



Agents of Change: Overcoming Racism in Community Associations (ETHICS)

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2 – 3pm

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 VIRTUAL EVENT
 JANUARY 25-29, 2021



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Overcoming Racism in Community Associations

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GOALS

Part One – History

- History of Racism in Community Associations
- Restrictive Covenant Cases and Key Legislation
- Effects of *Reeves vs. Carrollsburg*

Part Two – Education

- The Four A's of Overcoming Racism in Community Associations
 - Awareness, Accountability, Action and Adoption

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RACISM IN COMMUNITY ASSOCIATIONS

- Evolution of Racially Restrictive Covenants
- Federal Housing Administration Systematization of Racism
- Levittown
- Continued existence of racially restrictive covenants in older governing documents

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RACIAL COVENANTS IN DEDICATORY INSTRUMENTS

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RACIAL COVENANTS IN DEDICATORY INSTRUMENTS

a garage or other outbuilding located 60 feet or more from the front line, shall be located nearer than 15 feet to any side lot line.

(d) No residential structure shall be erected or placed on any building lot, which lot has an area of less than 8,000 square feet or a width of less than 75 feet at the front building setback line, as shown on the recorded plan.

(e) No noxious or offensive trade or activity shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood.

(f) No persons of any race other than the white race shall use or occupy any buildings on any lot, except that this covenant shall not prevent occupancy by domestic servants of a different race domiciled with an owner or tenant.

(g) No trailer, basement, tent, shack, garage, barn or other outbuilding erected in the tract shall at any time be used as a residence temporarily or permanently, nor shall any structure of a temporary character be used as a residence.

(h) No dwelling costing less than \$4,500. shall be permitted on any lot in the tract. The ground floor area of the main structure, exclusive of one-story open porches, and garages shall be not less than 625 square feet in the case of a one-story structure nor less than 570 square feet in the case of a one and one-half, two, or two and one-half story structure.

(i) An easement is reserved over the rear five feet of each lot for utility installation and maintenance.

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RESTRICTIVE COVENANT CASES AND KEY LEGISLATION

- Racially restrictive covenants cases, restrictions outlawed by 1948 U.S. Supreme Court case *Shelley v. Kraemer*
- Fair Housing Act (1968) prohibits housing discrimination based on race and effectively outlaws discriminatory covenants

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Reeves v. Carrollsburg Condo Unit Owners Association

- Plaintiff: Deborah E. Reeves, African American attorney and former board president
- Defendants: Carrollsburg Condo Unit Owners Association and Thomas Schongalla (white resident)
- Schongalla subjected Reeves to racial and sexual harassment
 - Prevented Reeves from using common areas – parking lots, lobby and laundry rooms
 - Threatened to rape, lynch and kill her
 - Reeves proposed to POA that it buy her unit. POA accepted. Parties signed contract. POA backed out.

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Reeves v. Carrollsburg Condo Unit Owners Association - cont.

- Lawsuit:
 - Reeves – emotional injury claimed as result of harassment AND the POA's failure to take action
 - Schongalla deposition: "I have had enough Blacks, enough aggressive feminist women and enough aggressive Jews for two lifetimes."
- Court: POA liable. Bylaws authorized POA to address and curtail conduct that violates law. POA should have taken action.

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HUD's HARASSMENT REGULATIONS

- Effective October 14, 2016
- HUD sought to formalize standards for harassment claims
- Potential Respondents:
 - Associations
 - Board Members
 - Association employees
 - Management companies
 - Other agents



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HUD – HOSTILE ENVIRONMENT HARASSMENT

- Elements:
 - Unwelcome Conduct
 - Because of a protected class
 - Severe or pervasive enough to interfere with
 - Sale, rental or use of dwelling
 - Terms, conditions or privileges of sale or rental
 - Provision of services or facilities



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HOSTILE ENVIRONMENT HARASSMENT

- Severe or pervasive?
 - Nature of conduct
 - Context of incidents
 - Severity, scope, frequency, duration and location
 - Single incident enough?
 - Pattern more than a quarrel among neighbors
 - Relationship of persons involved



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HOSTILE ENVIRONMENT HARASSMENT

- Hostile Environment Harassment Examples:
 - Harassment so severe it causes a resident to move away
 - Frequent sexually suggestive comments and/or offensive touching
 - Frequent use of offensive racial epithets
 - Graffiti with "go home" or ethnic slurs



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HOSTILE ENVIRONMENT HARASSMENT

- Who can be liable?
 - Individuals for their own harassment
 - Associations for their employees' and agents' harassment
 - Includes contractors if agency relation exists
 - Liability for third parties' harassment
 - A POA can be held liable for third party's harassment if POA
 - Knew or should have known about the harassment
 - Had power to correct it
 - Failed to take prompt corrective action



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LAWS ENACTED TO NULLIFY AND REMOVE RACIALLY RESTRICTIVE COVENANTS

- Many states have enacted laws to enable membership/boards to remove discriminatory language from their documents:
 - Colorado
 - Washington
 - California
 - Florida
 - Maryland

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DEALING WITH HARASSMENT COMPLAINTS – BEST PRACTICES

- Recommendations for responding to harassment allegations:
 - Harassment reporting policies
 - Evaluate POA's authority to respond to harassment complaints
 - Formulate a response plan
 - Training for Association personnel and agents



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EDUCATION – BECOMING AGENTS OF CHANGE

- The four A's
 - Awareness
 - Accountability
 - Taking Action to modify behavior
 - Adopt and practice behaviors that support equality



TAKE ACTION

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RACIAL MICROAGGRESSIONS

- Racial microaggressions – brief and commonplace daily verbal, behavioral or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory or negative racial slights and insults towards people of color



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RACIAL MICROAGGRESSIONS – THREE FORMS

- Microassaults: Conscious, deliberate, and explicit racist attacks—both verbal and nonverbal—meant to denigrate or hurt the victim
- Microinsults: Often unconscious and more subtle – demeans and belittles the victim through racial slights or comments that seem innocuous but are insulting to a person of color
- Microinvalidations: Comments and behaviors that exclude and invalidate people’s thoughts, feelings, or experiences in life.

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RACIAL MICROAGGRESSIONS – NINE CATEGORIES

- Alien in one's own land
- Ascription of intelligence
- Color blindness
- Criminality/assumption of criminal status
- Denial of individual racism
- Myth of meritocracy
- Pathologizing cultural values
- Second class citizen
- Environmental

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TACKLING MICROAGGRESSIONS – IDENTIFY AND REDUCE

- Introspection
- Mindfulness
- Perspective-taking
- Learn to slow down
- Individuation
- Check your messaging
- Institutionalize fairness
- Take two



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IMPLICIT BIAS



Implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner

- You can act on the basis of prejudice and stereotypes without intending to do so
- Free implicit bias test:
<https://implicit.harvard.edu/implicit/Study?tid=-1>

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IMPLICIT BIAS – RETRAIN YOUR BRAIN

- Practice the behavior that you want so it becomes automatic
- Believe that you can do it
- Adopt the new behavior in all aspects of your life
- Stop all of the behaviors that are holding you back
- Slow down and make a shift so you are less likely to act on bias

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IMPLICIT BIAS - EXAMPLES

- Louisville, Kentucky (July 18, 2020)
- Winston-Salem North Carolina (July 6, 2018) (see video below)
- North Little Rock, Arkansas (November 30, 2020)



Source: BBC News
<https://www.bbc.com/news/world-us-canada-44731122>

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HEALTHY CONVERSATIONS AND BEHAVIORS

- Healthy Conversations
 - Reflective and open to others' feelings
 - Seek common ground
 - Listen with a sense of caring and understanding



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BEST PRACTICES

- Acknowledge existence of racism in community associations
- Accountability
- Take Action
 - Coaching and education
 - Healthy conversations
- Adopt rules governing behavior
 - Publicly state that racist behavior is unacceptable
- Get the lawyer involved!



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Questions



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OVERCOMING RACISM IN COMMUNITY ASSOCIATIONS: ATTORNEYS AS AGENTS OF CHANGE

by

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INTRODUCTION

Racism exists in community associations. We all know it does. How many times have you been on the phone with a board of directors discussing a covenant violation when all of a sudden one of the board members will chime in with a comment about the race of the homeowner at issue? Before you even have a chance to bring up the Fair Housing Act and advise the board that it cannot discriminate against homeowners on the basis of race or national origin or selectively enforce its covenants and restrictions, the board member at issue will make a knee-jerk statement that “Race has nothing to do with it.” A red flag goes up in your mind. You want to give the board member the benefit of the doubt and believe that the board member’s actions are not motivated by implicit bias against people of color, but you know as an experienced professional and counselor of the law – not to mention as a human – that racism is playing a role in the board member’s decision-making on that particular issue.

