



## TRENDS:

# Religion in Community Associations: Fair Housing or Free Speech?

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## Religion in Community Associations: Fair Housing or Free Speech? Thou Shalt Not Violate the Law

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## Religious Claims under the Fair Housing Act

42 U.S.C. §3604 makes it illegal for a community association:

**(a)** To 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.

**(b)** To **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.

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## Case Study: Banning Bible Study in the Clubhouse

Donna Dunbar is a 7<sup>th</sup> Day Adventist Minister and condominium unit owner. She has used the clubhouse for a small Bible study group for 2 hours every Monday for a year. The board then requires Dunbar to obtain insurance to continue the meetings. No other group using the clubhouse is required to obtain insurance.

The board later adopts a resolution that provides as follows: "Prayers and other religious services, observations, or meetings of any nature shall not occur ... in or upon any of the common elements." After adopting the resolution, the board places a sign stating that "**Any and all Christian Music is Banned**" on the clubhouse piano.



Donna files a Fair Housing complaint with HUD? Who wins?

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## Case Study: Security or Religious Discrimination?



Pickpocket Pines Condominium Association has dealt with 10 reported robberies by masked men in the past year. The board adopts a rule banning co-owners from wearing any attire that covers the face in the common areas so they can differentiate between co-owners and robbers on the security cameras.

A Muslim female co-owner who wears a hijab is fined for violating the rule.

Has a Fair Housing Act violation occurred?





## Intentional v. Unintentional Discrimination

### Intentional Discrimination

...an “invidious discriminatory purpose was a motivating factor” behind the HOA’s actions. “A plaintiff does not have to prove that the discriminatory purpose was the sole purpose of the challenged action, but only that it was a ‘motivating factor.’ ”

*Bloch v. Frischholz*, 587 F3d 771, 784 (CA 7, 2009) (“...one method requires proof of discriminatory intent.”)

### Disparate Impact

A claim can be established based upon showing that an action of the community association, while not intended to be discriminatory, had a disparate impact on owners who held certain religious beliefs. Generally speaking, a disparate impact claim can be established by demonstrating that the decision of the community association had a segregative effect or that it made housing options significantly more restrictive for members of a protected group than for persons outside that group.

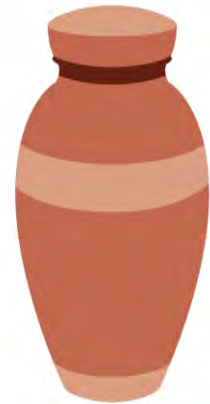
*S & R Dev Estates, LLC v. Town of Greenburgh, New York*, No. 16-CV-8043 (CS), 2018 WL 4119188, at \*4 (USDC, SDNY, August 29, 2018) (the FHA penalizes actions that, in any way, “make unavailable” any dwelling to any person “because of race, sex, familial status, or national origin.” 42 U.S.C. § 3604(a). The results-oriented phrase “otherwise make unavailable” “signal[s] a shift in emphasis from an actor’s intent to the consequences of his actions.” citing *Texas Dept. of Hous. & Cmty. Affairs (TDHCA) v. Inclusive Communities Project, Inc.*, - U.S. -, 135 S.Ct. 2507, 2525, 192 L.Ed.2d 514 (2015)



## Case Study: Accommodation for the Ashes?

Condominium loving Kathleen has served on her condominium board for 20 years. Kathleen wants to stay at her condominium **FOREVER** as it is operated in compliance with every CAI best practice and policy. Kathleen’s will leaves her unit to her daughter, Chloe the Cremator. The will also instructs Chloe to scatter Kathleen’s ashes on the common element lawn in front of the Condominium.

Various provisions of the condominiums bylaws would prohibit spreading ashes on the common elements. After Chloe inherits her mother’s condominium, she requests a reasonable accommodation to spread the ashes based upon her religious beliefs. The board denies the request. Chloe sues for religious discrimination claiming that the Association has violated the Fair Housing Act.



**Is the board required to provide Chloe with a reasonable accommodation?**

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## Accommodations are not required for religious reasons

- ***Bloch v. Frischholz***, 587 F.3d 771, 783 (7<sup>th</sup> Cir., 2009) (“That the Blochs’ claim arose under the FHA (unlike the Free Exercise Clause of the First Amendment, at issue in *Smith* ) doesn’t change matters; the FHA requires accommodations only for handicaps, 42 U.S.C. § 3604(f)(3)(B), not for religion.”)
- ***Hack v. President & Fellows of Yale Coll.***, 237 F.3d 81, 88 (2d Cir., 2000) (“[T]he FHA does not require a landlord or seller to provide a reasonable accommodation with respect to an individual applicant’s religion.”), *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002).
- ***Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners’ Ass’n., Inc.***, 456 F.Supp. 2d 1223, 1233–34 (S.D. Fla, 2005) (“Section 3604(f) was added in 1998 by PL 100–430, 1988 HR 1158. Congress would not have needed to insert the reasonable accommodation language into section 3604(f) if it had already been encompassed by 3604(b). Nor would it have specified that a failure to make a reasonable accommodation by reason of handicap would constitute discrimination. The Court will not construe subsection 3604(f) to be mere surplusage. Rather, the Court holds that by omitting any such reasonable accommodation language from subsection 3604(b), Congress intended that there be no such requirement in the context of religious discrimination.”)

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## Case Study: Bay View Association Discrimination or Exemption?

Bay View Association was organized under the Michigan Summer Resort Act in 1875 by a group of Michigan Methodists. Bay View’s stated purpose is to “improve lands to be occupied for summer homes, for camp meetings, for meetings and assemblies of associations and societies organized for scientific and intellectual culture and for the promotion of religion and morality.” The Association’s property consists of 337 acres of land on which sits 444 summer cottages.

The original bylaws prohibited an individual from purchasing a cottage without first being granted membership status. The bylaws restricted membership to practicing Christians and required prospective members to obtain letters of recommendation from current members and achieve approval by the Board of Trustees.

After various owners filed a lawsuit alleging Fair Housing violations, the bylaws were amended to remove the above requirements. However, the amended bylaws requires prospective members to agree to “respect the principles of the United Methodist Church” and support Bay View’s Christian mission. The bylaws also require that a majority of the nine-person board of directors be Methodist.



### Do Bay View’s bylaws violate the Fair Housing Act?

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## Religious Organization Exemption

42 U.S.C. §3607(a) provides in pertinent part:

Nothing in this subchapter shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin.

In order to qualify for an exemption, a community association would need to demonstrate the following:

- (1) It is a religious organization, or
- (2) It is a non-profit organization “operated, supervised or controlled by or in conjunction with” a religious organization.

Whether a community association would qualify under either of these standards is highly fact specific.

See e.g. *United States v Columbus Country Club*, 915 F.2d 877 (3<sup>rd</sup> Cir. 1990).

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## Case Study: Freedom of Religion or Bylaw Violation?

The Congregation of Toras Chaim meets at least two times a day at an Orthodox synagogue in Dallas. The synagogue happens to be located in a 3500 square foot home that is in a deed restricted community. The deed restrictions permit only “residential use” of the homes. The congregation has approximately 25 members who park on the street. The HOA and individual members of the Association file a lawsuit to enforce the restrictions.

The Congregation argues that they have constitutional and statutory rights to the free exercise of religion. The association argues that they are a private entity and that the constitutional and statutory protections regarding the freedom of religion only apply to governmental entities.



**Who is correct?**

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## Different Constitutional Provisions

### Is a community association a government actor?

#### The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. U.S. Const. amend. I.

#### Michigan Constitution

Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right, and no law shall be enacted to restrain or abridge the liberty of speech or of the press. Michigan Const. 1963 Art. I, § 5 Freedom of Speech and Press.

#### New Jersey Constitution

Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. New Jersey Const. Art. I, § 6.

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## Other possible statutes

- Religious Land Use and Institutionalized Persons Act - 42 USC §2000cc
- Religious Freedom Restoration Acts – 42 USC §2000bb or State Acts

Alabama	Arizona	Arkansas	Connecticut
Florida	Idaho	Illinois	Indiana
Kansas	Kentucky	Louisiana	Mississippi
Missouri	New Mexico	Oklahoma	Pennsylvania
Rhode Island	South Carolina	Tennessee	Texas Virginia

- Community Association Specific Statutes

See e.g., Conn. Gen. Stat. Ann. §47-230a; Ill. Com. Stat. Ann. 605/18.4(h); R.I. Gen. Laws 1956 §34-37-5.5; Tex. Code Ann., Property Code §202.018.

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## WORSHIP IN THE HOME

- Associations typically have jurisdiction over the conduct of religious services within a dwelling through covenants requiring a dwelling to be used in accordance with the requirements of Federal, State or local laws.
- An association can then look to the local zoning ordinances to determine whether a dwelling may be used for the conduct of religious services.
- This can result in a challenge as to whether a local zoning ordinance that limits the size of a gathering or overtly prohibits the conduct of religious services within a dwelling violates the Fair Housing Act.

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## Case Study: Prayer Service in the Home

- A rabbi converted his home into a synagogue for his small congregation, consisting of approximately 25 members. The home was located within an association containing restrictive covenants prohibiting lots to be used for non-residential purposes. A neighbor filed suit against the rabbi and his congregation based on the restrictive covenant and the detrimental impact the congregation had on parking on the street during days of worship, but lost on the grounds that the covenants violated state and federal laws protecting the right to religious worship. In a separate action, the municipality filed suit alleging that the synagogue was operating without a certificate of occupancy, lacked an adequate number of dedicated parking spots, was not accessible to the disabled and had other fire and safety concerns.

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- If the association were to take enforcement action rather than the neighbor, would it potentially constitute housing discrimination?
- Under what circumstances, if any, could the City's action be found to violate the Fair Housing Act?
- If sufficient parking were present, would there be valid grounds to challenge the operation of the synagogue out of the home?
- Is the answer different if the home is being used to host voodoo church services at which animals are sacrificed?

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If an ordinance has a discriminatory impact, it can be found to violate the Fair Housing Act, even if the language is neutral on its fact.

Courts will look at whether there was a discriminatory intent behind the adoption of the ordinance. *LeBlanc Sternberg v. Fletcher*. 67 F.3d 412 (2nd Cir. 1995), *cert. denied*, 518 U.S. 1017, 116 S.Ct. 2546, 135 L.Ed.2d 1067 (1996)

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## Case Study: Worship in the Common Elements or Common Area

A condominium unit owners' association adopts a rule prohibiting the use of its clubhouse for the conduct of religious services following receipt of complaints from a number of members that the clubhouse's use is being dominated by the religious use. A group of unit owners sues the association, contending that the rule is discriminatory. Does this rule violate the Fair Housing Act on its face?

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- What if the rule is adopted after the clubhouse is used by a group of animists?
- What if the rule is applied to permit Christian religious service, but to prohibit the animists services?
- What if the facility as an association-owned golf course and an informal group of golfers hold a prayer service prior to teeing off? Does the prayer service cause an issue of the use of the facility for religious purposes is otherwise prohibited?

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- Associations are permitted to adopt rules prohibiting the conduct of religious services in or on their common area or common element facilities, provided the rules do not favor one or more religious faiths over others.
- *Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners' Ass'n.*, Inc., 456 F.Supp.2d 1223, 1231-32 (S.D. Fla. 2005).
- *Neuman v. Grandview at Emerald Hills, Inc.*, 861 So.2d 494 (Fla. App. 2003).

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## Allowing Outside Third Parties to Use Association Facilities for Religious Services

The association is approached to allow a church to use their large community room for religious services on a Sunday. The association does not ordinarily permit its members to use the facility for religious services. What issues arise if the association were to permit the outside church to use the facility?

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## Individual Rights and Claims

Variety of requested religious practices

Balance individual rights of residents against overall well-being of community

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## Individual Rights and Claims

### Case Study: The Case of the Christmas Fundraiser

A couple residing in a planned community informs the association they plan to hold a Christmas fundraiser for the public at their home.

The board informs couple that the fundraiser would violate the covenants and threatens legal action if the couple holds the fundraiser.

The association sends a letter to the community's residents advising them of the plans for the fundraiser and conducts a meeting of the residents to discuss the matter.

Has the association violated the Fair Housing Act?

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## Individual Rights and Claims

What if the association also informs the couple that the fundraiser would create an issue for non-Christian residents?

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## Individual Rights and Claims

**A facially neutral rule or policy that was adopted with the intent to discriminate against a particular religion constitutes a violation of the Fair Housing Act.**

**Intent may be demonstrated by evidence of comments and other actions.**

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## Individual Rights and Claims Case Study: The Tale of the Toran

A unit owner of the Hindu faith hangs a toran, a decorative Hindu door hanging, at the top of his door.

The association rules prohibit decorations on or in front of doors.

Must the association allow the toran?



## Individual Rights and Claims

What does the association need to know?

Does it make a difference if the association allows the hanging of mezuzahs by Jewish residents?



## Individual Rights and Claims

### *Tripathi v. Murano Condominium Association*

Settled

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## Individual Rights and Claims Case Study: Single-Sex Swimming

Three-fourths of the owners of units in the planned community vote to require separate use of the pool by males and females due to religious beliefs.

The board adopts a rule setting schedules for male-only swim times, female-only swim times, and mixed gender swim times. 40% of the time the pool is open during the week is male-only; 40% is female-only; 20% is for mixed gender swimming.

A unit owner complains about not having access to the pool at all times.

Is there a valid claim for religious discrimination?

