence of such discriminatory covenants, the Florida legislature has proposed House Bill 623 for the upcoming 2020 legislative session. Part of House Bill 623 restates that any provision in a community association's declaration, bylaws, or rules that violates any right under the Fourteenth Amendment of the U.S. Constitution or article I, section 2 of the Florida Constitution is void and unenforceable, and no action is required by an association to remove or amend such provisions because they cannot be enforced. Further, the Bill allows community associations to take the extra step of recording a notice in the public records to indicate its disavowal of such covenants.

The goal may be noble, but the Bill leaves the author wondering if it is not too broad as to invite further governmental regulation of a community's covenants. The Equal Protection Clause pertains to actions of the State, rather than those of private parties. *Shelley v. Kraemer* told us that the Fourteenth Amendment does not apply to covenants between private parties, although it does become implicated once court (government) action is required to enforce them. By applying the Fourteenth Amendment so directly to a community's covenants, House Bill 623 seemingly extends the jurisdiction of the State to regulate the contents of the Declaration of Covenants based on Constitutional grounds.

At this point, the author would like to point the reader's attention to another portion of the United States Constitution; namely the Obligation of Contracts Clause found in Article I. The purpose of this Contracts Clause is to prohibit states from interfering with private contracts, such as those between owners and their community associations founded on the Declaration of Covenants. This potential Constitutional conflict leaves the author hoping that House Bill 623 does not make it past the bill stage of its lifecycle, and that the legislature finds a better way of perceivably righting past wrongs. ■



UPCOMING EVENTS

BREVARD COUNTY

Board Member Certification Class

March 5, 2020

Viera, FL

Final locations and times TBD. Refreshments and light hors d'oeuvres will be served.
If you have any questions or to RSVP, email us at contact@ruggierilawfirm.com.

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