So, what do you do? As counsel for the community association, we all know that we are obligated to advise on the law and make recommendations based on the state of the law as it exists at the time of the rendering of our opinions. Does the role of counsel include educating boards and managers on addressing and overcoming racism in community associations? We believe it does.

Disclaimer: This topic will make you uncomfortable. It is a highly sensitive issue that carries the weight of centuries of hostility and pain. Rather than shy away from it, we encourage you to lean into the discomfort as we tackle how we as attorneys can become agents of change in overcoming racism in community associations. We are not here to shame anyone or accuse our audience of being racist. We are here to educate on belief systems and stereotypes that are oftentimes engrained in our psyches as a result of our experiences and environment rather than as a result of deliberate action. Through that

education, we will explore how we can become more mindful of the role we and our boards and managers play in unintentionally perpetuating racism in our communities.

Our discussion will be broken down into two parts. Part One will discuss the history of racism in community associations and the current state of the law as it pertains to discrimination on the basis of race. Part Two will discuss overcoming racism in community associations by acknowledging the existence of racial microaggressions and implicit bias; taking accountability for the role we and our boards and managers play in the perpetuation of those microaggressions and implicit biases; providing tools we can use to overcome and reduce racist behaviors and stereotypes; and adopting behaviors and policies that support equality in community associations.

PART ONE

HISTORY OF RACISM IN COMMUNITY ASSOCIATIONS

Before we can hope to overcome racism in community associations, we must understand where and how it began. Of course, the practice of separating communities of people based on race can be traced back to the days of slavery. However, restrictions on the sale or occupancy of residential property based on race really began in the nineteenth century. Racialized deed restrictions and restrictive covenants became prevalent in the United States as the country was going through a period of urbanization while, simultaneously, African Americans were migrating out of the rural south into northern and midwestern industrial cities (the “Great Migration”).

What is a racially restrictive covenant? The Civic Unity Committee, in a 1946 publication, defined racial restrictive covenants as: “agreements entered into by a group of property owners, sub-division developers, or real estate operators in a given neighborhood, binding them not to sell, lease, rent or otherwise convey their property to specified groups because of race, creed or color for a definite period unless all agree to the transaction.”¹ When a restrictive covenant existed on a property deed or plat map, the owner was legally prohibited from selling to members of the specific minority group or groups listed in the covenant.² As a result, racial restrictions were rarely contested – which is a key reason why they were so effective. Still, how did it become such a widespread practice?

¹ Grant Pankey, Katharine I., “Restrictive Covenants in Seattle: A Case Study in Race Relations,” 1947, CUC Collection, Box 17, Folder 19.

² *Id.*

A. Evolution of Racially Restrictive Covenants

In response to the increased presence of Black families during The Great Migration, many cities enacted ordinances that prohibited these families from owning, renting or occupying property except in designated areas of the city. These ordinances were challenged in courts, most notably in *Buchanan v. Warley*, which declared municipally mandated racial zoning unconstitutional.³ Yet, many cities continued to adopt racial zoning ordinances after *Buchanan*, trying to find other indirect ways to keep cities segregated. For instance, in 1924, Richmond, Virginia adopted a state law banning interracial marriage. That law also prohibited Blacks from living on a street with a majority of White occupants since they were unable to intermarry. Attorneys in Richmond argued that *Buchanan* did not apply because their city's racial zoning law was solely intended to prevent intermarriage and its interference with residential property rights was incidental.⁴

After *Buchanan*, restrictive covenants became the primary means of perpetuating exclusion of minorities from developed urban areas. The restrictive covenants combined the legally enforceable rule and the socially enforceable norm of segregation.⁵ Legally, if a White property owner violated the covenant, other White property owners bound by the same covenant could file a lawsuit seeking a judicial declaration to enforce the covenant. Racial covenants also functioned as a social norm of segregation because they were written agreements that were recorded in the public records and disclosed to prospective buyers. Such covenants sent a message to prospective Black homebuyers that even if the covenant would not be enforced, they would be living in a hostile community where they would not likely be accepted.

Racial segregation was as much a function of laws and policy decisions at the local, state and federal level as it was perpetuated by individual prejudices, incomes differences and the actions of private institutions like banks and real estate agencies. As the business of urban real estate development became increasingly professionalized, institutions like the National Association of Real Estate Board or NAREB adopted its own methods to encourage segregated communities. In 1924, NAREB decreed a "Realtors Code of Ethics" that included the directive that "A Realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or

³ 245 U.S. 60 (1917)

⁴ Racial Integrity Act of 1924. State legislature of Virginia.

⁵ Retrieved on December 15, 2020. "Report: Monroe County awash in racist land deeds", by Jeremy Moule, August 4, 2020. <https://www.wxnews.org/post/report-monroe-county-awash-racist-land-deeds>

nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood".⁶ Adoption of such policies were utilized by some organizations as a means to skirt Supreme Court rulings and promote racial separation under the guise of a supposed duty to their customers.

Then, in 1926, the Supreme Court considered the validity of private racially restrictive covenants. *Corrigan v. Buckley* was based on a restrictive covenant executed by a group of homeowners in Washington D.C. that prohibited homeowners and their successors from selling to racial minorities.⁷ One of the homeowners violated the agreement by selling his home to a Black family and a neighboring homeowner subsequently sued. The Supreme Court agreed with the lower court's ruling that the fourteenth amendment applied only to actions taken by states or government entities and did not apply to actions by individuals in respect to their property.⁸ The Court held that none of the United States Constitution's amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property.⁹ Essentially, the Court endorsed the legality of restrictive covenants. Significantly, the Court did not decide the central question of the case which was whether courts could actually enforce racially restrictive covenants.

1. Creation of Community Associations

In *Shelley v. Kramer*¹⁰, which we will discuss below, the Court held that deeds with racially restrictive covenants were essentially a private contract between the present and previous owner. Following *Shelley*, it was difficult for a neighbor to obtain legal relief against another neighbor for breach of such a private contract. Nevertheless, the FHA and other federal agencies made efforts to subvert the Court's ruling and preserve state-sponsored segregation.¹¹ Gradually, the racial covenant took the form of a contract among all owners in a neighborhood which would allow a neighbor to sue if an African American family bought property in the area. The caveat: the contract wasn't enforceable against a neighbor who didn't sign the contract.

To overcome that difficulty, many subdivision developers created community associations before putting homes up for sale and made membership in the community

⁶ *Id.*

⁷ 271 U.S. 323 (1926).

⁸ *Id.*

⁹ *Id.*

¹⁰ 334 U.S. 1 (1948).

¹¹ Rothstein, Richard, The Color of Law. Liveright Publishing Corporation, 2017, pp 77-81.

association a condition of purchase.¹² This practice started in the 1920's when a certain developer-initiated construction of a country club district in Kansas City. The developer required each purchaser of property to join the district's association which not only prohibited sales or rentals to Black families, but further provided that the racial exclusion policy could not be modified without the assent of owners of a majority of the developer's acreage.¹³ Notably, the threshold for amendment of an association's restrictions remains high to this day, thereby making removal of racially restrictive covenants from a community association's governing documents especially challenging if the required percentage of owners do not agree with such removal.

Significantly, the most powerful endorsement of racially restrictive covenants actually came from the federal government. In 1926, the same year that the Supreme Court upheld exclusionary zoning, it also upheld the legality of restrictive covenants.¹⁴ The Court found that restrictive covenants were voluntary private contracts. As a result, successive presidential administrations embraced racially restrictive covenants as a means of segregating the nation.

B. The Federal Housing Administration (FHA) Systematizes Racism

In 1929, the Federal Housing Administration ("FHA") was created for the purpose of salvaging the home building and finance industries that had collapsed during the Great Depression. The FHA paved the way for post-World War II mass suburbanization by lowering home down payments, establishing minimum standards for home construction, and eliminating lending institution's risk in providing mortgage financing.¹⁵ Thereafter, the FHA's home building subsidies and subdivision regulations helped to institutionalize racial residential segregation on a national scale by requiring the use of racially restrictive covenants on government-insured housing and refusing to insure mortgages for homes in predominantly minority areas of the inner city.¹⁶

The National Housing Act of 1934 ("The Housing Act") also played a part in popularizing these covenants by introducing the practice of "redlining," or drawing lines on city maps delineating the ideal geographic areas for bank investment and the sale of

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Sociological Perspectives, Volume 43, Number 2, pages 291-317; "Racialization and the State: The Housing Act of 1934 and the Creation of the Federal Housing Administration", Kevin Fox Gotham, June 1, 2000.