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## Individual Rights and Claims

### *Curto v. Country Place Condominium Association, Inc.*

- Plaintiffs asserted gender discrimination in violation of the Fair Housing Act.
- The court held there was no gender discrimination because males and females had equal time to use the pool.
- Now on appeal.
- What would have been outcome if plaintiffs alleged religious discrimination?

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## Individual Rights and Claims Case Study: Eruv or Not

Strictly observant Jews are prohibited from carrying outside of their homes on the Sabbath.

A group of Jewish owners asks the association for permission to set up and maintain an eruv around the community.

An eruv is an artificial enclosed area made of an overhead wire strung from poles (and may include pre-existing boundaries such as a river or railroad track). It expands the domiciles to allow carrying outside homes within the eruv area.

Must the association allow the construction of the eruv?

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## Individual Rights and Claims

Association is not required by the Fair Housing Act to reasonably accommodate a religious practice.

However, a reasonable accommodation may avoid litigation and the potential for a penalty.

*Boodram v. Maryland Farms Condominium*

*Hanrahan v. Housing and Redevelopment Authority of Duluth, Minnesota*

State law may require a reasonable accommodation.

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## Religious Symbols & Religious Displays

- Does the Fair Housing Act allow claims for “religious accommodations” for Religious Symbols & Religious Displays? Currently, the answer is NO.
- What is an example of Religious Symbol?
  - Mezuzah
    - A mezuzah is a small religious object that an observant Jewish person installs on the doorpost or doorframe outside his or her residence in fulfillment of a religious obligation.
    - To these folks, mezuzahs are not “decorative” in nature; one cannot reside inside of a residence where a mezuzah is not installed on the outer doorpost or doorframe.



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## State Protections for Religious Symbols

Currently, five states\* prohibit restrictions on the placement of mezuzahs or other required religious objects on outer doorposts or doors.

\* Connecticut Florida Illinois Rhode Island Texas

Watch for pretext for intentional discrimination in a facially neutral policy prohibiting all objects (Bloch v. Frischholz, 533 F.3d 562 (7<sup>th</sup> Cir. 2008), aff'd. in part, rev'd. in part, 587 F.3d 771 (7<sup>th</sup> Cir. 2009, *en banc*).

\* Practitioner Tip: Check state and local laws that may prohibit restrictions

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## Religious Displays

An example of a religious display is a sukkah.

A sukkah is a temporary outdoor structure that may be used for meals and sleeping during the Jewish holiday of Sukkoth.

- NY condo prohibited sukkah on LCE balcony restricted to use by owners under Bylaws
- Court held board exceeded authority because there was nothing in Bylaws prohibiting a sukkah from being placed on a balcony (as opposed to being improperly placed and prohibited on a condominium common area, as was the court's holding some eight years prior in a case litigated by the same parties). Greenberg v. Board of Managers of Parkridge Condominiums, 2000 W.L. 35921423 (N.Y. Sup. Ct., September 1, 2000), aff'd., 294 A.D.2d 467 (2d Dept. 2002).
- Something which may be specifically prohibited by the governing documents for a non-discriminatory reason need not be allowed by the association, but disallowing something that is not specifically prohibited by the governing documents may be deemed to be improper by a court.



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## Disparate Treatment v. Disparate Impact

### Disparate Treatment

- Discrimination due to different treatment, *i.e.*, treating someone differently because of religion, would be included. These claims involve allegations of intentional bias.

### Disparate Impact (a/k/a “Discriminatory Effect”)



- Discrimination by different impact, *i.e.*, when a neutral policy or procedure has a disproportionately negative impact on a protected class. Shifts focus away from “intent” to one of result.
  - Disparate impact claims are cognizable under the Fair Housing Act (Texas Department of Housing and Community Affairs (TDHCA) v. Inclusive Communities Project, 135 S.Ct. 2507 (2015)).
  - Disparate impact will likely be utilized in cases involving religious symbols and displays, as the display of religious symbols and items, by default, generally only involves one protected class of people (*i.e.*, members of one religion that requires or otherwise utilizes the religious symbol or item) and not others.
  - In Philadelphia, a case with disparate impact allegations was recently filed in federal court (Tripathi v. Murano Condominium Association, Case No. 2:18-cv-01840-JP (U.S.D.C., E.D.Pa., May 3, 2018)). The case involved a Hindu condominium owner who wanted to hang a toran, a decorative object, in his doorway. Doing so contradicted the association’s rules, which at the same time specifically permitted mezuzahs. The matter appears to have settled, as it was dismissed, and, as such, the interpretation and application of claims brought under a disparate impact theory remain unclear.

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## What About Holiday Decorations?

According to the United States Supreme Court (when evaluating the constitutionality of Christmas and Hanukkah displays on public property in Pittsburgh under the Establishment Clause (Fourteenth Amendment)):

- A Christian nativity scene is a religious symbol and a Christmas tree is not.
- A Jewish menorah is a religious symbol, but is not solely “religious” in nature. When a menorah is put next to a Christmas tree, it is secular in nature.
- Whether or not a holiday decoration is actually a religious symbol or religious display depends on whether an observer would believe the decoration is an endorsement or disapproval of an individual religious choice, to be deemed by a “reasonable observer” standard. See County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989). **However, residents may disagree with the Supreme Court’s opinion.**
- When faced with a “holiday decoration” situation, care must be taken to properly evaluate the issue in order to determine if it is instead a religious symbol or religious display in order to plan the proper course of action.



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## TEN COMMANDMENTS FOR HANDLING RELIGIOUS ISSUES

1. **Otherwise non-discriminatory policies and rules, which have a reasonable basis, may be unlawful if they are implemented with any intent or motivation to discriminate against a particular religion, and such intent or motivation can be demonstrated by the actions and words of association representatives.**
2. **A community association has the authority to regulate or prohibit the use of its common areas for religious purposes, provided such regulations are reasonable and do not have the intent or effect of discriminating against a particular religious faith.**
3. **Any restriction(s) on the use of association facilities for religious-related activities by either owner-sponsored organizations or outside organizations must be neutral on their face and may not have a disproportionate discriminatory impact upon a particular religious faith.**
4. **Community associations may be able to prohibit a home from being used as a place of worship based on a residential use covenant or zoning ordinance. However, a residential use covenant or a zoning ordinance may be found to be discriminatory if it has a disparate impact on a religious faith or it was adopted with a discriminatory intent.**
5. **Federal courts have largely determined that community associations are private actors that are not subject to First or Fourteenth Amendment claims under the United States Constitution. However, individual states may find broader religious protections under state constitutions, the RFRA or the RLUIPA. It is important to know the law in your jurisdiction.**

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## TEN COMMANDMENTS FOR HANDLING RELIGIOUS ISSUES

6. **Reasonable accommodations under the Federal Fair Housing Act are only required for disability-related claims. Community Associations are not obligated to make reasonable accommodations for religious reasons.**
7. **However, check your state and/or local laws for any obligation to reasonably accommodate religious practices.**
8. **Although associations may not be obligated to reasonably accommodate religious practices, providing a reasonable accommodation where it does not interfere with or substantially impact community operations or policies may avoid a lawsuit.**
9. **The religious affiliate/organization exemption under 42 U.S.C. §3607(a) of the Fair Housing Act has thus far been narrowly construed. One who is claiming an exemption for a community association is best served by having a formal arrangement in place between the community and a religious organization.**
10. **Know the difference between a holiday decoration, a religious display and a religious symbol in order to properly handle any issues involving a religious display or religious symbol and avoid a lawsuit.**

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# **Religion in Community Associations: Fair Housing or Free Speech? Thou Shalt Not Violate the Law**

by

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## **Introduction**

Religion. It has been the source and focus of cultures throughout the ages. On the negative side, nations and tribes have gone to war over religion. On the positive side, freedom of religion is respected by our society and is incorporated into our federal and state Constitutions. It is no wonder then that people have strong feelings regarding their ability to practice their religions.

Nevertheless, the right to practice one's religion is not necessarily absolute. When one person's practices can conflict with others' rights or private contractual agreements and covenants, it is necessary to balance the competing interests to determine the extent of permissible practices in public settings.

The governing boards of community associations need to deal with such issues reasonably and objectively so as not to unduly impede people's rights. However, under the particular circumstances, the choices to be made by a board may not be clear or easy. Moreover, any decision believed to limit a person's religious practice runs the risk of a complaint of religious discrimination to the Department of Housing and Urban Development ("HUD") or a state fair housing agency. It is hoped that this paper will help guide community association attorneys in counseling their clients.

## **Anatomy of a Fair Housing Claim**

The Federal Fair Housing Act (“FHA”)<sup>1</sup> prohibits a community association from discriminating against a potential purchaser or a resident<sup>2</sup> based upon religious beliefs. Specifically, Section 3604<sup>3</sup> provides in pertinent part:

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

**(a)** To 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.

**(b)** To 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.

**(c)** To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

**(d)** To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

**(e)** For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

In the context of community associations, most claims will involve an alleged violation of Sections 3604(a)-(c) in that a community association has enacted or attempted to enforce a

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<sup>1</sup> 42 U.S.C. §3601, *et. seq.*

<sup>2</sup> See *e.g.*, *Bloch v. Frischholz*, 587 F.3d 771, 776 (7<sup>th</sup> Cir. 2009, *en banc*) (“§ 3604(a) may reach post-acquisition discriminatory conduct that makes a dwelling unavailable to the owner or tenant, somewhat like a constructive eviction.”); *The Fair Housing Council of San Diego v. Penasquitos Casablanca Owner’s Association*, 381 Fed.Appx. 674, 676 (9<sup>th</sup> Cir. 2010) (“The FHA reaches post-acquisition discrimination.”).

<sup>3</sup> 42 U.S.C. §3604.

restriction or rule that allegedly abridges the religious freedom of a resident and makes housing “unavailable” to that person. Claims may also involve violations of state statutes that prohibit religious discrimination as well.<sup>4</sup> Accordingly, practitioners should also determine if there are applicable state statutes and determine the standards of liability under such state statutes when analyzing potential religious discrimination claims.

A violation of the Federal Fair Housing Act based on religious grounds can be established in one of two ways under 42 U.S.C. §3604. First, a FHA claim can be proven based on intentional discriminatory action that resulted in disparate treatment.<sup>5</sup> To establish a claim, a plaintiff must demonstrate that:

...an “invidious discriminatory purpose was a motivating factor” behind the HOA’s actions. “A plaintiff does not have to prove that the discriminatory purpose was the sole purpose of the challenged action, but only that it was a ‘motivating factor.’ ”<sup>6</sup>

Second, a claim can be established based upon showing that an action of the community association, while not intended to be discriminatory, had a disparate impact on owners that held certain religious beliefs.<sup>7</sup> Generally speaking, a disparate impact claim can be established by

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<sup>4</sup> See, e.g., *West’s Ann. Cal. Gov. Code* §12955; *Col. Rev. Stat. Ann.* §24-34-502; *Iowa Code Ann.* §216.8; 5 *Maine Rev. Stat. Ann.* §4581-A; *Va. Code Ann.* §36-96.3. See also *infra* nn. 106, 107.

<sup>5</sup> *Bloch*, *supra* n. 2, 587 F.3d at 784 (“...one method requires proof of discriminatory intent.”).

<sup>6</sup> *Morris v. West Hayden Estates First Addition Homeowners Association, Inc.*, No. 2:17-CV-00018-BLW, 2017 W.L. 3666286, at \*3 (U.S.D.C., D Idaho, August 24, 2017), citing *Ave 6E Investments, LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 504 (9<sup>th</sup> Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 137 S.Ct. 295, 196 L.Ed.2d 214 (2016) (citations omitted) and *Arce v. Douglas*, 793 F.3d 968, 977 (9<sup>th</sup> Cir. 2015) (citations omitted).

<sup>7</sup> *Morris*, *supra* n. 6, 2017 W.L. 3666286, at \*3. See also *Texas Dept. of Hous. & Cmty. Affairs (TDHCA) v. Inclusive Communities Project, Inc.*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 2507, 2525, 192 L.Ed.2d 514 (2015) (“The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court’s interpretation of similar language in Title VII and the ADEA, Congress’ ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.”); *S & R Dev. Estates, LLC v. Town of Greenburgh, New York*, No. 16-CV-8043 (CS), 2018 W.L. 4119188, at \*4 (U.S.D.C., S.D.N.Y., August 29, 2018) (“The FHA penalizes actions that, in any way, ‘make unavailable’ any dwelling to any person ‘because of race, sex, familial status, or national origin.’ 42 U.S.C. §3604(a). The results-oriented phrase ‘otherwise make unavailable’ ‘signal[s] a shift in emphasis from an actor’s intent to the consequences of his actions.’ *Tex. Dep’t of Hous.*, 135 S.Ct. at 2519. In other words, the FHA was not designed simply to punish those who discriminate, but also to remove even unintentional barriers to the availability of housing.”).

demonstrating that the decision of the community association had a segregative effect or that it made housing options significantly more restrictive for members of a protected group than for persons outside that group.<sup>8</sup>

Additionally, many claims also allege a violation of Section 3617,<sup>9</sup> in conjunction with a violation of Section 3604. Section 3617 provides as follows:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

A violation of Section 3617 can only be established as follows:

To prevail on a §3617 claim, a plaintiff must show that (1) she is a protected individual under the FHA, (2) she was engaged in the exercise or enjoyment of her fair housing rights, (3) the defendants coerced, threatened, intimidated, or interfered with the plaintiff on account of her protected activity under the FHA, and (4) the defendants were motivated by an intent to discriminate. “Interference” is more than a “quarrel among neighbors” or an “isolated act of discrimination,” but rather is a “pattern of harassment, invidiously motivated.”<sup>10</sup>

No matter what theory of religious discrimination is alleged, the plaintiff bears the burden of establishing that the association has discriminated against him or her.<sup>11</sup> Once this is established, “the burden then shifts to the defendant to establish a legitimate non-discriminatory business reason for taking the action. If the defendant comes forth with such reason, then the burden returns to the plaintiff to establish that the defendant’s reason is merely a pretext.”<sup>12</sup>

Finally, it is noteworthy that the above claims do not permit a plaintiff to establish a claim for a violation of the Fair Housing Act by the refusal to grant a reasonable accommodation based upon religious grounds. Rather, the federal courts have routinely held that reasonable

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<sup>8</sup> *Hallmark Developers, Inc. v. Fulton Co., Ga*, 466 F.3d 1276, 1286 (11<sup>th</sup> Cir. 2006).

<sup>9</sup> 42 U.S.C. §3617.

<sup>10</sup> See *Bloch, supra* n. 2, 587 F.3d at 783 (citations omitted).

<sup>11</sup> *Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners’ Association, Inc.*, 456 F.Supp.2d 1223, 1231-32 (S.D. Fla. 2005).

<sup>12</sup> *Id.*



accommodations are only required to be made in situations involving a request related to a disability.<sup>13</sup> Nevertheless, as discussed below, state statutes may require certain accommodations, and associations may have to alter restrictions or rules if they have a discriminatory impact on owners.<sup>14</sup>

## **Exemptions to Compliance with the Fair Housing Act**

While religious discrimination is generally prohibited under Sections 3604 and 3617, the Federal Fair Housing Act does contain a limited exception for certain religious organizations. Specifically, Section 3607(a) provides in pertinent part:

Nothing in this subchapter shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin.<sup>15</sup>

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<sup>13</sup> See *Bloch*, *supra* n. 2, 587 F.3d at 783 (“That the Blochs’ claim arose under the FHA (unlike the Free Exercise Clause of the First Amendment, at issue in [*Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)] doesn’t change matters; the FHA requires accommodations only for handicaps, 42 U.S.C. §3604(f)(3)(B), not for religion.”); *Hack v. President & Fellows of Yale College*, 237 F.3d 81, 88 (2<sup>nd</sup> Cir.2000) (“[T]he FHA does not require a landlord or seller to provide a reasonable accommodation with respect to an individual applicant’s religion.”), *cert. denied*, 534 U.S. 888, 122 S.Ct. 201, 151 L.Ed.2d 142 (2001), abrogated on other grounds by *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). See also *Ungar v New York City Hous. Auth.*, No. 06 Civ. 1968, 2009 WL 125236, at \*17 (U.S.D.C., S.D.N.Y., January 14, 2009), *aff’d.*, 363 Fed.Appx. 53 (2<sup>nd</sup> Cir. 2010); *Savanna Club Worship Serv., Inc.*, *supra* n. 11, 456 F.Supp.2d at 1233-34 (“Section 3604(f) was added in 1998 by PL 100-430, 1988 HR 1158. Congress would not have needed to insert the reasonable accommodation language into section 3604(f) if it had already been encompassed by 3604(b). Nor would it have specified that a failure to make a reasonable accommodation by reason of handicap would constitute discrimination. The Court will not construe subsection 3604(f) to be mere surplusage. Rather, the Court holds that by omitting any such reasonable accommodation language from subsection 3604(b), Congress intended that there be no such requirement in the context of religious discrimination.”)

<sup>14</sup> See *infra* nn. 106, 107.

<sup>15</sup> 42 U.S.C. §3607(a).

In order to qualify for an exemption, a community association would need to demonstrate that it is: (1) a religious organization, or (2) a non-profit organization “operated, supervised or controlled by or in conjunction with” a religious organization.<sup>16</sup> Whether a community association can qualify under either of these standards is highly fact specific.

The United States Third Circuit Court of Appeals had the opportunity to consider whether a community of summer homes in Pennsylvania that was formed by the Knights of Columbus could restrict the leasing of bungalows on the property to only those of the Roman Catholic faith in *Columbus Country Club*.<sup>17</sup> In that case, the Columbus Country Club (“the Club”) owned and operated a community of 46 summer homes (called “bungalows”) located on a 23-acre tract of land. The Club was formed in 1920 by the Knights of Columbus, a Roman Catholic men’s organization. In 1936, the Club eliminated the requirement that members belong to the Knights of Columbus but retained the requirement that members be Catholic males.

The Club was organized as a non-profit organization, and its membership was comprised of annual, associate and social members. Annual members were required to be members in good standing of the Roman Catholic Church. The Club was not formally affiliated with the Roman Catholic Church nor with any Catholic organization, although the Archbishop of Philadelphia granted the club special permission for the celebration of Mass on the Club grounds each Sunday and provided a priest from a nearby town for such services. Some members prayed the Rosary each night in the chapel. A statue of the Virgin Mary stood in the grotto near the entrance to the property.

The Club followed a formal procedure in admitting new members to the community. Since the 1987 amendments to the by-laws, the membership applications had to be accompanied by a written recommendation from the applicant’s parish priest stating that the applicant is a practicing Roman Catholic in good standing. The full board, by majority vote, made the final decision on the admission of new members. A fair housing complaint was filed after it denied membership to an applicant.

The district court granted summary judgment in favor of the Club and determined that the Club was “operated, supervised or controlled by or in conjunction with” a religious organization under 42 U.S.C. 3607(a).<sup>18</sup> The Third Circuit Court of Appeals reversed the district court in a 2-1 decision. Specifically, the majority opinion held as follows:

In holding that defendant fell within the exemption for religious organizations, the district court relied upon the defendant's affiliation with the Church as evidenced by the Church's grant of the privilege of having weekly mass celebrated on the

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<sup>16</sup> *United States v. Columbus Country Club*, 915 F.2d 877, 882 (3<sup>rd</sup> Cir. 1990), *cert. denied*, 501 U.S. 1205, 111 S.Ct. 2797, 115 L.Ed.2d 971 (1991).

<sup>17</sup> *Id.*

<sup>18</sup> *United States v. Columbus Country Club*, Civ. A. No. 87-8184, 1989 W.L. 149935 (U.S.D.C., E.D.Pa., December 6, 1989), *rev'd.*, 915 F.2d 877 (3<sup>rd</sup> Cir. 1990), *cert. denied*, 501 U.S. 1205, 111 S.Ct. 2797, 115 L.Ed.2d 971 (1991).

grounds and its tacit approval of the recital of the rosary. In reaching its conclusion, the district court found that the Catholic Church does not actually “control” the club or its operations. The district court did state, however, that “the persons who, over the years, have operated and controlled the club, have done so ‘in conjunction with’ their continuing obligations as members of the Roman Catholic faith,” and went on to conclude that “[a]s a practical matter, by virtue of its ability to grant or withhold the privilege of holding religious services in the club chapel ... the Archdiocese does possess a very significant degree of control over the club itself.” *United States v. Columbus Country Club*, No. 87–8164, slip op. at 10–11, 1989 WL149935 (E.D.Pa.1989).

We do not think that these undisputed facts are sufficient to hold that defendant carried its burden. The critical words of the exemption are “in conjunction with,” and so there must be a mutual relationship between the non-profit society and a religious organization. The existence of this relationship cannot depend solely on the activities of the non-profit organization nor be viewed only from its perspective. Indeed, evidence of the club’s unilateral activities would go to whether it is itself a religious organization not to whether it is operated “in conjunction with” a religious organization. Furthermore, the Church’s ability to withdraw permission to hold mass and the fact that on one occasion it may have indirectly influenced the club’s Board of Governors by threatening to do so are not enough. Without further evidence of interaction or involvement by the Church, we cannot conclude that as a matter of law the Church controlled the defendant or that the defendant was operated “in conjunction with” the Church. Consequently, on this record and in light of our unwillingness to read the statutory exemption broadly, we hold that the defendant failed to carry its burden of proving its entitlement to the religious organization exemption.<sup>19</sup>

However, the dissenting opinion agreed with the district court and interpreted the religious exemption much more broadly. Specifically, the dissenting opinion stated:

... According to the majority, the words “in conjunction with” imply a “mutual relationship between a non-profit society and a religious organization...”

This result is not compelled by the text of the exemption itself. The language of the exemption does not focus solely upon “control” or “mutuality” but describes a number of different types of relationships which serve to bring an organization within the terms of the exemption. The majority’s reliance on equivocal legislative history notwithstanding, I think it clear that the Columbus Country Club, under the terms of the statute itself, qualifies for the religious organization exemption. If Congress had meant to make control or mutuality the determinative evaluative criterion, it certainly would have expressed this intention more clearly.

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<sup>19</sup> *Columbus Country Club*, *supra* n. 16, 915 F.2d at 883.

Even if a mutuality standard were clearly expressed in the text of the exemption, I would find that that standard has been met. In examining the history of Columbus Country Club and, the *uncontroverted* details of its connections to the Catholic church, I find it difficult to imagine what more the panel majority could want in terms of mutuality. The Club has operated to support the Church, both monetarily and by its members' living and practicing the tenets of the Roman Catholic faith. The Church, in turn, has supported the Club, by participating in its founding, by providing prayer support and by making clergy available to the community where it does not do so in other cases; the Church's provision of a priest to conduct services is central to the Club's purpose and philosophy and, as the district court concluded, certainly provides the Church with a substantial measure of *de facto* control over Club operations. The Church has, in fact, exercised its influence over the Club in bringing it into compliance with the Church's policy against sex discrimination.<sup>20</sup>

Unfortunately, other than *Columbus Country Club*, which was a split decision, there has been little guidance as to what types of community associations will qualify as being "operating in conjunction with" a religious organization under Section 3607(a).<sup>21</sup> However, in *Bay View Chautauqua Inclusiveness Group v. Bay View Association of the United Method Church, et. al.*, the Western District of Michigan, will be called upon to decide a similar issue as to whether a

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<sup>20</sup> *Id.* at 887-88 (Mansmann, C.J., dissenting)

<sup>21</sup> The Third Circuit Court of Appeals later adopted the following test in determining whether a Jewish Community Center satisfied the Section 3607(a) exemption:

Over the years, courts have looked at the following factors: (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists. ...It is apparent from the start that the decision whether an organization is "religious" for purposes of the exemption cannot be based on its conformity to some preconceived notion of what a religious organization should do, but must be measured with reference to the particular religion identified by the organization. Thus not all factors will be relevant in all cases, and the weight given each factor may vary from case to case.

*LeBoon v. Lancaster Jewish Cmty. Ctr. Association*, 503 F.3d 217, 226-27 (3<sup>rd</sup> Cir. 2007) (citations omitted).



Michigan community association has a sufficient relationship with the Methodist religion to qualify for an exemption under Section 3607(a).<sup>22</sup>

Finally, even if a religious based community association does not satisfy the requirements of Section 3607(a) of the Fair Housing Act, it is possible that a creative community association attorney could attempt to defend a religious discrimination claim under the Federal Religious Freedom Restoration Act (“RFRA”).<sup>23</sup> In *Burwell v Hobby Lobby Stores, Inc.*, the United States Supreme Court held that closely held corporations were capable of holding religious beliefs.<sup>24</sup> An argument could be made that a private nonprofit corporation, such as a community association, is capable of adopting religious beliefs and that those religious beliefs may not be substantially burdened by a federal governmental agency, such as HUD, without running afoul of the RFRA.<sup>25</sup>

## **Freedom of Religion**

In addition to claims under the Fair Housing Act, many community associations are also faced with claims from owners that they have prohibited the free exercise of religion under the First Amendment or Fourteenth Amendment of the United States Constitution, or similar provisions of their state constitutions. In determining whether community associations are

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<sup>22</sup> Case No. 1:17-cv-00622-PLM RSK (U.S.D.C., W.D.Mich.). In *Bay View*, HUD has already determined that the association is not entitled to a Section 3607(a) exemption. See “HUD: Michigan community barring non-Christians isn’t exempt from fair housing rules,” *The Hill*, May 10, 2018 (<https://thehill.com/blogs/blog-briefing-room/news/387171-feds-say-michigan-resort-barring-non-christians-from-living>). See also “Bay View Resort’s ban on non-Christians faces legal challenges,” *Detroit News*, June 21, 2018 (<https://www.detroitnews.com/story/news/local/michigan/2018/06/22/bay-view-northern-michigan-resort-ban-non-christians-faces-lawsuit/712707002/>); “New evidence submitted in the Bay View case,” *Petoskey News*, September 21, 2018 ([https://www.petoskeynews.com/featured-pnr/new-evidence-submitted-in-bay-view-case/article\\_0d3a54dd-99f0-5bf8-8666-68ef2054aa63.html](https://www.petoskeynews.com/featured-pnr/new-evidence-submitted-in-bay-view-case/article_0d3a54dd-99f0-5bf8-8666-68ef2054aa63.html)).

<sup>23</sup> The United States Supreme Court previously held that the RFRA, 42 U.S.C. §§2000bb, *et seq.*, was unconstitutional as applied to the states. See *City of Boerne v. Flores*, 521 U.S. 507, 536, 117 S. Ct. 2157, 2172, 138 L.Ed.2d 624 (1997).

<sup>24</sup> \_\_\_ U.S. \_\_\_, 134 S.Ct. 2751, 2775, 189 L.Ed.2d 675 (2014).