¹⁶ *Id.*

mortgages. Areas blocked off by redlining were considered risky for mortgage support and lenders were discouraged from financing property in those areas.¹⁷

Portions of the Housing Act encouraged land developers, realtors and community residents to write in racial restrictive covenants to prevent neighborhoods from being redlined thereby providing a financial justification for racial restrictive covenants and encouraging their use. Redlining made it exceedingly more difficult for non-Whites to purchase property because financing was refused in the only neighborhoods in which they could afford to live.¹⁸

The Underwriting Manual, which established the FHA's mortgage lending requirements, considered African Americans to be "adverse influences" on property values and warned against the "infiltration of inharmonious racial or nationality groups" in racially homogenous neighborhoods.¹⁹ These discriminatory activities legitimized the notion that racial discrimination is a necessary and normal characteristic of all housing market transactions, housing appraisal and mortgage lending.²⁰ After World War II, the newly established Veteran's Administration ("VA") also began to guarantee mortgages for returning servicemen. The VA adopted the FHA's housing policies, and VA appraisers used the FHA's Underwriting Manual. By 1950, the FHA and the VA worked together to insure half of all new mortgages nationwide.

Here's an example of the harm done by the FHA: In the late 1930's, as Detroit grew outward, White families began to settle near a Black enclave adjacent to the area known as Eight Mile Road. By 1940, Blacks were surrounded, but neither they nor Whites could obtain FHA insurance because of the proximity of neighboring inharmonious racial groups. In 1941, an enterprising White developer built a concrete wall between the White and Black areas.²¹ The FHA appraisers subsequently elected to approve the mortgages on the White properties. On one hand, the FHA was instrumental in alleviating the home ownership crisis. On the other, the enactment of the FHA had significant negative effects.²²

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

C. Levittown: A Legacy of Bias and Racial Exclusion

In 1947, entrepreneur Abraham Levitt and his two sons, William and Alfred, developed a planned community located in Nassau County, Long Island. To effectuate their development, the Levitts obtained FHA subsidies to finance four thousand homes before clearing the land to build Levittown, a settlement intended for returning World War II veterans and one of the first mass-produced suburbs in the country.²³

Levittown's covenants contained a number of restrictions that prevented certain demographics from buying homes in the area.²⁴ For instance, a clause in the original Levittown covenants prevented tenants from allowing non-Caucasians to use or occupy Levitt houses. The Levitts justified the clause by stating that the covenant would serve to maintain the value of the properties, since most Whites at the time preferred not to live in mixed communities.²⁵

Significantly, the Levittown development plans reviewed by the FHA required approved construction materials, the design specifications, the proposed sale price, etc., and a commitment not to sell to African Americans. In 1948, the Supreme Court in *Shelley v. Kraemer*, which we will discuss in detail below, struck down these racially restrictive housing covenants as violations of the Fourteenth Amendment. The Levittown clause was subsequently eliminated. Even with this ruling, though, the area remained overwhelmingly segregated until 1954. Notably, the history of Levittown highlights the practices which contributed to the country's perpetuation of systemic racism in community associations.

RESTRICTIVE COVENANT CASES AND KEY LEGISLATION

A. Restrictive Covenant Cases

We have already discussed the seminal 1917 case of *Buchanan v. Warley*²⁶, where the U.S. Supreme Court (the "Court") ruled racial zoning unconstitutional and the 1921 case of *Corrigan v. Buckley*²⁷, where the Court held that restrictive covenants were voluntary private agreements over which it had no jurisdiction. Together, these cases

²³ Rothstein, Richard, *The Color of Law*. Liveright Publishing Corporation, 2017, pp 68-75.

²⁴ Retrieved on December 15, 2020. "The Controversial History of Levittown, America's First Suburb", by Noah Sheidlower, July 31, 2020. <https://untappedcities.com/2020/07/31/the-controversial-history-of-levittown-americas-first-suburb/>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

effectively endorsed the widespread use of racially restrictive agreements in community associations.

The next landmark Court decision was decided in 1948 in the case of *Shelley v. Kraemer*²⁸. *Shelley* was actually a consolidation of appeals from two state supreme court decisions, *Shelley v. Kramer* and *McGhee v. Sipes*²⁹ and the consolidation of two cases concerning properties located in the District of Columbia in *Hurd v. Hodge*³⁰. All four cases were referred to collectively as the Restrictive Covenant Cases. These Cases addressed the validity of court enforcement of restrictive covenants against Black property owners.³¹

The case of *Shelley v. Kramer* arose out of African American defendant Shelley and his wife's purchase of a parcel of property in St. Louis, Missouri in 1945. Incident to the sale of the property was the presence of a recorded agreement which restricted occupancy of the property to Caucasians. Neighbors who were parties to the restrictive agreement brought suit to restrain the Shelleys from taking possession of the property and to forfeit their title. The Supreme Court of Missouri ultimately held that the restrictive agreement was effective, and its enforcement did not violate any rights guaranteed by the United States Constitution.³²

The 1944 Michigan case of *McGhee v. Sipes* contained similar facts as those of *Shelley*. The African American defendants bought a parcel of property which was bound by and subject to a restrictive covenant which prohibited occupants that were not of the Caucasian race. Neighbors filed suit to enforce the covenant. The Court held in favor of the petitioners. The Court ordered the defendants to vacate the property within ninety days and restrained them from using or occupying the property in the future. The Supreme Court of Michigan subsequently affirmed the ruling.³³

In the last two cases, *Hurd v. Hodge* and *Uricolo v. Hodge*, African Americans purchased properties in the District of Columbia. In both cases, the properties were purchased from White owners under deeds which contained covenants restricting rental

²⁸ 334 U.S. 1 (1948).

²⁹ 25 N.W.2d 639 (Mich. 1947).

³⁰ 334 U.S. 24 (1948). These cases represented the consolidation of two cases concerning properties in the District of Columbia: *Hurd v. Hodge* and *Uricolo v. Hodge*.

³¹ Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 Wash. U.L. Q. 737 (1989).

³² *Id.*

³³ *Id.*

or sale to “any Negro or colored person, under a penalty of Two Thousand Dollars”.³⁴ As in the cases of *Shelley* and *McGhee*, neighbors who were parties to the covenant brought suit. The District Court then consolidated the two cases for trial purposes and eventually entered a judgment that nullified the defendants’ deeds and enjoined the defendants and the White property owner from leasing, selling or conveying the properties to any person of color.³⁵

The rulings in these consolidated cases were significant because the Court had finally rendered judicial enforcement of these racial restrictive covenants invalid, albeit for reasons that did not address the real issue. Interestingly, in the *Shelley* and *McGhee* cases, the Court held that the states at issue had denied the defendants the equal protection of the laws as guaranteed by the Fourteenth Amendment and declared that judicial action constitutes the kind of state action with the meaning of that clause.³⁶ In the *Hodge* cases, the Court applied the first section of the Civil Rights Act of 1866 and gave consideration of public policy in support of its decision.³⁷

Notably, the Court did not actually address the validity of the racial restrictive covenants in any of the cases. In fact, the Court in *Shelley* emphasized that “the restrictive covenants standing alone cannot be regarded as a violation of any rights guaranteed to the petitioners by the Fourteenth Amendment. So long as the purposes of these agreements are effectuated by voluntary adherence to their terms, it would appear that there has been no action by the State and the provisions of the Amendment have not been violated.”³⁸ In *Hurd*, the Court likewise held that “the [Civil Rights Act of 1866] does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms.”³⁹ In sum, the restrictive covenants themselves were not nullified. Instead, judicial enforcement of the restrictive covenants was found to be in violation of the rights guaranteed by the Fourteenth Amendment – not the restrictions themselves.

Although the Court invalidated statutory racial segregation in *Buchanan*, it was not until *Shelley* that the Court declared its position on judicial enforcement of the covenants 31 years later. During that time, racially restrictive covenants had become a

³⁴ *Id.*

³⁵ Kiang, Yi-Seng, Judicial Enforcement of Restrictive Covenants in the United States, 24 Wash. L. Rev & St. B.J. 1 (1949).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

tool to effectively bar almost all minority groups in the United States from predominately White urban neighborhoods. The impact of the Restrictive Covenant Cases was tremendous, but the practice of inserting racially restrictive covenants in governing documents or deeds remained commonplace. Additionally, minority groups still had to contend with the economic burden of buying into White neighborhoods as well as the social force of racial prejudice.

1. *Barrows v. Jackson*

Following the Restrictive Covenant Cases, similar issues came before the Court in different ways. Notably, in *Barrows v. Jackson*, the owners of residential estates in a neighborhood in Los Angeles adopted a covenant which ran with the land and restricted the use and occupancy of property to persons of the White or Caucasian race. The covenant further obligated sellers to incorporate the restriction in all transfers of land.⁴⁰ White neighbors sued fellow White owners for damages after the owners disregarded the racial covenant and sold their home to Black purchasers. In reliance on the principles in *Shelley*, six members of the Court held that a restrictive covenant could not be enforced at law through a suit for damages against a co-covenantor who broke the covenant.⁴¹ The *Barrows* case solidified the idea that racially restrictive covenants could not be enforced indirectly, at least not through lawsuits seeking damages or injunctive relief, as such enforcement would violate the Fourteenth Amendment.