<sup>25</sup> Pursuant to 42 U.S.C. §2000bb-1, the federal government may only substantially burden religion if it is in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest are utilized. An argument could be made that the federal government does not have a compelling interest in preferring the religious beliefs of an owner over those of a religious based community association, depending on the circumstances.

subject to the constitutional claims, the majority of courts that have dealt with this issue have determined that community associations are private actors and not subject to the First Amendment, Fourteenth Amendment or state constitutional speech protections.<sup>26</sup>

By way of example, in 2002, the Eleventh Circuit Court of Appeals upheld a deed restriction which prohibited the posting of “For Sale” signs in front yards.<sup>27</sup> The court rejected the homeowners’ claim that the enforcement of the deed restriction violated their rights under the First and Fourteenth Amendments.<sup>28</sup> Specifically, the court held that “[a]ctions by private

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<sup>26</sup> See *e.g.*, *Loren v. Sasser*, 309 F.3d 1296 (11<sup>th</sup> Cir. 2002) (holding that a community association was not a state actor in enforcing a restriction banning “for sale” signs); *Barr v. Camelot Forest Conservation Association, Inc.*, 153 Fed.Appx. 860, 862 (3<sup>rd</sup> Cir. 2005) (homeowners’ association’s removal of “for sale” signs from landowner’s property and enforcement of deed restriction did not involve state action necessary to § 1983 claim alleging violation of First and Fourteenth Amendments); *Murphree v. Tides Condo. At Sweetwater by Del Webb Master Homeowners’ Association, Inc.*, No. 3:13-cv-713-J-34MCR, 2014 W.L. 1293863, at \*10 (U.S.D.C., M.D.Fla., March 31, 2014) (association’s enforcement of its flag restrictions did not constitute state action giving rise to a §1983 claim); *Lennon v. Overlook Condo. Association*, No. 08–357 (MJD/SRN), 2008 W.L. 2042636, at \*6 (U.S.D.C., D.Minn. May 13, 2008) (holding that a condominium association was not a state actor in imposing fines and assessments); *Fromal v. Lake Monticello Owners’ Association, Inc.*, No. Civ.A. 3:05–CV–00067, 2006 W.L. 1195778, at \*1 (U.S.D.C., W.D.Va. May 3, 2006) (dismissing a §1983 claim against homeowners’ association; “Defendants are all private parties, and Plaintiffs’ claims arise from Defendants’ violations of private covenants and agreements”); *Kalian at Poconos, LLC v. Saw Creek Estates Cmty. Association, Inc.*, 275 F.Supp.2d 578, 588–90 & n. 14 (M.D.Pa. 2003) (“public function” § 1983 analysis not applicable to community association and individual members of the association where association had only the authority to maintain roads and utilities and collect dues, but could do “little else,” and thus, was not the “functional equivalent” of a municipal corporation). See also, *e.g.*, *Prysak v. R.L. Polk Co.*, 193 Mich.App. 1, 10; 483 N.W.2d 629 (1992) (holding that “the federal and the Michigan constitutional provisions guaranteeing free speech do not extend to private conduct, but have been limited to protections against state action.”); See also *Fiesta Mall Venture v. Mecham Recall Committee*, 159 Ariz. 371, 767 P.2d 719 (Ct. App. 1989); *Cologne v. Westfarms Associates*, 192 Conn. 48, 469 A.2d 1201 (1984); *Citizens for Ethical Government v. Gwinnett Place Associates*, 260 Ga. 245, 392 S.E.2d 8 (1990); *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 378 N.W.2d 337 (1985); *State v. Wicklund*, 589 N.W.2d 793 (Minn. 1999); *SHAD Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985); *State v. Felmet*, 302 N.C. 173, 273 S.E.2d 708 (1981); *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St.3d 221, 626 N.E.2d 59, *cert. denied*, 513 U.S. 933, 115 S.Ct. 329, 130 L.Ed.2d 288 (1994); *Charleston Joint Venture v. McPherson*, 308 S.C. 145, 417 S.E.2d 544 (1992); *Republican Party of Texas v. Dietz*, 940 S.W.2d 86 (Texas 1997); *Jacobs v. Major*, 139 Wis.2d 492, 407 N.W.2d 832 (1987) (all holding that their state constitutions grant no greater rights to speech than the First Amendment and so provide no rights on private property).

<sup>27</sup> *Loren*, *supra* n. 26, 309 F.3d 1296.

<sup>28</sup> *Id.* at 1303.

organizations may be considered state action ‘only if[ ] there is such “a close nexus between the State and the challenged action” that seemingly private behavior “may be fairly treated as that of the State itself” ’ [citations omitted].”<sup>29</sup> By enforcing the deed restriction, the court concluded the property owners’ association was “not acting under state law.”

However, there are several jurisdictions that have held that even in the absence of state action, state constitutional free speech guarantees apply to community associations, thus finding broader rights under state constitutions. For example, the New Jersey Supreme Court held that “the free speech and assembly clauses . . . can be invoked against private entities ‘because of the public use of their property.’ ”<sup>30</sup> The court adopted a three-prong test to determine whether a private entity, including a community association, would be required by the state constitution to protect free speech on private property. Specifically, the court had held that the following must be analyzed:

the nature, purposes, and primary use of such private property, generally, its “normal” use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.<sup>31</sup>

In a case involving a political poster within a unit owner’s residence, displayed on his window, rather than speech on a common element,<sup>32</sup> the New Jersey Court modified the *Schmid* three-prong test to balance the owner’s right to speech within his own unit against the property rights of and impact on the other owners.<sup>33</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *State v. Schmid*, 84 N.J. 535, 560, 423 A.2d 615, 628 (1980), appeal dismissed *sub nomen Princeton University v. Schmid*, 455 U.S. 100, 102 S.Ct. 867, 70 L.Ed.2d 855 (1982).

<sup>31</sup> *Id.* at 563, 423 A.2d at 630; *Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association*, 192 N.J. 344, 365, 929 A.2d 1060, 1072 (2007).

<sup>32</sup> *Mazdabrook Commons Homeowners Association v. Khan*, 210 N.J. 482, 46 A.3d 507 (2012).

<sup>33</sup> *Id.* at 500-01, 503, 46 A.3d at 518, 520.

Other courts have held that state action is invoked when a community association has attempted to curtail free speech through the enforcement of a state statute.<sup>34</sup> However, the *Preu* decision may have misconstrued a United States Supreme Court case upon which it partially relied.<sup>35</sup>

It is important to note that *Mazdabrook*, *Schmid* and *Preu*, *supra*, did not involve religious discrimination claims as these cases all involved claims related to the abridgement of some form of political speech. Accordingly, these cases merely demonstrate that some state courts may afford broader individual rights using a constitutional analysis when it comes to the abridgement of religious expression as well. This appears to have been the case in a Texas district court case that involved a dispute about whether a synagogue could be operated in violation of the restrictive covenants.<sup>36</sup> In that case, the Highlands of McKamy IV and V Community Improvement Association, as well as an individual owner, attempted to enforce a restrictive covenant that limited the use of homes in a subdivision to residential use. The court held that the owners were allowed to operate the Toras Chaim synagogue out of their home in violation of the residential use restriction<sup>37</sup> on the basis that the enforcement of the restrictive

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<sup>34</sup> See e.g., *Board of Managers of Old Colony Village Condominium v. Preu*, 80 Mass.App.Ct. 728, 731-33, 956 N.E.2d 258, 261-62 (2011) (“In this case, a State statute provides that the expenses plaintiff has incurred ‘as a result of’ Preu’s ‘failure to abide by ... the requirements of the master deed, trust, by-laws, restrictions, rules or regulations, or by [his] misconduct’ must be borne by Preu (citation omitted). The United States Supreme Court has made clear in the context of civil actions involving private parties and common-law claims that ‘the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes “state action” under the Fourteenth Amendment.’ ... [A] condominium association does not have as free a hand in restricting the speech of unit owners in the common areas in which those owners share an undivided property interest as another property owner might in dealing with a stranger on his or her property. ... We do not hold condominium restrictions on speech and expressive conduct may never be enforceable, nor that expenses incurred in addressing their violation may never be shifted to the unit owner under the statute. We hold only that when an action is brought claiming that the breach of such restrictions amounted to conduct entitling a plaintiff to shift its costs..., the restrictions are subject to scrutiny under the First Amendment.”), review denied, 461 Mass. 1110, 964 N.E.2d 985 (2012).

<sup>35</sup> The *Preu* court relied in part on *Cohen v. Cowles Media Company*, 501 U.S. 663, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991). However, in *Cohen*, the United States Supreme Court stated that although enforcement of legal obligations by the courts constitutes state action, such state action is not, by itself, sufficient to raise a First Amendment violation. The court concluded that notwithstanding court enforcement, “generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report news.” *Id.* at 669, 111 S.Ct. at 2518.

<sup>36</sup> *Schneider v. Gothelf*, Cause No. 429-04998-2013-00 (Collin Co. Texas Dist. Ct.) (See Appendix 1, Defendants’ Motion for Summary Judgment).

<sup>37</sup> *Schneider*, *supra* n.36 (Appendix 2, Order Granting Defendants’ Motion for Summary Judgment and Denying Plaintiffs’ No-Evidence Motions for Summary Judgment).

covenant would violate the Texas Religious Freedom Restoration Act (“TRFRA”)<sup>38</sup> and the Federal Religious Land Use and Institutionalized Persons Act (“RLUIPA”).<sup>39</sup> Similar to the above constitutional analysis, claims under the TRFRA<sup>40</sup> and RLUIPA<sup>41</sup> require a finding of state or governmental action. While the Texas district court did not specify how it found state or governmental action, it was likely on one or more of the following grounds proffered by the defendants: (i) plaintiffs were seeking to enforce state statutes that are subject to Texas RFRA, (ii) judicial enforcement of restrictive covenants was itself state action subject to Texas RFRA or that (iii) homeowners’ associations are quasi-governmental entities that are themselves subject to Texas RFRA.<sup>42</sup> A finding that a community association was a “quasi-governmental entity” may

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<sup>38</sup> *Texas Code Ann., Civil Practice & Remedies Code* §110.001, *et seq.* There are currently 21 states that have some form of the Religious Freedom Restoration Act.

<sup>39</sup> 42 U.S.C. §§2000cc-1, *et seq.*

<sup>40</sup> *Texas Code Ann., Civil Practice & Remedies Code* §§110,001(2) & 110.003.

<sup>41</sup> 42 U.S.C. §§2000cc-1 & 2000cc-5.

<sup>42</sup> *Schneider, supra* n.36 (Appendix 1, Defendants’ Motion for Summary Judgment, and Appendix 2, Order Granting Defendants’ Motion for Summary Judgment and Denying Plaintiffs’ No-Evidence Motions for Summary Judgment).

Note, though, that *Schneider, supra* n. 36, is a trial court decision that has no precedential value and appears to be at odds with *Tien Tao Association, Inc. v. Kingsbridge Park Community Association, Inc.*, 953 S.W.2d 525 (Texas App. – Houston 1997), where the Texas Court of Appeals enforced a residential use restriction to ban religious activity in a unit. See also *Osborne v Power*, 319 Ark. 52, 52–53; 890 S.W.2d 574, 575 (1994) (declining to apply the RFRA to a community association that enforced a restriction banning Christmas lights, prior to the United States Supreme Court’s ruling in *City of Boerne v. Flores, supra* n. 23, that the federal RFRA could not be constitutionally applied to the states). Similarly, the United States Supreme Court has held that action by a private party, pursuant to statute, does not alone qualify a person as a “state actor” or acting under the color of law and that “something more” would be required. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982).

While the United States Supreme Court has held that “state action” occurred when private parties sought judicial enforcement of racially restrictive covenants, such a holding has largely been limited to racial discrimination claims. *Shelley v. Kraemer*, 334 U.S. 1, 13-14, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948). See also *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1191–92 (11<sup>th</sup> Cir. 1995) (“The holding of *Shelley*, however, has not been extended beyond the context of race discrimination...Instead, the concept of state action has since been narrowed by the Supreme Court. See, e.g., *Tarkanian*, 488 U.S. at 199, 109 S.Ct. at 465-66 (holding that the NCAA is not a state actor); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 542-47, 107 S.Ct. 2971, 2984-87, 97 L.Ed.2d 427 (1987) (holding that U.S. Olympic Committee is not a governmental actor despite federal charter, regulation, and funding); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164-65, 98 S.Ct. 1729, 1737-38, 56 L.Ed.2d 185 (1978) (rejecting argument that private post-eviction sale of furniture permitted under New York Uniform Commercial Code constituted state action).”).



be consistent with the decisions in *Mazdabrook*, *Schmid* and *Preu*, *supra*, but whether a community association qualifies as a “quasi-governmental entity” may vary from state to state.

Accordingly, while the majority of courts have held that community associations are not states actors, a minority of jurisdictions have applied broader constitutional protection with respect to speech guarantees. By analogy, these jurisdictions may extend constitutional protection of religion to private associations, similar to *Schneider*, *supra*.. Practitioners therefore should be careful to determine whether community associations have been held subject to state or federal constitutional guarantees, the RFRA or the RLUIPA in their particular jurisdictions.

## **Religious Services**

The conduct of religious services within an association can be a source of discomfort and conflict within an association. When a particular religious group requests permission to conduct their services or other gatherings within an association, it can create awkward questions for the board to address, such as when such services shall be conducted, what religious denominations to approve or disapprove, and how to balance the competing interests among various groups. In general, associations have substantial authority to regulate the use of their common elements or common areas, but such authority is reduced when the religious service would be limited to a dwelling.

### **Worship within a Dwelling**

The courts generally have disfavored restrictions imposed on the use of a dwelling for religious purposes. There is little case law on the issue of whether an association may prohibit the use of a dwelling for religious services. This may be because it is rare for restrictive covenants to explicitly address the issue. Instead, an association is likely to have jurisdiction over the conduct of religious services within a dwelling through covenants requiring a dwelling to be used in accordance with the requirements of federal, state or local laws. An association can then look to the local zoning ordinances to determine whether a dwelling may be used for the conduct of religious services. That can result in a challenge as to whether a local zoning ordinance that either limits the size of a gathering or overtly prohibits the conduct of religious services within a dwelling violates the Fair Housing Act or other legal protections.

This issue of the impact of zoning restrictions on religious practice was implicitly addressed in a case arising in New York.<sup>43</sup> This case involved judgments entered in the United States District Court for the Southern District of New York arising from claims that defendant Village of Airmont, New York, along with individual defendants, had incorporated the Village for the purpose of discriminating against Orthodox Jews on the basis of their religion through the adoption of zoning policies which would discourage Orthodox Jews from living in the community.

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<sup>43</sup> *LeBlanc Sternberg v. Fletcher*, 67 F.3d 412 (2<sup>nd</sup> Cir. 1995), *cert. denied*, 518 U.S. 1017, 116 S.Ct. 2546, 135 L.Ed.2d 1067 (1996).

In that case, a number of individuals filed suit against the village, previously an unincorporated section of the Town of Ramapo, and its officials and a number of residents. The complaint charged that the incorporation of the village, promoted by the Airmont Civic Association, Inc. (ACA) and following a referendum in favor, was motivated by an intent to exclude Orthodox Jews from the community, in violation of the First Amendment, the Fair Housing Act, and 42 U.S.C. §§1983 and 1985(3). The United States filed a separate suit.

Following a trial of the private lawsuit, the jury found in favor of the individual defendants but also determined that the village had violated the private plaintiffs' rights under the FHA and conspired to violate their First Amendment rights. However, the District Court judge, relying on his own findings of fact and reasoning regarding the United States' case, dismissed the government's claims, finding that the government failed to establish that the village or its officers engaged in unlawful discrimination or that the village's zoning code would be interpreted in a discriminatory manner. He then denied the private plaintiffs' claims for injunctive relief, set aside the jury verdict and entered judgment against the plaintiffs pursuant to *Fed.R.Civ.P.* 50(b) (judgment as a matter of law).

On appeal, the Second Circuit concluded there was sufficient evidence to establish that Airmont had violated the private plaintiffs' rights under the FHA and First Amendment. The court found that the evidence demonstrated that the reason behind the push for incorporation was a concern over the number of home synagogues used by Orthodox Jews, the recent purchase of a tract in Airmont by a Hasidic sect of Orthodox Jews, and the proposed zoning in another section of Ramapo, Monsey, for multi-family housing which would facilitate the growth of the Hasidic community there.<sup>44</sup> At trial, the plaintiffs also presented evidence of actions taken to obstruct Jewish religious services, such as the comment by a village trustee that there were ways other than a lawsuit to "harass them" and that members of the ACA posted themselves outside a rabbi's home to count the number of congregants arriving for services.<sup>45</sup> They also demonstrated that the defendants focused their concerns on Orthodox synagogues, asserting at least in part objections based on noise or traffic, but did not oppose non-religious uses that generated noise and traffic and decided not to oppose a height variance for a Catholic church "because this was a Catholic church that wants it."<sup>46</sup>

The court noted that a violation of Section 3604(b) of the FHA may be found due to a disparate impact or disparate treatment. If the motive behind the action is discriminatory, it does not matter if the conduct would have been permitted if it had occurred for a non-discriminatory reason.<sup>47</sup> Here, the court held that because there was sufficient evidence to support the jury verdict, the judge's entry of judgment as a matter of law was in error, and that the jury's finding

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<sup>44</sup> *Id.* at 418.

<sup>45</sup> *Id.* at 420.

<sup>46</sup> *Id.* at 421.

<sup>47</sup> *Id.* at 425.

constituted collateral estoppel so that the judge's judgment against the United States also was in error.<sup>48</sup> The Second Circuit held that since the incorporation had been promoted and approved with discriminatory intent, the village had engaged in unlawful housing discrimination based on religion. The court thus held that housing discrimination can be found based on a discriminatory impact, even when the ordinance's language is neutral on its face.

The United States Supreme Court has addressed similar issues. In a case it decided in 1993,<sup>49</sup> the petitioner church practiced Santeria, leased land in the respondent city, and announced plans to establish a house of worship. In response to this, the city enacted multiple ordinances relating to slaughtering of animals, rituals and sacrifices of animals. Petitioners filed suit under 42 U.S.C. §1983, alleging violations of their rights under the Free Exercise Clause of the First Amendment. The District Court acknowledged the ordinances were not religiously neutral but concluded that a compelling government interest in preventing public health risks and cruelty to animals justified the prohibition on ritual sacrifices. Additionally, the court held that an exception to the ordinances for religious conduct would unduly interfere with the fulfillment of the governmental interest because more narrow restrictions would be unenforceable due to the secret nature of the Santeria religion. The Court of Appeals affirmed the District Court, and the Supreme Court reversed.

The court held that the laws in question were enacted contrary to free exercise principles and were void. Under the Free Exercise Clause, a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability. If the law is not neutral or not of general application, then it must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.

The court concluded that these ordinances were not neutral because the object was to suppress animal sacrifice, the central element of Santeria. It found that there was no compelling governmental interest because the interests in protecting the public health and preventing cruelty to animals could be addressed by general regulations on disposal of animals, care of animals, and methods of slaughter as opposed to a flat prohibition of Santeria sacrificial rituals. The ordinances here were not of general applicability because they were underinclusive since they did not address other types of animal killings or regulate non-religious slaughter for food. The court determined that the ordinances were not narrowly tailored and did not address analogous non-religious conduct.

The New Jersey Supreme Court considered a challenge brought by a minister alleging that a local zoning ordinance that prohibited churches and places of worship for a residential use district was unconstitutionally vague.<sup>50</sup> The minister used his home for a one-hour religious service each week. The court ruled in favor of the minister and found that the ordinance was

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<sup>48</sup> *Id.* at 424.

<sup>49</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

<sup>50</sup> *State v. Cameron*, 100 N.J. 586, 498 A.2d 127 (1985).

unconstitutionally vague as applied to the minister. The court was careful to rule that the ordinance was unconstitutional only as applied in the specific instance where a home was being used for worship.

On the other hand, where a non-discriminatory private restrictive covenant applies, the result may be different. That issue was addressed in a Texas case.<sup>51</sup> Tien Tao Association, Inc. was a corporate homeowner subject to the restrictive covenants of the Kingsbridge Park Community Association. Tien Tao's predecessor owner had applied for and received approval to add a game room to the home. Over time, the prior owner made changes to his application and received approval for such changes. The changes were designed to allow the room to be used for worship.

After Tien Tao acquired the property, it made several changes to the property, all without seeking approval from the association. Tien Tao housed priests in the home and provided accommodations to followers who gathered for worship and to discuss plans for the construction of a nearby temple. Apparently, the influx of visitors caused increased traffic and parking problems near the home, which caused a neighbor to complain to the association. This caused the association to conduct inspections of the property, which revealed the numerous modifications that were made without approval from the association. The association sued Tien Tao to obtain injunctive relief requiring the removal of unapproved modifications, certain other changes, and to require the home be used "in a manner consistent with single family residential use." The trial court ruled in favor of the association.

Tien Tao appealed to the Texas Court of Appeals, alleging that the following restrictive covenant only allows the association to regulate the appearance of the property, but not its use:

Section 1. Single family residential construction. No building shall be erected, altered, or permitted to remain on any Lot other than one detached, single-family dwelling used for residential purposes only, and not to exceed two and one-half (2 ½) stories in height.

....

As used herein, the term "residential purposes" shall ... be construed to prohibit mobile homes or trailers being placed on the Lots, or the use of said Lots for garage apartments, or apartment houses; and no Lot shall be used for business or professional purposes of any kind, nor for any commercial or manufacturing purposes.

On appeal, the court found that the restrictive covenant was designed to regulate both appearance and use and that the dwelling could not be used for any purpose other than as a residence. It therefore upheld the injunction imposed by the trial court requiring the home to only be used in a manner consistent with a single-family residential use.

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<sup>51</sup> *Tien Tao Association, supra.* n. 42, 953 S.W.2d 525.

However, the court explained that the association had enforced its rule not to abridge religious freedom but rather to abate the nuisance that had been caused by the use,<sup>52</sup> and that the religious use of the home was not merely incidental to residential living but instead was the principal use.<sup>53</sup> Accordingly, a more private use of the home for worship that did not disrupt parking for the community may have led to a different result.

### **Use of Association Facilities for Religious Gatherings**

Associations have far greater latitude in regulating their facilities than they do the use of a home for religious purposes. The courts that have examined instances where an association's rules prohibit the use of their facilities for religious gatherings generally have upheld such rules, provided that they were neutral on their face and did not have a disparate impact upon one religion over another.

This issue was addressed in the context of the use of a homeowners' association's common areas in *Savanna Club Worship Serv.*<sup>54</sup> Prior to 2004, the Savanna Club Worship Service used the Savanna Club Homeowners' Association's common areas for their weekly religious services. In response to complaints from members, the Savanna Club Homeowners Association adopted a new rule prohibiting religious services from being conducted in the common areas of the association. The Savanna Club Worship Service was a club created consisting primarily of residents of the homeowners' association who wished to conduct religious services within the association's common area. The lawsuit was brought under §3604(b) of the Fair Housing Act, which prohibits discrimination against persons 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.

The court held that the rule was neutral on its face and applied to all religions, and, accordingly, it was not unlawful religious discrimination. The court further found that the association, in implementing the rule, had provided an un rebutted, nondiscriminatory reason for the rule. The association introduced evidence that the religious services caused violations of other rules of the association, such as its parking rules, and impinged on the right of other members of the association to use the common areas during the long periods of time that the club was conducting its religious services each weekend.

The courts have ruled similarly when a condominium association has adopted rules to prohibit the use of its common facilities for religious purposes. In *Neuman v. Grandview at Emerald Hills, Inc.*,<sup>55</sup> for years, the condominium association had permitted its auditorium to be used for religious services when at least 80% of the attendees were residents of the Grandview Condominium. However, over time, a group of owners complained about the existing policy

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<sup>52</sup> *Id.* at 532.

<sup>53</sup> *Id.* at 533.

<sup>54</sup> *Supra.* n. 11, 456 F.Supp.2d 1223 (S.D. Fla. 2005).

<sup>55</sup> 861 So.2d 494 (Fla. App. 2003).

permitting the use of the facilities for religious services. The court noted that a basis for the complaints was that “such usage was contrary to the areas’ stated purpose of being ‘devoted to the common use, recreation and enjoyment of the members of the Association.’” In response to such complaints, the board of directors of the condominium association deliberated about the issue, and adopted the following rule: “No religious services or activities of any kind are allowed in the auditorium or any other Common Elements.”

A unit owner filed suit to challenge the rule, contending that it violated unit owners’ constitutional rights to assemble, that it violated a state statute that prohibits condominium associations from unreasonably restricting the unit owners’ right to peaceful assembly, and that the rule was arbitrary and capricious. The unit owner’s argument was that religious services fell within the category of peaceful assembly and that the rule prohibiting the holding of religious services was unreasonable on its face. The court disagreed. It applied the Florida statutory test of reasonableness to establish whether the rule was invalid. The court found that the rule preventing the use of the auditorium for religious services was reasonable considering the board’s concerns over the serious potential for a conflict between different religious organizations wishing to use the facilities. The court also noted that the board only adopted the rule after it conducted a poll of the members that reflected that a majority of the owners who responded were concerned that the auditorium was being dominated for a single use every week on Saturdays. The court further found that prohibiting types of assembly which might have a “particularly divisive effect on the condominium community is a reasonable restriction.” Accordingly, the court ruled in favor of the defendant condominium association.

When determining whether an association should adopt a rule prohibiting the use of its common areas or facilities for religious purposes, it is important that the rule be drafted neutrally and that the purpose behind the rule not be directed at a particular faith. See, for example, Appendix 3, Rules Prohibiting the Use of Association Facilities for Religious Purposes. If such a rule is adopted, it can reduce the likelihood of a Fair Housing complaint. Permitting common areas and facilities to be used for religious purposes, on the other hand, creates the risk of practitioners of certain faiths alleging that the association, by permitting particular religious gatherings but not others, is discriminating based on religion. Also, neutral rules avoid allegations that the common areas and facilities are being used for purposes other than those that are permitted or contemplated by the association’s documents.

## **Individual Rights and Claims**

Claims of religious discrimination arise when a resident or group of residents seeks to assert a perceived individual right related to the claimant’s religion which conflicts with an association policy, rule or covenant. The governing board needs to balance the individual rights of the residents against the overall well-being of the community as a whole.

There are relatively few reported (published or unpublished) cases concerning allegations of religious discrimination against common interest ownership associations. Nevertheless, the cases demonstrate that there is a wide range of activities that can lead to such claims. In addition, the cases, including some cases regarding tenancies or zoning rather than community associations, are instructive because they indicate what types of conduct courts deem to be



religious discrimination and what types that may affect religious practices are permitted. These rulings are helpful in providing guidelines for boards.