B. The Fair Housing Act of 1968

Though cases like *Shelley* and *Barrows* held against the legal enforceability of racially restrictive covenants, the cases had little to no impact on racial covenants that were privately made by property owners and voluntarily accepted by purchasers of property. As a result, the use of the racially restrictive covenants continued into the late 1960's.

The 1968 Fair Housing Act ("The Act") changed everything. Per the Act, racially restrictive covenants were deemed illegal regardless of whether they were voluntarily accepted by purchasers of property.⁴² The Act prohibited discrimination concerning the sale, rental and financing of housing based on race, religion, national origin or sex. The enactment of the Act marked the first time since 1883 that that the United States

⁴⁰ 346 U.S. 249.

⁴¹ *Id.*

⁴² Retrieved December 16, 2020. "Historical Shift from Explicit to Implicit Policies Affecting Housing Segregation in Eastern Massachusetts." <https://www.bostonfairhousing.org/timeline/1920s1948-Restrictive-Covenants.html>.

government had endorsed the rights of African Americans to reside wherever they chose and could afford.

The Act had two main purposes: (1) to prevent discrimination and (2) reverse housing segregation. The reversal of segregation was necessary because decades of unjust government practices had led to a prevalence of housing segregation. Unfortunately, despite the Act's best efforts, housing segregation continues in the United States even today.

Though the country has made progress since the enactment of the Act, many challenges to fair housing remain. Extreme racial disparities in homeownership and wealth continue to exist. In 1968, 65.9% of White families owned their homes. That rate was 25% higher than the 41.1% of Black families that owned their homes.⁴³ Shockingly, even today, the Black homeownership rate has not changed but White homeownership has increased five percentage points to 71.1%.⁴⁴ These homeownership disparities contribute to the racial wealth gap in United States. In 2017, the typical White family held ten times the amount of wealth as the typical Black family (\$171,000 for Whites to \$17,409 for Blacks, on average).⁴⁵ These numbers have worsened since 1968 and support the notion that housing discrimination may have a direct and oftentimes negative effect on life outcomes of the victims of such discrimination.⁴⁶

C. *Reeves v. Carrollsburg*

The lingering negative effects of racial discrimination in housing and racially based harassment were felt as recently as the late 1990's seminal case of *Reeves v. Carrollsburg*.⁴⁷ At this point, most if not all of us are aware of the significance of the *Reeves* case and its effect on our community association law practice. However, we believe it is important for purpose of our current discussion to delve into the heinous facts of that case are not as readily known.

Ms. Reeves, a Black woman and administrative judge who had notably once served on the board of directors of her condominium association, was harassed,

⁴³ Retrieved on December 15, 2020. "National Low Income Housing Coalition, Fair Housing Act Overview and Challenged", October 23, 2018. <https://nlihc.org/resource/fair-housing-act-overview-and-challenges>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Retrieved on December 15, 2020. "National Low Income Housing Coalition, Fair Housing Act Overview and Challenged", October 23, 2018. <https://nlihc.org/resource/fair-housing-act-overview-and-challenges>.

threatened, and accosted by her White neighbor (and self-described racist) Mr. Schongalla.⁴⁸ During the course of Ms. Reeves' occupancy, Schongalla engaged in a nonstop and aggressive campaign of racially and sexually motivated verbal assaults against Reeves, which included threats on Reeves' life.⁴⁹ Reeves repeatedly sought assistance from law enforcement.⁵⁰ Schongalla was ultimately arrested and found guilty of criminal violations. Reeves was awarded restraining orders against Schongalla.⁵¹ Unfortunately, none of these actions stopped Schongalla from his continued harassment of Reeves.⁵²

Reeves turned to the condominium association for help. In response, the board sent violation letters to Schongalla in which it demanded that he cease and desist his reprehensible misconduct. Unfortunately, the letters were no more effective in stopping Schongalla's misconduct than the criminal law sanctions that had been imposed against him.⁵³ Although the association's governing documents provided the board with legal authority to take action against Schongalla, the board elected against taking such action because it took the position that Schongalla's actions were criminal in nature and were therefore not remediable or actionable as a civil matter.⁵⁴ Accordingly, the association opted against the pursuit of an injunction to enforce its covenants.⁵⁵ Reeves subsequently sued the association for creating and failing to prevent a hostile housing environment in violation of her civil rights under the Fair Housing Act.⁵⁶ The court in *Carrollsbury* ultimately held that the association's failure to do everything within its power to address and remedy the hostile housing environment was actionable under the Fair Housing Act.⁵⁷

⁴⁸ Retrieved on December 16, 2020. "HUD Says You Are Your Neighbor's Keeper" by Wil Washington <https://www.chadwickwashington.com/blog/hud-fair-housing-compliance/>.

⁴⁹ Reeves alleged that commencing in 1989, Mr. Schongalla began a course of conduct which subjected her to racial and sexual harassment. She contends that Mr. Schongalla repeatedly yelled racist and sexist epithets at Ms. Reeves, prevented her from using the common areas of the condominium, physically intimidated her and threatened to rape, lynch and kill her. *Reeves v. Carrollsbury Condo Unit Owners Ass'n*, No. 96-2495, 1997 WL 1877201 (D.D.C. Dec. 18, 1997).

⁵⁰ Retrieved on December 16, 2020. "HUD Says You Are Your Neighbor's Keeper" by Wil Washington <https://www.chadwickwashington.com/blog/hud-fair-housing-compliance/>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

The ruling in the *Reeves* case changed the game for community associations. Where it was once thought that neighbor-to-neighbor disputes did not require association intervention, *Reeves* made it clear that associations do have a duty to intervene and protect residents from hostile housing environments when the association's governing documents authorize the association to take action.

EFFECTS OF THE REEVES CASE

A. 2016 HUD Update

In the wake of the *Reeves* case, some courts continued to believe that the Fair Housing Act did not impose a duty on community associations to intervene in neighbor-to-neighbor dispute involving discrimination on the basis of an individual's race, color, religion, sex, national origin, familial status or disability.⁵⁸

Per the Fair Housing Act, housing providers cannot:

- (1) make unavailable or deny a dwelling to any person because of a protected class;⁵⁹
- (2) discriminate against individuals in the provision of services or facilities relating to their dwellings;⁶⁰
- (3) make statements that indicate a preference or limitation or discrimination in the sale or rental of a dwelling because of a person's protected class;⁶¹
- (4) coerce, intimidate, threaten, or interfere with an individual for exercising or enjoying a right or protection granted by the Act;⁶² or

⁵⁸ See *Lawrence v. Courtyards at Deerwood Association, Inc.*, 318 F.Supp.2d 1133 (S.D. Fla., 2004)42 U.S.C. §§ 3604–06; 24 C.F.R. §§ 100.50–100.205. The Texas Fair Housing Act generally tracks the federal Fair Housing Act. See generally Tex. Prop. Code §§ 301.001–171; 40 Tex. Admin. Code §§ 819.111–221.

⁵⁹ 42 U.S.C. § 3604(a); 24 C.F.R. §§ 100.50(b)(3), 100.60(b)(5).

⁶⁰ 24 C.F.R. § 100.65(b)(4).

⁶¹ 42 U.S.C. § 3604(c) (prohibiting statements indicating a preference, limitation, or discrimination with respect to the sale or rental of a dwelling); 24 C.F.R. §§ 100.50(b)(4), 100.75(a) (same); see, e.g., *Yazdini v. Las Virgenes Vill. Cmty. Ass'n*, No. CV 11-07611 SJO (JCx), 2012 U.S. Dist. LEXIS 191221, at *40–41 (C.D. Cal. 2012) (denying the defendant's motion for summary judgment on the plaintiff's § 3604(c) claim based on "No Playing" signs and a letter stating "there is no play area for children [in the subdivision]. Parents should take their children to the park to play.").

⁶² 42 U.S.C. § 3617; 24 C.F.R. § 100.400.

(5) coerce, intimidate, threaten, or interfere with an individual in the enjoyment of his or her dwelling because of the individual's protected class.^{63, 64}

Pursuant to these standards, it appeared that community associations and their boards could, in fact, be held liable if they failed to successfully address harassment of owners in their communities who were part of a protected class. Clarification was needed.