### **Discriminatory Conduct**

Although the Federal Fair Housing Act as amended (FHA)<sup>56</sup> includes discrimination in housing based on religion, and state fair housing laws also may apply, not all claims of religious discrimination are based on the FHA. Other standards also may serve to bar religiously discriminatory practices. The FHA is the focus of the discussion below, but the cases cited also sometimes reference other applicable standards.

The *LeBlanc-Sternberg* case,<sup>57</sup> discussed above, concerns municipal government and zoning rather than a community association but demonstrates that actions motivated by religious discrimination will be found to violate the Fair Housing Act. A California case emphasizes that actions taken with discriminatory intent are actionable even if the action appears neutral.<sup>58</sup> In that case, the plaintiffs, tenants of an apartment complex, alleged that the defendants had formed a plan to tear down the complex and then build luxury condominiums to be sold at above market prices solely to wealthy Jewish people of Arabic descent from Iran and Iraq. The complaint alleged that this purpose was stated openly as the “religious mission” of the defendants’ organization and also was repeated by individual defendants. Defendants moved to dismiss the complaint on the pleadings, on a number of grounds, including that it failed to state a claim under the Fair Housing Act. The court rejected that argument because, even if the eviction process itself were non-discriminatory, the plaintiffs “plainly plead that Defendant’s plan is discriminatory.”<sup>59</sup>

*Bloch v. Frischholz*<sup>60</sup> is probably one of the most cited cases concerning religious discrimination. It involved a prohibition of a mezuzah, a small rectangular container holding a parchment bearing inscriptions from the Torah, the Five Books of Moses, which observant Jews are required to post on the doorposts of their homes. In that case, the condominium association adopted a rule in 2001 that prohibited “mats, boots, shoes, carts or objects of any sort ... outside Unit entrance doors.” The rule initially was not interpreted to prohibit mezuzahs. However, in 2004, following hallway renovations and painting, the association board reinterpreted the rule to bar mezuzahs, as well as other religious, political and decorative items. The association staff removed and confiscated the Blochs’ mezuzahs from their three units each time they put them on their doorposts. When Marvin Bloch died, the association agreed to allow the Blochs to keep a

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<sup>56</sup> 42 U.S.C. §§3601, *et seq.*

<sup>57</sup> *Supra* n. 43, 67 F.3d 412.

<sup>58</sup> *Scaduto v. Esmailzadeh*, No. CV 07-4069-GW(AJWx), 2007 W.L. 8435679 (U.S.D.C., C.D.Cal., August 9, 2007).

<sup>59</sup> *Id.* at \*7.

<sup>60</sup> *Supra* n. 2, 587 F.3d 771.

mezuzah up during the seven-day “shivah” mourning period following burial. Nevertheless, upon their return from the funeral and burial, the Blochs found the mezuzah had been removed, and when they retrieved it and reinstalled it, the condominium staff attempted to remove it again.

The Blochs then sued the association and its president, claiming religious discrimination in violation of the Federal Fair Housing Act, specifically, Sections 3604(a), 3604(b) and 3617.<sup>61</sup> They also claimed violation of Section 1982 of the Civil Rights Act.<sup>62</sup> The District Court granted summary judgment for the defendants. The court relied on an earlier decision by the Seventh Circuit that Sections 3604(a) and 3604(b) pertained only to claims arising in the sale or rental of a home and not to incidents occurring after a home has been acquired.<sup>63</sup> The court also found no evidence of discriminatory intent and so dismissed the §3617 and §1982 claims because those statutes required proof of discriminatory intent. On appeal, a majority affirmed, but there was a dissent.<sup>64</sup> The full court agreed to hear the matter *en banc*.

The *en banc* court determined that Section 3604(a) could apply to post-acquisition conduct if it rose to the level of a constructive eviction, thus making the unit unavailable. However, because the Blochs did not move out of their units, they could not claim that the units were unavailable.<sup>65</sup> However, the court held that Section 3604(b) can apply in two types of situations. First, it can apply where there is a constructive eviction.<sup>66</sup> Second, the court explained that when a condominium unit is sold, the purchaser’s agreement to subject its rights to rules and restrictions imposed by the condominium board is a condition of the purchase. Therefore, the board may not implement such rules or restrictions in a discriminatory manner.<sup>67</sup>

The court also concluded that although the association’s actions did not constructively evict the Blochs, they could be found to have interfered with the Blochs’ enjoyment of their rights or to have intimidated the Blochs on account of exercising those rights and so could give rise to a claim under Section 3617.<sup>68</sup> The court noted that HUD had supported the interpretations regarding Sections 3604(b) and 3617 by its adoption of regulations, 24 *C.F.R.*

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<sup>61</sup> 42 *U.S.C.* §§3604(a), 3604(b) and 3617.

<sup>62</sup> 42 *U.S.C.* §1982.

<sup>63</sup> *Halprin v. The Prairie Single Family Homes of Dearbrook Park Association*, 388 F.3d 327, 328-30 (7<sup>th</sup> Cir. 2004).

<sup>64</sup> *Bloch v. Frischholz*, 533 F.3d 562 (7<sup>th</sup> Cir. 2008), *aff’d. in part, rev’d. in part*, 587 F.3d 771 (7<sup>th</sup> Cir. 2009, *en banc*).

<sup>65</sup> *Bloch, supra* n. 2, 587 F.3d at 776-78.

<sup>66</sup> *Id.* at 779.

<sup>67</sup> *Id.* at 779-80.

<sup>68</sup> *Id.* at 781.

§100.65(b)(4) and 24 C.F.R. §100.400(c)(2), respectively.<sup>69</sup> The court concluded that the Blochs had sufficient evidence to support their claims, so summary judgment was inappropriate.<sup>70</sup> However, the court emphasized that denial of a religious exemption to a facially neutral rule does not constitute intentional discrimination and that to succeed in their claim, the Blochs would need to prove that the association's reinterpretation of the hallway rule was motivated by religious animus.<sup>71</sup>

In rendering this decision, the Seventh Circuit rejected the *Halprin* panel's earlier suggestions<sup>72</sup> that Section 3617 applies only to pre-acquisition conduct and possibly to constructive evictions and that the HUD regulation interpreting that section, 24 C.F.R. §100.400, may be invalid.<sup>73</sup> The *Bloch* court also noted that 42 U.S.C. §1982 provided another cause of action for the plaintiffs, citing a United States Supreme Court case,<sup>74</sup> and explained that that claim required proof of intentional discrimination.<sup>75</sup>

A federal case out of Arizona<sup>76</sup> also presented a case that was dependent on motive. There, former members of the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS) obtained a lease to occupy a residence in an unfinished home on property previously restricted to occupancy by members of the FLDS. However, the home required electric and water service. The municipal utility board denied the plaintiffs' application for a water service connection unless the plaintiffs or the property owner could bring physical water to the system, asserting that the present water system was unable to accommodate new homes. The plaintiffs sued on several grounds, including religious discrimination under the Federal and Arizona Fair Housing Acts, claiming in part that the defendants had denied them service because they were not members of the FLDS.

On motions for summary judgment, the court found an insufficient basis for a claim under 42 U.S.C. §3604(a) and its Arizona counterpart because there was no evidence that the absence of a water service connection made the home unavailable to the plaintiffs.<sup>77</sup> However,

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<sup>69</sup> *Id.* at 781, 782.

<sup>70</sup> *Id.* at 785.

<sup>71</sup> *Id.*

<sup>72</sup> *Supra* n. 63, 388 F.3d 327.

<sup>73</sup> *Bloch*, *supra* n. 2, 587 F.3d at 782.

<sup>74</sup> *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617–18, 107 S.Ct. 2019, 2022, 95 L.Ed.2d 594 (1987) (holding that Jews can sue for race discrimination under §1982).

<sup>75</sup> *Bloch*, *supra* n. 2, 587 F.3d at 776, n. 5.

<sup>76</sup> *Cooke v. Town of Colorado City, Arizona*, 934 F.Supp.2d 1097 (D. Ariz. 2013).

<sup>77</sup> *Id.* at 1112.

the court concluded that the plaintiffs had shown they were likely denied utility service because they were not FLDS members and so had a valid claim pursuant to 42 *U.S.C.* §3604(b) and the Arizona counterpart.<sup>78</sup> Inquiring of a prospective tenant about the tenant's religion before denying the tenancy also can show a motive of religious discrimination in violation of the FHA.<sup>79</sup>

Thus, conduct that discourages or prohibits members of a particular religion from seeking or obtaining housing in a community or that interferes with the enjoyment of the housing and that was undertaken in order to discourage or prohibit that religious group from seeking, obtaining or enjoying the housing violates the Fair Housing Act even though it might have been legal if it had been undertaken for non-discriminatory reasons.

A number of other cases demonstrate other situations where interference with religious practices without sufficient justification has been deemed discriminatory and unlawful. For example, applying an association rule to ban religious statues outside a condominium unit after having allowed such statues for six years and having vacated an invalid regulation banning them was found to be in bad faith and so not protected by the business judgment rule.<sup>80</sup>

Conduct barred by the bylaws for a non-discriminatory reason need not be allowed despite the restriction's potential impact on the practice of one's religion. However, barring an activity that is not prohibited by the bylaws may be improper. For example, when a New York City condominium association prevented the erection of a sukkah, a temporary outdoor hut to be used for meals (and possibly for sleeping) during the eight days of the Jewish autumn holiday of Sukkoth, on unrestricted common elements, the court upheld that restriction because the bylaws prohibited installation on the common elements.<sup>81</sup> In a Florida case, the court prohibited the association from allowing the erection of a sukkah on common elements because the bylaws forbade the conduct of religious activities on the property.<sup>82</sup>

However, the New York City condominium later prohibited the erection of the sukkah on the plaintiffs' balcony, which was restricted to use only by the unit owner. The court found that there was nothing in the bylaws that prohibited the placement of the sukkah on the balcony so that by barring the sukkah, the board of governors had violated the bylaws and its decision was

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<sup>78</sup> *Id.* at 1114.

<sup>79</sup> *Snyder v. Bazargani*, 241 Fed.Appx. 20 (U.S. Ct. App., 3<sup>rd</sup> Cir., June 22, 2007, unpublished), *cert. denied*, 552 U.S. 1040 & 1062, 128 S.Ct. 661 & 717, 169 L.Ed.2d 511 & 554 (2007), rehearing denied, 552 U.S. 1170, 128 S.Ct. 1137, 169 L.Ed.2d 958 (2008).

<sup>80</sup> *Vacca v. Board of Managers of Primrose Lake*, 251 A.D.2d 674, 676 N.Y.S.2d 188 (1998).

<sup>81</sup> *Greenberg v. Board of Managers of Parkridge Condominiums*, No. 20257/95, 2000 W.L. 35921423 (N.Y. Sup. Ct., September 1, 2000), *aff'd.*, 294 A.D.2d 467, 742 N.Y.S.2d 560 (2002).

<sup>82</sup> *Tower Forty-One Association v. Levitt*, 426 So.2d 1290 (Fla. App. 1983).

not protected by the business judgment rule. It enjoined the board from preventing the placement of the sukkah but did require that the plaintiffs remove the sukkah within one or two days after the end of the holiday.<sup>83</sup>

In a Florida case,<sup>84</sup> a Jewish woman alleged that defendants discriminated against her based on religion, in violation of the Fair Housing Act. She claimed that the defendants informed her that “her type” (which she understood to mean a Jew) was not wanted in the community, insulted her, enforced non-existent deed restrictions against her, stole a mezuzah from outside her home, allowed neighbors’ pets to trespass on her property, refused to maintain common areas near her residence, and vandalized the sidewalk near her residence by spray painting the word “Jew.” The court held that these allegations raised a cause of action under 42 U.S.C. §3617 and so defeated a motion to dismiss.

A Christian couple sued their homeowners association for attempting to discourage them from holding a Christmas fundraiser in their home.<sup>85</sup> The association had written to the couple that the fundraiser would violate the covenants, had expressed concern that it would create an issue for non-Christian residents, had sent a letter to the community’s residents advising them of the plans for the fundraiser, had conducted a meeting of the residents to discuss the matter, and had threatened legal action if the couple held the fundraiser. The court denied the motion to dismiss the complaint, finding that it raised plausible causes of action under 42 U.S.C. §§3604(b), 3604(c) and 3617. The Spokane, Washington *Spokesman Review* reported on November 6, 2018 that following a trial, a jury awarded the plaintiffs \$75,000.00.

### **No Discrimination Found**

Not all claims of religious discrimination have valid bases. For example, allegations that a member of one religion is harassing a member of another religion does not establish discrimination without evidence that the harassment was based on religious discrimination.<sup>86</sup> Derogatory religion-specific (and gender-specific or disability-specific) remarks made to offend an individual due to animosity between residents are not sufficient to make a Fair Housing claim where other evidence disproves any actual discriminatory intent.<sup>87</sup> Enforcement of deed restrictions regarding use of the property and exterior modifications which were adopted before

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<sup>83</sup> *Greenberg, supra* n. 81, 2000 W.L. 35921423.

<sup>84</sup> *Adamson v. Shaddock Estates Homeowners Association, Inc.*, No. 8:08-cv-354-T-26TBM, 2008 W.L. 10590598 (U.S.D.C., M.D. Fla., June 13, 2008).

<sup>85</sup> *Morris, supra* n. 6, 2017 W.L. 3666286.

<sup>86</sup> *United States v. Weisz*, 914 F.Supp. 1050 (S.D.N.Y. 1996).