In October 2016, the U.S. Department of Housing and Urban Development (HUD) answered the call by publishing new interpretive regulations regarding harassment claims under the Act.⁶⁵ Under these regulations, HUD formalized standards for evaluating claims of "quid pro quo"⁶⁶ and "hostile environment"⁶⁷ harassment in the housing context, and "clarif[ied] when [respondents] may be held directly or vicariously liable under the Act for illegal harassment."⁶⁸

The new regulations unequivocally established HUD's view that associations and managers, as well as their employees and agents, may be held liable for discrimination under the Fair Housing Act if they knew or should have known of discriminatory conduct occurring in their associations and failed to take action to address it. Under this regulation, a community association can be held liable under the Act for resident-on-resident harassment (based on a protected class) if the harassment violated the

⁶³ 24 C.F.R. § 100.400(c)(2).

⁶⁴ In addition to the anti-discrimination requirements listed in the text, the Fair Housing Act also requires community associations to (1) permit reasonable modifications to existing premises (at the disabled resident's expense) to the extent necessary to afford the resident full enjoyment of the premises, and (2) make reasonable accommodations in rules, policies, practices, and services (at the association's expense) to the extent necessary to afford a disabled resident equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604(f)(3)(A), (B); 24 C.F.R. §§ 100.203–04.

⁶⁵ Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054 (Sept. 14, 2016) (to be codified at 24 C.F.R. ch. 100).

⁶⁶ See *Honce v. Vigil*, 1 F.3d 1085, 1089–90 (10th Cir. 1993) (analyzing tenant's quid-pro-quo and hostile-environment harassment claims under the 42 U.S.C. § 3604(b)).

⁶⁷ See *id.*; *Tagliaferri v. Winter Park Hous. Auth.*, 486 F. App'x 771, 774 (11th Cir. 2012) (analyzing tenant's hostile-environment sexual harassment claim under 42 U.S.C. § 3604(a)); *Quigley v. Winter*, 598 F.3d 938, 946 (8th Cir. 2010) (recognizing hostile-environment sexual-harassment claims under the Fair Housing Act, without citation to a specific provision of the Act); *Bloch*, 587 F.3d at 782–83 (recognizing a claim for invidiously motivated interference or harassment under 42 U.S.C. § 3617).

⁶⁸ *Id.* at 63,054–55.

association's restrictive covenants and the association opted against enforcement of the restrictions.⁶⁹

The enactment of the 2016 HUD regulations effectively codified the finding in *Reeves*⁷⁰ and provides that if an association has the authority to take civil action against a person who is engaged in unlawful discriminatory conduct under its governing documents or applicable laws governing the association, it has a duty to exercise that authority on behalf of the aggrieved resident. Failure to do so now formally constitutes a violation by the association of that person's civil rights under the Fair Housing Act.⁷¹

B. Progress: Laws Enacted to Nullify and Remove Racially Restrictive Covenants

Encouragingly, many states have taken action to enact laws to nullify and/or remove racially restrictive covenants from their states' real property records. In 2018, Washington State amended its discrimination laws to provide property owners a new way to strike racially restrictive covenants from documents affecting the title of their properties.⁷² An owner can now record a modification document with the county auditor where the property is located in order to remove a recorded racially restrictive covenant.

In 1990, Colorado passed a law which allowed attorneys, title insurance companies and title insurance agents to remove any void or unenforceable restrictive covenant based upon race or religion contained in an instrument affecting the transfer or sale of, or any interest in, real property.⁷³

In 1985, the Texas legislature introduced a bill that related to modification of covenants and land use restrictions applicable to certain real estate subdivisions, which included findings that "racial covenants in subdivisions are offensive and harmful to members of racial or ethnic minority groups and public policy required that such covenants be deleted". The law provided that the fact that "such covenants are unenforceable in law does not affect this finding. The mere existence of such covenants, rather than their enforceability, is what makes same repugnant."⁷⁴ The bill intended to provide for "removal of any restriction or other provision thereof relating to race,

⁶⁹ Retrieved on December 16, 2020. "HUD Says You *Are* Your Neighbor's Keeper" by Wil Washington <https://www.chadwickwashington.com/blog/hud-fair-housing-compliance/>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Retrieved on December 26, 2020. "Restrictive Covenant Modification »; <https://www.spokanecounty.org/4272/Restrictive-Covenant-Modification>.

⁷³ Concerning Restrictive Covenants Which Are Void and Unenforceable, H.R. 90-1218, Chap. 274 (1990).

⁷⁴ 1985 Tex. Laws Ch. 309 (House Bill 2256)

religion, or national origin that is void and unenforceable under the U.S. Constitution or Section 5.026 of the Texas Property Code.”⁷⁵ Unfortunately, racially restrictive covenants do remain in Texas real property records. However, and very excitingly, proposed bills which would allow for the actual removal of such racially restrictive covenants have been pre-filed with the Texas Legislature in preparation for the 87th Legislative Session which begins on January 12, 2021.⁷⁶

In August 2020, California lawmakers announced legislation to remove racist language from real estate covenants.⁷⁷ Various other states have ratified laws to allow for the removal of racially restrictive covenants (Arizona⁷⁸ Delaware⁷⁹ Kansas⁸⁰ Maryland⁸¹, Missouri⁸², Nevada⁸³, Ohio⁸⁴, Virginia⁸⁵ Oregon⁸⁶, and Minnesota⁸⁷) and surely others will follow. The positive effects of the enactment of such regulations are far-reaching. Unfortunately, the act of purging racially restrictive language from real estate documents

⁷⁵ *Id.*

⁷⁶ House Bill 485 relates to the removal of certain unconstitutional provisions from real property records. Introduced by Representative Wu. HB 485 would permit an owner of property to file suit to remove from a recorded instrument affecting or conveying an interest in the property a provision that: (1) violates the United States Constitution; (2) is unenforceable under law; and (3) is unambiguously discriminatory. Senate Bill 222 relates to the removal of certain discriminatory restrictions and provisions from certain real property records. Introduced by Senator Hughes. SB 222 permits owner to request, on a form provided and created by the attorney general, that the county clerk remove a discriminatory provision or restriction from an instrument.

⁷⁷ Retrieved on December 29, 2020. “Assemblymember Kevin McCarty and Legislators Announce Legislation to Remove Racist Language from Real Estate Covenants.” <https://a07.asmdc.org/press-releases/20200804-assemblymember-kevin-mccarty-and-legislators-announce-legislation-remove>.

⁷⁸ 2000 Arizona Laws, Ch. 16 (Senate Bill 1164).

⁷⁹ 2018 Delaware Laws Ch. 409 (Senate Bill 243).

⁸⁰ 2006 Kansas Laws Ch. 144 (House Bill 2582).

⁸¹ In 1971, Maryland passed House Bill 764, a bill that, among other things, declared restrictive covenants to be “null, void and of no effect, and contrary to the public policy of this State, as well as contrary to the Constitution and the laws of the United States.” Stricken from the final bill was this notable mechanism for removing racial covenants: “Any person who has an interest in any real or lease-hold property may request the clerk of any court in which is recorded a document affecting title to said property, to reform such document by deleting therefrom any such covenant. Upon the receipt of such request the clerk of court shall place such document on record without cost after deleting from the record copy thereof any reference to such covenant.”; 2004 Maryland Laws Ch. 478 (Senate Bill 692); 2018 Maryland Laws Ch. 636, (Senate Bill 621); 2020 Maryland Laws Ch. 421 (House Bill 1077).

⁸² 2005 Missouri Laws (Senate Bill 168).

⁸³ 1965 Nevada Laws Ch. 350 (Assembly Bill 424); 2019 Nevada Laws Ch. 68 (Senate Bill 117).

⁸⁴ 1997 Ohio Laws Ch. 5309 (Senate Bill 83).

⁸⁵ 1998 Virginia Laws Ch. 873 (House Bill 1121); 2020 Virginia Laws Ch. 748 (House Bill 788).

⁸⁶ ORS 93.270 and OR 93.274; 2018 Oregon Laws Ch. 35 (House Bill 4134).

⁸⁷ 2019 Minnesota Laws, Ch. 45 (H.F. 51).

on a nationwide scale would be massive undertaking and many states have not elected to take such action. As a result, discriminatory language will continue to remain governing documents, deeds and other real estate documents recorded prior to 1968.

C. Still a Ways to Go: Condominium Association's Right of First Refusal

Following the enactment of the Fair Housing Act, the Supreme Court, in *Jones v. Alfred H. Mayer Co.*,⁸⁸ held that section 1982 of the Civil Rights Act of 1866 prohibited all racially motivated refusals to sell or rent since it was deemed a "relic of slavery".⁸⁹ Unfortunately, such racially motivated practice continues even today through the practice of a condominium association's right of first refusal.

Generally, the right of first refusal in a condominium association's governing documents exists to enable a condominium to exercise some degree of control over the sale or leasing of apartments.⁹⁰ However, some condominium associations manipulate that right in order to prevent sales to persons of color. The good news is that while many condominiums possess the authority to exercise this right of first refusal, most rarely implement it.