<sup>87</sup> *Radcliffe v. Avenel Homeowners Association, Inc.*, No. 7:07-CV-48-F, 2013 W.L. 556380 (U.S.D.C., E.D.N.C., February 12, 2013).

the use of a home for religious purposes does not constitute religious discrimination simply because the nuisance being addressed arises from a religious gathering.<sup>88</sup>

In *Hack*,<sup>89</sup> plaintiffs, Orthodox Jewish freshmen and sophomores at Yale College, charged Yale with violation of the Civil Rights Act, the Sherman Antitrust Act and the Fair Housing Act and other statutes because of the college's policy requiring all unmarried freshman and sophomores under the age of 21 to reside in the college's coeducational dormitories. The plaintiffs sought an exemption from the policy because of their religious objections to residing in coeducational facilities. Significantly, they did not ask for on-campus male-only housing but rather sought a refund of their housing charges so that they could arrange off-campus housing.

The court rejected the Civil Rights Act claim because Yale was not a state actor and held that the Antitrust Act did not apply to Yale's dormitory rules. Furthermore, the court noted that the FHA does not require a reasonable accommodation of a person's religion. Therefore, to assert a claim, plaintiffs must allege that Yale either denied them housing because of their religion or granted them housing on discriminatory terms or conditions. However, plaintiffs did not seek housing from Yale but rather an exemption from housing. Therefore, according to the court, their claim did not come under the FHA.<sup>90</sup> The complaint did not allege an intent to discriminate, a facially discriminatory policy, facts demonstrating a disparate impact or even that plaintiffs were excluded from housing, so the court affirmed the District Court's dismissal of the complaint.<sup>91</sup> The dissent, however, felt that the plaintiffs established a disparate impact because Yale's requirement effectively made the housing unavailable to Orthodox Jews<sup>92</sup> and that the ultimate decision whether the policy was discriminatory should have been left to the trier of fact.<sup>93</sup>

Policies that barred the use of common elements for any religious gathering were found to be permissible. In *Neuman*,<sup>94</sup> the court held that such a rule did not violate the owners' statutory rights to peaceably assemble. *Savanna Club Worship Serv., Inc.*<sup>95</sup> dealt with a fair housing claim. The court concluded that because the rule did not discriminate against any particular religion, that no unit owner was denied use of the common areas, and that the rule did

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<sup>88</sup> *Tien Tao Association, supra*. n. 42, 953 S.W.2d 525.

<sup>89</sup> *Supra* n. 13, 237 F.3d 81.

<sup>90</sup> *Id.* at 89-90.

<sup>91</sup> *Id.* at 90.

<sup>92</sup> *Id.* at 92 (Moran, S.D.J., dissenting in part).

<sup>93</sup> *Id.* at 104 (Moran, S.D.J., dissenting in part).

<sup>94</sup> *Supra* n. 55, 861 So.2d 494.

<sup>95</sup> *Supra* n. 11, 456 F.Supp.2d. 1223.



not make any home unavailable, the FHA did not apply.<sup>96</sup> Moreover, because the rule was adopted due to complaints by owners about the use of common elements, violations of rules regarding the use of common elements, and parking violations, the association had a legitimate non-discriminatory basis for the rule.<sup>97</sup>

Courts also have found no religious discrimination where associations have enforced general restrictions that are not intended to target religion. For example, in a case from Colorado, a plaintiff sued her association, making a number of claims of discrimination based on race, disability and religion.<sup>98</sup> Among her claims was that the association had violated her civil rights by citing her for installing an 8-foot high cross in her yard without association approval. In a prior state court case, the judge found that the association was enforcing a religion-neutral rule that did not affect the plaintiff's access to housing.<sup>99</sup> The District Court ruled that the doctrine of collateral estoppel barred re-litigation of this factual finding, so plaintiff could not prove unlawful discrimination.

A Muslim couple who dress in traditional attire claimed religious discrimination when the defendants denied their application to rent an apartment.<sup>100</sup> The application was denied because the plaintiffs did not satisfy the rental history screening. The court found no religious discrimination. Interestingly, the court concluded that the defendants' implementation of the screening process could be unfair, but it was unfair to all applicants, not just to plaintiffs or Muslims.<sup>101</sup> The court thus found that the plaintiffs could not establish religious discrimination in the screening process.<sup>102</sup>

### **Accommodations for Religious Purposes**

Although there is no obligation under the Fair Housing Act to make an accommodation for religious purposes, making a reasonable accommodation can avoid a finding of discrimination. In one case,<sup>103</sup> a Hindu unit owner sued his condominium association for alleged

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<sup>96</sup> *Id.* at 1232.

<sup>97</sup> *Id.* at 1233.

<sup>98</sup> *Weatherspoon v. Provincetowne Master Owners Association, Inc.*, Civ. Action No. 08-CV-02754-MSK-KLM, 2010 W.L. 3522559 (U.S.D.C., D. Col., September 2, 2010).

<sup>99</sup> *Id.* at \*4.

<sup>100</sup> *Peek v. Pines Apartment LLP*, 278 F. Supp.3d 679 (W.D.N.Y. 2017).

<sup>101</sup> *Id.* at 690.

<sup>102</sup> *Id.* at 691-92.

<sup>103</sup> *Boodram v. Maryland Farms Condominium*, No. Civ. JFM-92-549, 1992 W.L. 813667 (U.S.D.C., D.Md., October 2, 1992), *aff'd.*, 16 F.3d 408 (4<sup>th</sup> Cir., February 1, 1994, unpublished), *cert. denied*, 512 U.S. 1241, 114 S.Ct. 2753, 129 L.Ed.2d 870 (1994).

violation of the FHA. Plaintiff refused to remove from his balcony a pot containing a dead plant and red flags. The association cited him for a violation of the bylaws and imposed fines. Plaintiff asserted that the pot was a “jhandee,” which he was required by his religion to maintain. The association allowed plaintiff to keep the jhandee provided he moved it to a location on the balcony where it would not be seen by passersby, which plaintiff conceded was religiously permitted. The court therefore found no violation.

Another plaintiff demanded that the housing authority exempt him and his wife from an obligatory meal plan based on their religious belief in adhering to a vegetarian diet.<sup>104</sup> The housing authority offered to provide vegetarian meals to accommodate the religious belief or to provide an apartment in a building that did not require the meal plan, but plaintiff refused these alternatives. The court concluded there was no violation of the First Amendment or the Fair Housing Act.<sup>105</sup>

An example of an accommodation is a Limited License Agreement for Eruv, Appendix 4. Also, state laws may require a reasonable accommodation. Florida’s Condominium statute, for example, mandates that “[a]n association may not refuse the request of a unit owner for a reasonable accommodation for the attachment on the mantel or frame of the door of the unit owner of a religious object not to exceed 3 inches wide, 6 inches high, and 1.5 inches deep.<sup>106</sup> Other states have prohibited any rule barring an owner or lessee from attaching religious objects to an entry door or door frame, subject to specified exceptions.<sup>107</sup>

### **Wide Variety of Claims Continue**

Recent cases demonstrate the wide variety of conduct that can lead unit owners to claim religious discrimination. In one case,<sup>108</sup> plaintiff charged that the association failed to reasonably accommodate his religious practice of hanging a picture of a saint on his door. However, the court stayed the action pending the outcome of a similar state court action. The plaintiff in another case<sup>109</sup> claimed, among other grounds, that the denial of permission to operate a religious

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<sup>104</sup> *Hanrahan v. Housing and Redevelopment Authority of Duluth, Minnesota*, 912 F.Supp. 428 (D.Minn. 1995), *aff’d*, 86 F.3d 1159 (8<sup>th</sup> Cir., May 31, 1996, unpublished).

<sup>105</sup> *Id.* at 434.

<sup>106</sup> *West’s Fla. Stat. Ann.* §718.113(6). See also 765 *Ill. Comp. Stat. Ann.* 605/18.4(h) (stating, in part, “No rule or regulation shall prohibit any reasonable accommodation for religious practices, including the attachment of religiously mandated objects to the front-door area of a condominium unit.”).

<sup>107</sup> *E.g.*, *Conn. Gen. Stat. Ann.* §47-230a; *R.I. Gen. Laws* 1956 §34-37-5.5; *Texas Code Ann., Property Code* §202.018.

<sup>108</sup> *Amin v. 5757 N. Sheridan Road Condo Assn.*, No. 12C446, 2012 W.L. 2049820 (U.S.D.C., N.D. Ill., June 6, 2013).

<sup>109</sup> *Nelson v. Avondale HOA*, 172 Cal.App.4<sup>th</sup> 857, 91 Cal.Rptr.3d 726 (4 Dist. 2009).

counseling business in his home constituted religious discrimination. The trial court denied a preliminary injunction, and plaintiff appealed. However, the appellate court refused to consider plaintiff's arguments because he failed to adequately brief them or did not raise them below.

A Jehovah's Witness who formerly resided at the defendant's Interfaith House alleged that defendant committed several acts of discrimination.<sup>110</sup> She alleged that the home had prohibited meetings of Jehovah's Witnesses but had allowed meetings by other religious groups, had required tenants to attend political meetings although the Jehovah's Witness faith bars participation in politics, had given preferential treatment to non-Jehovah's Witnesses, and had refused to allow plaintiff to leave religious information in the lobby while allowing non-Jehovah's Witnesses to do so. The court dismissed claims arising before March 8, 2011 based on the statute of limitations. Although it denied defendants' motion for summary judgment to dismiss the post-March 7, 2011 claims, it commented that there did not appear to be any evidence of the plaintiff's allegations. The court allowed defendants to file another motion for summary judgment focusing on the lack of such evidence but also allowed plaintiff to conduct additional discovery to identify evidence supporting her claim.

A resident of a Philadelphia condominium alleged that the association discriminated against him based on religion because it refused to allow him to hang a Hindu toran at the top of his doorway although its regulation allows Jewish mezuzahs to be attached to door frames.<sup>111</sup> According to the complaint, a toran functions as a gateway with two or three lintels between two posts. Modern torans are typically made of fabric or jewelry and are hung between the doorposts at the top of the threshold. The complaint alleged that a Hindu priest blessed the toran, that adorning the doorway with a toran is a customary expression of the Hindu faith, and that the toran has deep religious meaning in the Hindu religion but did not allege that the religion mandates the use of a toran. The parties settled the case, and it was dismissed on September 21, 2018.

A group of Hasidic Jewish residents of the Highland Lake Homeowners Association sued the association, two management companies, and members of the board claiming religious discrimination.<sup>112</sup> The complaint alleges a number of discriminatory actions by the defendants, such as: that the association adopted a regulation prohibiting commercial transactions on Sundays, although Hasidic Jews do not conduct business on Saturdays and frequently are available for such transactions only on Sundays; that the association has barred the erection of eruvs, physically marked boundaries that allow religious Jews to carry within the eruv area on the Sabbath, although it allows substantial Christmas displays and other holiday decorations; and

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<sup>110</sup> *Lloyd v. Presby's Inspired Life*, 251 F.Supp.2d 891 (E.D.Pa. 2017).

<sup>111</sup> *Tripathi v. Murano Condominium Association*, Case No. 2:18-cv-01840-JP (U.S.D.C., E.D. Pa., complaint filed May 3, 2018).

<sup>112</sup> *Stern v. Highland Lake Homeowners Association*, Case No. 7:18-cv-04622-NSR (U.S.D.C., S.D.N.Y., complaint filed May 18, 2018).

that the association required removal of a sukkah. As of the preparation of this paper, that case was still pending.

In two related cases in New Jersey, plaintiffs challenged a condominium association's policy requiring separate use of the pool by males and females for most of each week, based on religious preferences. The association restricted mixed-gender access to the community pool to two hours a day, six days a week, Sunday through Friday, to accommodate the religious dictates of the majority of owners prohibiting mixed-gender swimming. Single sex swimming thus was the rule for most of each week. However, the complaints did not allege religious discrimination.

In the first case,<sup>113</sup> a unit owner challenged the rule under the N.J. Condominium Act<sup>114</sup> and the N.J. Law Against Discrimination.<sup>115</sup> The defendants removed the case to Federal court, arguing that the allegations raised a Federal claim under the FHA. The District Court remanded to the state court because the plaintiff had not raised a Fair Housing claim. There is no report of any further progress.

In the second case,<sup>116</sup> the plaintiffs alleged that the pool policy constituted discrimination based on gender, in violation of the FHA. The defendants removed the case to Federal court. However, the District Court found that there was no discrimination based on gender because both males and females were allowed to use the pool for equal periods of time. The court then remanded the remainder of the claims to the state court. The plaintiffs filed an appeal from the District Court's decision with the Third Circuit Court of Appeals, which, as of the preparation of this paper, was pending, and the state court action was stayed pending that appeal. If the plaintiffs had asserted discrimination based on religion instead of gender discrimination, might the District Court have denied dismissal and kept the case?

An Internet search revealed an additional sampling of claims. On March 6, 2018, Greenberg Traurig, P.A. and First Liberty Institute filed a complaint with HUD on behalf of Donna Dunbar against Cambridge House at Port Charlotte Condominium and its managing agent, The Gateway Group, Inc. alleging a violation of the Fair Housing Act. Dunbar alleges that the condominium association's prohibition of use of the condominium's social room for religious meetings and particularly for her Bible study group although the social room may be used for other types of activities constitutes religious discrimination. The complaint also alleges that the association bars Christian religious decorations and displays.