If a condominium is considering exercising its right of first refusal as to sales of units in the condominium, it should make sure that the transaction follows a uniform set of guidelines and procedures adopted by the board so as to ensure that purchases are not made purely for discriminatory reasons. While a condominium can essentially exercise its right of first refusal for any reason, or for no reason, exercising it for discriminatory reasons—such as to keep an African American or a Jewish person/family out of a building—would clearly be legally inappropriate.⁹¹ In fact, any adopted policy should avoid consideration of subjective factors such as the applicant's appearance, demeanor, owner's estimate of his character or even personal dislike as those may be considered by a trier of fact as little more than racial discrimination in disguise.⁹²

⁸⁸ 392 U.S. 409 (1968).

⁸⁹ *Id.*

⁹⁰ Retrieved on January 1, 2021. "The Right of First Refusal: What Your Board Should Know", by Stephanie Mannino, July 2008. <https://cooperator.com/article/what-your-board-should-know/full#:~:text=%E2%80%9CA%20condominium%20can%20exercise%20its,legally%20inappropriate%2C%E2%80%9D%20says%20Shmulewitz>.

⁹¹ *Id.*

⁹² Stern, Elliot M., "Condominiums and the Right of First Refusal", 4 St. John's. L. Rev. v. 48 (1974).

D. Dealing with Harassment Complaints

When confronted with a harassment complaint in a community association, it is incumbent on us as attorneys to educate and advise our boards and management companies on practical steps they can take to manage harassment issues:

1. *Training for Association Personnel and Agents*

- Hold board training regarding Fair Housing Act compliance
- Recommend updating of the association's employee handbook and volunteer policies to prohibit discrimination and harassment against residents under the Fair Housing Act
- Conduct separate training for association's volunteers, employees, and agents on anti-harassment issues under the Fair Housing Act
- Regarding contractors that may be considered agents of the association:
 - Require the contractors to agree in their contracts that the association has the right to terminate the contract if in the association's judgment the contractor unlawfully harasses a resident.
 - Require that the contractor agree to comply with all applicable laws, including the Fair Housing Act.
 - Consider providing the contractor an educational pamphlet setting forth the contractor's anti-discrimination and anti-harassment obligations.
 - When feasible, require the contractor to indemnify the association for any fair housing claims arising out of the contractor's (or its agent's) acts.

2. *Harassment-Reporting Policies and Resident Training*

- Encourage boards to adopt a harassment-reporting policy for residents to report third-party harassment under the Fair Housing Act. This decision should be made after much deliberation and consultation.
- If the association decides to adopt a harassment-reporting policy for third-party harassment claims, the association should provide annual training on

what constitutes actionable harassment and how residents should comply with the policy.

- If authorized by state law, condominium associations should consider adopting rules requiring landlord owners to comply with the Fair Housing Act and ensure that their tenants do the same. Condominium associations should also consider adopting restrictions providing for the association's authority to step into the shoes of the landlord owner and terminate the lease if the tenant unlawfully harasses another resident.

3. *Evaluate Current Authority and Adjust as Advisable*

- Evaluate and advise on the association's authority to address harassment by a resident or third party.

4. *Response Plan*

- Community associations need to be prepared to address residents' harassment complaints. The association's response plan will likely depend on whether the alleged harasser is an association agent or employee, or a third party.

E. Unfortunate Real-Life Examples of Racism in Community Associations

By way of transition into the second half of this paper which will discuss overcoming racism in community associations, we would like to present you with some real-life examples which serve to demonstrate the fact that racism is still very much alive and well in our communities. While discriminatory incidents occur on a daily basis, few of them make it to the news. Here are just a few recent examples:

1. Louisville, Kentucky (July 18, 2020). Michella Pineda, a Navy veteran, and Connie Pineda moved to a Lake Forest community in April 2019. The Pineda's neighbor and her then-12-year-old daughter thereafter began verbally harassing the family with racial slurs in an attempt to force the Pinedas out of the neighborhood. The neighbor, Suzanne Craft, was caught on camera spray-painting racially offensive slurs on the Pineda's driveway and front yard. Craft had vandalized the Pineda's property three times in the past and painted a swastika sign on the property on two separate occasions. The Pinedas filed suit seeking damages against the neighbor and compensation from the Lake Forest Community Association for "failing ... to promote the social welfare and common good of its members and

... failing to take prompt action to correct and end the harassment," which the victims claim has been occurring for months.⁹³ The Lake Forest Community Association issued a statement, "The Lake Forest Community Association has been made aware of an unacceptable racial slur being spray painted on a resident's driveway. The Association takes this intolerable act very seriously and is currently reviewing the matter with its Board of Directors and legal Counsel," the statement says. "The authorities have been contacted and an investigation is ongoing. Anyone with any additional information, please contact the police. The Lake Forest Community Association stands firmly against racial intolerance, in all of its forms. The Lake Forest neighborhood should be a place where all residents and visitors feel welcome, safe and happy. It is the expectation that community residents and visitors do their part to ensure that Lake Forest is such a neighborhood."⁹⁴ Investigation into this matter is ongoing.

2. Winston Salem, North Carolina (July 6, 2018). Community resident Jasmine Edwards and her baby attempted to enter her community pool in Winston-Salem. Pool Committee member Adam Bloom, a White man, stopped her and demanded that she produce identification to confirm she was a resident of the private Glenridge Homeowners Association. Ms. Edwards was the only Black person at the pool and Bloom only approached her. Bloom called the police. Ms. Edwards produced her electronic keycard. Bloom refused to apologize to Ms. Edwards. The Association published the following statement: "In confronting and calling the police on one of our neighbors, the pool chair escalated a situation in a way that does not reflect the inclusive values Glenridge seeks to uphold as a community".⁹⁵
3. North Little Rock, Arkansas (November 30, 2020). Chris Kennedy received an anonymous racist letter after he installed a Black Santa Claus in his front yard. The letter read as follows: "Please remove your negro Santa Claus yard decoration. You should try not to deceive children into believing that I am negro. I am a Caucasian (white man, to you) and have been for the past 600 years. Your being jealous of my race is no excuse for your dishonesty. Besides that, you are making yourself the laughingstock of the neighborhood. Obviously, your values are not

⁹³ Retrieved on December 29, 2020. https://www.wdrb.com/news/racial-slurs-found-on-lake-forest-driveway-neighbor-faces-charges/article_fb22ada0-c136-11ea-a57f-0bcec3c8a972.html.

⁹⁴ *Id.*

⁹⁵ Retrieved on December 29, 2020. "North Carolina mother alleges racism at private pool." <https://www.bbc.com/news/world-us-canada-44731122>.

that of the Lakewood area and maybe you should move to a neighborhood out east with the rest of your racist kind.” The letter contained an image of a white Santa with two thumbs down and a label affixed to the front of the envelope that resembled the Lakewood Property Owners Association’s logo. In support of the Kennedy family, neighbors drove by and honked, delivered cookies and dropped off a sign that said, “loved your neighbor”. Many of the Kennedy’s neighbors then installed Black Santas on their own lawns in a show of support.⁹⁶ Additionally, the management company, on behalf of the board of directors, personally visited the Kennedy’s home and condemned the behavior of the racist neighbor.

PART TWO

THE FOUR A’S OF OVERCOMING RACISM IN COMMUNITY ASSOCIATIONS: AWARENESS, ACCOUNTABILITY, ACTION AND ADOPTION

Picture this: Your firm has a high-paying community association client located in a rural area of the state. This client has found itself embroiled in costly litigation involving a deed restriction violation. The firm assigns its top litigator to the case. This litigator happens to be a woman of color. The litigator attends various hearings and obtains rulings in the association’s favor every time apart from one particular hearing where the association had the law on its side, but the judge still found in favor of the homeowner on the issue. Subsequent to the hearing, one of the board members calls the litigator’s supervising partner and tells him the board doesn’t want the litigator on the case anymore and requests a reassignment. The partner asks the reason. The board member says, “She just doesn’t look like the other attorneys here.”

“Whoa,” you think to yourself. “That was a very racist comment.” The board member is clearly allowing his implicit bias towards people of color in his rural community to be a deciding factor in what should otherwise be a business decision. So, what do you do? Do you agree to reassign the case because you want to keep the client happy? Of course you do. You need to honor the client’s wishes, even though what you really want to do is cite to the litigator’s skills and experience – not to mention success rate – and advise the client that it should disregard the litigator’s race and keep her on the case because she’s the best person for the job. You feel compelled to shine a light on

⁹⁶ Retrieved on December 29, 2020. “Black Santa brigade: Neighborhood rallies around Arkansas family targeted with racist rant.” <https://www.kiro7.com/news/trending/black-santa-brigade-neighborhood-rallies-around-arkansas-family-targeted-with-racist-rant/HNWXPTTI4VFSHDZPUCVLHO54RI/>.

the board member's racial bias. You tell yourself that you would not be accusing the board member of being racist. You would be having what is known as the "That thing you said was racist" conversation.⁹⁷ You would focus on the board member's words and actions and explain why what he did and said was unacceptable.

This approach will not work. The board member will be insulted because he will assume you are accusing him of being racist. You're not, of course, but the board member will feel that you are. You may – and likely would – lose the client. Unfortunately, in the above example, the time to address the issue had already passed and the supervising partner did not really have a choice other than reassignment of the litigator.

In this paper, we are advocating in favor of attorneys modeling the antiracist behavior they want others to emulate so the type of conversation above does not even occur. How do we model antiracist behaviors? We do it through educating our boards and managers on microaggressions and implicit bias and providing tools they can use to overcome racism in their communities; supporting diversity in our firms by hiring and promoting attorneys of color; and fostering a climate of inclusion and compassion in our firms so we set an example to other leaders in our industry of what it means to be an antiracist organization.

In the following sections, we will attempt to bring awareness to the form in which racism takes in community associations; encourage our audience to take accountability for the role they play in perpetuating racist behaviors despite good intention; and provide tools attorneys and community association boards and managers can use to effect antiracist action and truly become agents of change.

A. Awareness: Racism exists in Community Associations through Racial Microaggressions and Implicit Bias

1. Racial Microaggressions⁹⁸ - Making the Invisible Visible

At this point, most if not all of us have heard the term "microaggression" used in conjunction with the racism conversation on more than a few occasions. So, what are racial microaggressions? Racial microaggressions are everyday subtle insults or

⁹⁷ How To Tell Someone They Sound Racist. Jay Smooth. <https://www.youtube.com/watch?v=b0Ti-gkJiXc>

⁹⁸ The term "racial microaggression" was originally coined by psychiatrist Chester M. Pierce, MD in the 1970s after the Civil Rights era.

derogatory messages directed toward minorities and people of color, often from well-intentioned people who believe they've done nothing offensive and who consciously believe in and profess equality.⁹⁹ Perpetrators are often unaware that they engage in such communications when they interact with racial minorities. Microaggressions can be behavioral, but the vast majority are communicated through language. While they may seem harmless, microaggressions can cause great distress to those who experience them.

The reality is that you are the sender of a message through your words and actions, but the racism is experienced in the mind of the receiver – not you. You may not think there's anything wrong with what you've said, but a person of color may nonetheless be highly offended. At extreme levels, it is easy to distinguish toxic behavior, e.g., yelling, verbal abuse, explicit threats, antagonism, violence, touching without permission, and sexual advances. However, microaggressions include a much broader range of behaviors that are equally toxic but more subtle and subjective. "Microaggressions hold their power because they are invisible, and therefore they don't allow us to see that our actions and attitudes may be discriminatory."¹⁰⁰

To understand the range of these incidents, it is important to identify the different forms of microaggressions and how they can play out in everyday life.

There are three recognized forms of racial transgressions¹⁰¹:

- i. *Microassaults*: These conscious, deliberate, and explicit racist attacks—both verbal and nonverbal—are meant to belittle or hurt the victim
 - a. Examples: Name-calling, using racial slurs, avoiding and/or discouraging interracial interactions; displaying a swastika
- ii. *Microinsults*: While often unconscious and much more subtle, a microinsult demeans and belittles the victim through racial slights or comments that seem innocuous but are insulting to a person of color
 - a. Examples: A person of color being mistaken for a service worker; a woman clutching her purse when walking past a person of color

⁹⁹ Retrieved on December 20, 2020. "Racial microaggressions in everyday life: implications for clinical practice." <https://pubmed.ncbi.nlm.nih.gov/17516773/>.

¹⁰⁰ Sue, Derald Wing, et al. "Racial Microaggressions in Everyday Life." *American Psychologist*, No. May-June, pp. 276-277.

¹⁰¹ *Id.*

- iii. *Microinvalidations*: These comments and behaviors can exclude and invalidate people's thoughts, feelings, or experiences in life and ignore the lived experiences of historically marginalized groups
 - a. Examples: Asking an Asian American where they are *really* from implies that they are not from the United States and are therefore a foreigner; those who think the notion of microaggressions is just out-of-control political correctness

The first step in addressing and overcoming racial microaggressions is to first recognize when the microaggression has occurred and acknowledge the message that it may be sending to the person of color. Below are the nine recognized categories of racial microaggressions¹⁰², organized according to theme, microaggression example and message that may be received by the person of color:

1. **Alien in one's own land**
 - a. Theme: Assuming a person of color is foreign born
 - b. Microaggression: "Where are you from?" "Where were you born?"
 - c. Message: You are not American. You are a foreigner
2. **Ascription of intelligence**
 - a. Theme: Assigning intelligence level to a person on basis of race
 - b. Microaggression: "You are a credit to your race."
 - c. Message: People of color are not as smart as Whites
3. **Color blindness**
 - a. Theme: White person doesn't want to acknowledge race
 - b. Microaggression: "When I look at you, I don't see color."
 - c. Message: Denial of a person of color's racial/ethnic experiences
4. **Assumption of criminal status**
 - a. Theme: Presuming that people of color are criminals
 - b. Microaggression: Clutching purse; store clerk following Black shopper
 - c. Message: You are a criminal. You are dangerous
5. **Denial of individual racism**
 - a. Theme: Statement that denies your racial biases.
 - b. Microaggression: "I'm not racist. I have Black friends." "As a woman, I know what you go through as a minority."
 - c. Message: You are immune to racism because you have friends who are persons of color

¹⁰² *Id.*

6. **Myth of meritocracy**
 - a. Theme: Statement that race doesn't play a role in life successes
 - b. Microaggression: "I believe the most qualified person should get the job."
 - c. Message: People of color are given unfair treatment because of their race
7. **Pathologizing cultural values**
 - a. Theme: Notion that values and communication of Whites are ideal
 - b. Microaggression: "Why are you so loud? Just calm down."
 - c. Message: Assimilate to White culture
8. **Second class citizen**
 - a. Theme: White person given preferential treatment over person of color
 - b. Microaggression: Mistaking Black person for service worker
 - c. Message: People of color are servants to Whites
9. **Environmental**
 - a. Theme: Systematic and environmental
 - b. Microaggression: TV shows depicting mostly White key characters; colleges with buildings all named after White upper-class men.
 - c. Message: People of color have no key place in society

The hope is that by recognizing and naming the above microaggressions, one can undercut their power and expose the nonverbal cues (tone of voice, body language, gestures, facial expression, etc.) that carry meaning behind them, thereby enabling one to recognize and cease from engaging in microaggressions moving forward.¹⁰³

Practically speaking, how do you prevent your boards and managers from engaging in racial microaggressions? First, you must recognize that microaggressions are not automatic. People can control their unintended insensitivity.¹⁰⁴ "Because microaggressions are often communicated through language, it is very important to pay attention to how we talk, especially in the workplace and other social institutions like classrooms, courtrooms, and so on," says Christine Mallinson, professor of language, literacy, and culture at the University of Maryland.¹⁰⁵

¹⁰³ See Freire, Paulo, *Pedagogy of the Oppressed* (1968).

¹⁰⁴ Bolea, Al and Leanne Atwater, *Deeping the Journey* (Publication pending 2021)

¹⁰⁵ Retrieved on November 15, 2020. "What is a microaggression? 14 things people think are fine to say at work — but are actually racist, sexist, or offensive." <https://www.businessinsider.com/microaggression-unconscious-bias-at-work-2018-6>.

Below is a framework of behaviors that we as attorneys can use to identify and address our own possible and certainly unintentional use of microaggressions so we are better able to educate our boards and managers how to do the same in their own lives¹⁰⁶:

Introspection. Become aware that words matter to people in different ways. Be mindful of your own imperfections. Examine your beliefs. Call yourself on your own stuff. Do your own personal work.

Mindfulness. Notice what you notice. When you meet someone new, you typically “size them up” and identify the differences between you. Ask yourself if you are making any stereotypic assumptions and, if so, refrain from making those assumptions. Also, watch others’ body language that may signal your words were perceived in an unintended way. Practice being more mindful about how what you say and do might affect those around you. Acknowledge other people’s feelings.

Perspective-taking. Consider the stereotyped person’s point of view. Embrace empathy. Put yourself in other people’s shoes. By exploring another person’s perspective, you can glean insight into your behaviors. If you’ve been called out for doing or saying something hurtful, resist getting defensive. Instead, embrace curiosity. Ask questions that can help you understand the person’s point of view. Try not to downplay the situation and listen carefully as the person share their experience. Remember, the person is taking a risk by allowing themselves to be vulnerable by sharing this information with you.

Learn to slow down/Check your messaging. Before speaking, ask yourself if the recipient of your message may be offended by your words. If the answer is yes, put the thought aside momentarily and let time provide an opportunity for you to rephrase your message in a more productive way so your listener will be more receptive.

Individuation. Evaluate people based on their personal characteristics rather than their race.

Institutionalize fairness. Support a culture of diversity and inclusion in your organization. Publicly state that racist behavior is unacceptable. Include a disclaimer on the organization’s website which conveys a viewpoint that the organization welcomes and encourages diversity and does not tolerate discrimination of any kind.

Take two. Recognize that you will not be able to overcome your use of microaggressions overnight and neither will your boards and managers. Show yourself

¹⁰⁶ Bolea, Al and Leanne Atwater, Deeping the Journey (Publication pending 2021).

grace. Act with positive intention. If you slip, restart the process and look for ways to improve.

We all have a role to play in addressing and preventing microaggressions. By taking the time to learn, ask questions, and be accountable for our actions, real progress against racism can be made.

Next, let's talk about implicit bias and the role it plays in the perpetuation of racism in community associations.

2. Implicit Bias – Retraining the Brain

Implicit bias refers to the attitudes or stereotypes that affect our understanding, behaviors, actions and decisions in an unconscious manner.¹⁰⁷ Simply put: Everyone has them. You can act on the basis of prejudice and stereotypes without intending to do so. Implicit bias is the brain's automatic processing of negative stereotypes that have become embedded in our brains over time about particular groups of people oftentimes without our conscious awareness. We make associations based on a particular group's traits and make quick decisions about those people based on those associations. These associations develop over the course of a lifetime beginning at an early age through exposure to direct and indirect messaging received through life experiences and, oftentimes, the media and news programming.¹⁰⁸

Although people are taught to be colorblind and further taught that they can be objective when evaluating people, science suggests that sometimes our values aren't sufficient for us to actually practice those pieces because our brains see race very quickly. "We develop, derive bias from just seeing certain pairings of words together over time. And those bits of information help us navigate our unconscious processes."¹⁰⁹ This means that in order to address people's implicit bias, a lot of fundamental processes in the brain have to be changed. People generally intend well and try to align their behavior with their intentions, but their implicit bias gets in the way. By exploring and understanding implicit bias, we can help ourselves and our boards and managers better achieve alignment in behavior and intention.

¹⁰⁷ Retrieved on December 23, 2020. "Implicit or unconscious bias." <https://www.simplypsychology.org/implicit-bias.html>.

¹⁰⁸ Retrieved on January 1, 2021. "Understanding Implicit Bias." <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>.

¹⁰⁹ Retrieved on December 23, 2020. "A Lesson In How To Overcome Implicit Bias." <https://www.tpr.org/2018-04-19/a-lesson-in-how-to-overcome-implicit-bias>.

Implicit biases are bits of knowledge about social groups that are stored in our brains because we encounter them in our cultural environment. “Once lodged in our minds, hidden biases can influence our behavior towards members of a particular social groups, but we remain oblivious to their influence.”¹¹⁰ Simply put: Your behavior can be guided by mental content of which you are completely unaware.

“A Few Key Characteristics of Implicit Biases:

- Implicit biases are pervasive. Everyone possesses them, even people with avowed commitments to impartiality such as judges.
- Implicit and explicit biases are related but distinct mental constructs. They are not mutually exclusive and may even reinforce each other.
- The implicit associations we hold do not necessarily align with our declared beliefs or even reflect stances we would explicitly endorse.
- We generally tend to hold implicit biases that favor our own ingroup, though research has shown that we can still hold implicit biases against our ingroup.
- Implicit biases are malleable. Our brains are incredibly complex, and the implicit associations that we have formed can be gradually unlearned through a variety of debiasing techniques.”¹¹¹

Harvard professor William James concluded over 130 years ago that “The body shapes the mind which shapes the brain.”¹¹² He argued that a person’s behavior influences their attitudes, thought processes, and feelings, and not the other way around. Thus, he concluded that people could change their attitudes (biases) by altering their behavior.¹¹³

¹¹⁰ Banaji, Mahzrin R. and Anthony G. Greenwald, Blind Spot: Hidden Biases of Good People (2013).

¹¹¹ Retrieved on January 1, 2021. “Understanding Implicit Bias.” <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>.

¹¹² Wiseman, R. Rip it Up: The Radically New Approach to Changing your Life. London, England: Macmillan (2012).

¹¹³ *Id.*

So – how do you change your behavior, and therefore your attitudes and biases?

We contend that you can retrain your brain to reduce and potentially eliminate your implicit bias by taking the following actions:

- (1) Practice the behavior that you want in order for it to become automatic.
- (2) Believe that you can do it.
- (3) Adopt the new behavior in all aspects of your life.
- (4) Stop all of the behaviors that are holding you back.¹¹⁴ Slow down and make a shift so you are less likely to act on bias.

With these key concepts in mind, let's move on to a brief discussion of the second "A" in overcoming racism: Accountability.

3. Accountability

This will undoubtedly be the shortest section of this paper. What does it mean to take accountability for the role you play in perpetuating racism? It means that you should apologize when warranted and strive to do better moving forward. An apology goes a long way. Keep in mind that if you don't address the issue in the moment, that doesn't mean you can't address it later. There is no statute of limitations on addressing microaggressions or implicit bias and taking accountability for certain actions – however well intended – that may have hurt or insulted a person of color.

4. Take Action – Adopt Behaviors and Policies that Support Equality

To overcome racism in community associations, we as leaders must adopt and practice behaviors that eliminate bias and inequality in our own organizations, i.e., "lead by example," and then educate our boards and manager leaders on how to adopt and practice those behaviors in their own communities. By being deliberate with these behaviors, our boards and managers will have the tools necessary to shape their minds and refine their character so they will be able to serve as role models for their communities in the pursuit of equality.

We encourage you to educate your boards and managers to adopt and foster the following leadership behaviors which support equality¹¹⁵:

1. **Courage**. Have the courage to take actions and make decisions in the community which support equality.

¹¹⁴ Bolea, Al and Leanne Atwater, Deeping the Journey (Publication pending 2021)

¹¹⁵ Bolea, Al and Leanne Atwater. Becoming a Leader. (2020).

2. **Integrity**. Have the integrity to stand for equality as a core value in the community and never compromise in situational challenges and policymaking.
3. **Intolerance**. Be an ally. Be intolerant of others who are not mindful of equality and call them out (gently and with tact) when they behave inappropriately. Sometimes your voice can be heard more powerfully than the victims of microaggressions and implicit bias.
4. **Self-awareness**. Be aware of your own biases and the effect that they have on equality. Take responsibility for increasing your understanding of your own privileges and prejudices.
5. **Self-Regulation**. Maintain control over your own decisions and actions in the matter of equality.
6. **Motivation**. Motivate to pursue equality with energy and persistence and relentlessly challenge its achievement in the community. Intentionally and deliberately engage in non-biasing activities. Educate yourself. Engage in conversations about race.
7. **Empathy**. Have empathy. Understand how inequality affects community members emotionally; treat the victimized compassionately; and appreciate that people have unique mindsets that affect their perception of inequality.
8. **Sociability**. Manage relationships to establish a common ground of equality in the community.

So, how would all of the above teachings play out when a community association board is confronted with an accusation of racist behavior in the community? Here are the steps we recommend that a board take in such a situation:

- (1) Acknowledge the aggrieved member's complaint.
- (2) Meet with the aggrieved member – virtually or in person.
- (3) Engage in a healthy conversation with the member. Such a healthy conversation would involve being reflective and open to the member's feelings; seeking common ground; and listening with a sense of caring and understanding.

(4) Investigate.

(5) If appropriate and authorized by the association's governing documents, take enforcement action.

(6) When in doubt, call the community association lawyer!

FINAL TAKEAWAY IN ADDRESSING RACISM IN COMMUNITY ASSOCIATIONS

In closing, we want to acknowledge the fact that we all make mistakes. However, we (and people in general) don't like to acknowledge mistakes when it comes to race because we equate perfection with being a good person. Just know that we're not supposed to be perfect when dealing with race. "Keep in mind that we are not good despite our imperfections. It is the connection we maintain between our imperfections that allows us to be good."¹¹⁶

The tackling and overcoming of racism in community associations will not happen overnight. The hope is that by utilizing the four "A's" of overcoming racism – awareness, accountability, action and adoption – first for ourselves and then through education of our community association boards and managers, we can do our part to make our communities more diverse and inclusive places to call home and can serve as true agents of change like the trailblazer attorneys that came before us and those that will seek to follow our example in the future.

¹¹⁶ TEDxHampshireCollect – Jay Smooth – How I Learned to Stop Worrying and Love Discussing Race. <https://www.youtube.com/watch?v=MbdxeFcQtaU>.