The *Palm Beach Post* ran a story on December 18, 2015 about the Lands of the President complex threatening a resident with a \$100.00 per day fine for displaying a Christmas wreath on

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<sup>113</sup> *Richman v. A Country Place Condominium Association, Inc.*, Civ. Action No. 16-9453-BRM-LHG, 2017 W.L. 4830367 (U.S.D.C., D.N.J., September 29, 2017).

<sup>114</sup> *N.J. Stat. Ann.* §46:8B-1, *et seq.*

<sup>115</sup> *N.J. Stat. Ann.* §10:5-1, *et seq.*

<sup>116</sup> *Curto v. Country Place Condominium Association, Inc.*, Civ. Action No. 16-5928-BRM-LHG, 2018 W.L. 638749 (U.S.D.C., D.N.J., January 31, 2018).

her unit's door, although mezuzahs are allowed year round. The associate manager responded that the rule only regulates the size of displayed items and has nothing to do with religion. On August 6, 2018, Scripps Media, Inc. reported that a Bakersfield, California resident had begun soliciting signatures for a petition to the homeowners association because the board had denied an application to permit installation of a wooden cross in the flower bed in front of the unit.

## **Religious Symbols and Religious Displays**<sup>117</sup>

Can a community association legally restrict a resident's ability to put up religious symbols or religious displays? Can cognizable claims be brought under the Fair Housing Act for "religious accommodations"? What about holiday decorations? These questions have been arising with increasing frequency over the last few years. Whether it is "winds of change" or a function of the political climate we are in, these issues are not going away any time soon so we must be prepared to properly handle them.

To begin, disputes involving religious symbols and religious displays are increasing in frequency. A frequently litigated issue involves the installation of mezuzahs. A mezuzah is a small religious object that an observant Jewish person installs on the doorpost or doorframe outside of his or her residence in fulfillment of a religious obligation. To these folks, mezuzahs are not "decorative" in nature; one cannot reside inside of a residence where a mezuzah is not installed on the outer doorpost or doorframe.

Currently, to the authors' knowledge, there are five states (Connecticut, Florida, Illinois, Rhode Island and Texas) that prohibit restrictions on the placement of mezuzahs or other required religious objects on outer doorposts or doors. We produce them below for your convenience. (Practitioner's tip: there are local municipalities and local governments around the country that also prohibit such restrictions; this should therefore be evaluated in your jurisdiction when undergoing an analysis of this issue).

### A. *Conn. Gen. Stat. Ann.* §47-230a.

- (a) No person may prohibit or hinder the owner, lessee or sublessee of a condominium unit from attaching to an entry door or entry door frame of such unit an object the display of which is motivated by observance of a religious practice or sincerely held religious belief.
- (b) Subsection (a) of this section shall not prohibit the enforcement or adoption of a bylaw that, to the extent allowed by the first amendment to the United States Constitution and section 3 of article first of the Constitution of the state,

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<sup>117</sup> Content in this section is primarily based upon the published written work of Edward Hoffman, Jr., particularly, "The Rights Approach: The First Amendment can create chaos for community associations if they don't understand the law," published in the November/December 2018 issue of *Common Ground*, a publication of the Community Associations Institute.

prohibits the display or affixing of an item on an entry door or entry door frame to the owner's, lessee's or sublessee's unit when such item: (1) threatens the public health or safety; (2) hinders the opening and closing of an entry door; (3) violates any federal, state or local law; (4) contains graphics, language or any display that is obscene or otherwise patently offensive; (5) individually or in combination with each other item displayed or affixed on an entry door frame has a total size greater than twenty-five square inches; or (6) individually or in combination with each other item displayed or affixed on an entry door has a total size greater than four square feet.

B. *West's Fla. Stat. Ann.* §718.113(6).

An association may not refuse the request of a unit owner for a reasonable accommodation for the attachment on the mantel or frame of the door of the unit owner of a religious object not to exceed 3 inches wide, 6 inches high, and 1.5 inches deep.

C. *765 Ill. Comp. Stat. Ann.* 605/18.4(h).

. . . [N]o rule or regulation may impair any rights guaranteed by the First Amendment to the Constitution of the United States or Section 4 of Article I of the Illinois Constitution including, but not limited to, the free exercise of religion, nor may any rules or regulations conflict with the provisions of this Act or the condominium instruments. No rule or regulation shall prohibit any reasonable accommodation for religious practices, including the attachment of religiously mandated objects to the front-door area of a condominium unit.

D. *R.I. Gen. Laws* 1956 §34-37-5.5.

Except as otherwise provided by this section . . . an association of unit owners, as defined in § 34-36.1-1.03 (hereinafter "property owners"); may not enforce or adopt a restrictive covenant or otherwise prohibit a unit owner or tenant from displaying or affixing on the entry to the unit owner's or tenant's dwelling one or more religious items, the display of which is motivated by the unit owner's or tenant's sincere religious belief.

E. *Vernon's Texas Code Ann., Property Code* §202.018.

Except as otherwise provided by this section, a property owners' association may not enforce or adopt a restrictive covenant that prohibits a property owner or resident from displaying or affixing on the entry to the owner's or resident's dwelling one or more religious items the display of which is motivated by the owner's or resident's sincere religious belief.

In all other states, the Fair Housing Act and/or the state analog would generally prohibit restrictions against the installation of religiously required objects based on particular scenarios.



Unlawful restrictions would include prohibiting a required religious display but allowing secular items to be displayed or prohibiting a member of one religion to display an item while allowing a member of another religion to do so. Of course, where there is evidence that a [seemingly] facially neutral restriction adopted by an association related to the removal of objects (name plates or signs) from the exterior of homes was really a pretext for intentional discrimination based on religious prejudice (*e.g.*, to prohibit mezuzahs), or where prohibiting the religious artifact effectively prevents a religious person from living in the community (constructive eviction), a violation of the Fair Housing Act would occur.<sup>118</sup> Nevertheless, associations probably can establish reasonable size and location requirements.

Another religious symbol or display issue that has been litigated involves the sukkah, which is a temporary outdoor structure that may be used for meals and sleeping during the Jewish holiday of Sukkoth. As discussed above, where an association board exceeds its authority by prohibiting a sukkah that is not proscribed by its governing documents, its prohibition may be *ultra vires*.<sup>119</sup> Something which may be specifically barred by the governing documents for a non-discriminatory reason need not be allowed by the association, but disallowing something that is not specifically forbidden by the governing documents may be deemed to be improper by a court.

As it relates to religious symbols and religious displays and fair housing discrimination, it is important to note that HUD has interpreted the Fair Housing Act to include two types of discrimination: disparate treatment and disparate impact (also known as “discriminatory effect”). Disparate treatment involves discrimination due to different treatment, *i.e.*, treating someone differently because of religion would be included. These claims involve allegations of intentional bias.

Disparate impact, on the other hand, involves discrimination by different impact, *i.e.*, when a neutral policy or procedure has a disproportionately negative impact on a protected class. Disparate impact claims shift the focus away from “intent” to one of result.

In 2013, HUD issued a final rule entitled “Implementation of the Fair Housing Act’s Discriminatory Effects Standard.”<sup>120</sup> This final rule provides that if a practice has a “discriminatory effect,” HUD or a private plaintiff can establish liability under the Fair Housing Act even if a facially neutral practice has no discriminatory intent. In 2015, the United States Supreme Court held that disparate impact claims are cognizable under the Fair Housing Act.<sup>121</sup> This case is now the law of the land as it relates to making disparate impact claims under the Fair Housing Act. What this means for associations is that although an association may not intend to

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<sup>118</sup> See *Bloch*, *supra* n. 2, 587 F.3d 771.

<sup>119</sup> *Greenberg*, *supra* n. 81, 2000 W.L. 35921423.

<sup>120</sup> *Federal Register*, Vol. 78, No. 32, Friday, February 15, 2013.

<sup>121</sup> *TDHCA*, *supra* n.7, 135 S.Ct. 2507.

discriminate against a class or group of people through a policy or practice, a violation of the Fair Housing Act may still be found if the policy or practice has a disproportionately negative impact on a protected class – and this would include religious symbols and religious displays.

It would appear that claims brought under a theory of disparate impact are a growing phenomenon, and this theory will likely be utilized in future cases involving religious symbols and religious displays, as the display of religious symbols and religious displays, by default, generally only involves one protected class of people (*i.e.*, members of one religion that requires or otherwise utilizes the religious symbol or religious display) and not other people.

The Philadelphia case involving a Hindu condominium owner who wanted to hang a toran, a decorative object, in his doorway raised allegations of disparate impact. Hanging the toran contradicted the association's rules, which at the same time specifically permitted mezuzahs. The matter was settled and dismissed, so the interpretation and application of claims brought under a disparate impact theory remain unclear.<sup>122</sup>

With respect to holiday decorations, there appears to be a legal distinction between a holiday decoration and a religious symbol. According to the United States Supreme Court (which evaluated the constitutionality of Christmas and Hanukkah displays on public property in Pittsburgh under the Establishment Clause (First Amendment)), a Christian nativity scene is a religious symbol and a Christmas tree is not, and a Jewish menorah is a religious symbol but is not solely “religious” in nature. According to the Court, when a menorah is put next to a Christmas tree, it is secular in nature. Whether or not a holiday decoration is actually a religious symbol or religious display depends on whether an observer would believe the decoration is an endorsement or disapproval of an individual religious choice, to be deemed by a “reasonable observer” standard.<sup>123</sup>

Members of particular religions, though, may not be familiar with the Supreme Court's definitions and may disagree with them. Accordingly, when faced with a “holiday decoration” situation, care must be taken to properly evaluate the issue in order to determine if it is instead a religious symbol or religious display in order to plan the proper course of action.

Finally, while community associations are currently not required to provide owners with reasonable accommodations for religious purposes under the Fair Housing Act, as pointed out above, providing a reasonable accommodation may resolve a dispute and avoid litigation. A governing board therefore may wish to adopt a policy allowing and establishing criteria for religious symbols, displays and decorations, such as the sample included as Appendix 5. In any event, association leaders should nonetheless elicit the sage advice of counsel before making any decision related to the issue.

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<sup>122</sup> *Tripathi, supra* n. 111, Case No. 2:18-cv-01840-JP.

<sup>123</sup> *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989).

## **Conclusion**

In closing, while community associations are currently not required to provide owners with reasonable accommodations for religious purposes under the Fair Housing Act, association leaders should nonetheless be educated on these issues in order to properly handle them. Boards and managers should elicit the advice of counsel before making any decision related to requested religious practices.

The authors offer the following parting gift to assist the practitioner in handling religious issues in community associations:

### **The Ten Commandments for Handling Religious Issues in Community Associations**

1. Otherwise non-discriminatory policies and rules, which have a reasonable basis, may be unlawful if they are implemented with any intent or motivation to discriminate against a particular religion, and such intent or motivation can be demonstrated by the actions and words of association representatives.
2. A community association has the authority to regulate or prohibit the use of its common areas for religious purposes, provided such regulations are reasonable and do not have the intent or effect of discriminating against a particular religious faith.
3. Any restriction(s) on the use of association facilities for religious-related activities by either owner-sponsored organizations or outside organizations must be neutral on their face and may not have a disproportionate discriminatory impact upon a particular religious faith.
4. Community associations may be able to prohibit a home from being used as a place of worship based on a residential use covenant or zoning ordinance. However, a residential use covenant or a zoning ordinance may be found to be discriminatory if it has a disparate impact on a religious faith or it was adopted with a discriminatory intent.
5. Federal courts have largely determined that community associations are private actors that are not subject to First or Fourteenth Amendment claims under the United States Constitution. However, individual states may find broader religious protections under state constitutions, the RFRA or the RLUIPA. It is important to know the law in your jurisdiction.
6. Reasonable accommodations under the Federal Fair Housing Act are only required for disability-related claims. Community Associations are not obligated to make reasonable accommodations for religious reasons.

7. However, check your state and/or local laws for any obligation to reasonably accommodate religious practices.
8. Although associations may not be obligated to reasonably accommodate religious practices, providing a reasonable accommodation where it does not interfere with or substantially impact community operations or policies may avoid a lawsuit.
9. The religious affiliate/organization exemption under 42 *U.S.C.* §3607(a) of the Fair Housing Act has thus far been narrowly construed. One who is claiming an exemption for a community association is best served by having a formal arrangement in place between the community and a religious organization.
10. Know the difference between a holiday decoration, a religious display and a religious symbol in order to properly handle any issues involving a religious display or religious symbol and avoid a lawsuit.

**APPENDIX 1**

***SCHNEIDER v. GOTHELF***

**DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT**



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## I. INTRODUCTION AND SUMMARY

This suit is about Plaintiff David Schneider’s and Intervening Plaintiff Highlands of McKamy IV and V Community Improvement Association’s (the “HOA”) (collectively, “Plaintiffs”) attempt to obtain an injunction that would end community religious practice for approximately thirty families of Orthodox Jews in far North Dallas based only on minor irritations such as having to stop vehicles to permit blind people and mothers with children to cross the street. The members and other attendees of the Congregation Toras Chaim, Inc. (the “Congregation”)<sup>1</sup> are homeowners who want to practice their religious beliefs in their homes, an issue that lies at the core of individual liberty. Plaintiffs—a single neighbor and the HOA—unfortunately are attempting to bully minority members of their community with this suit.

Since February 2011, with the HOA’s full knowledge, the Congregation’s prayer and study activities have taken place primarily at two homes in the housing development over which the HOA has authority: the Highlands of McKamy IV and V (the “Highlands of McKamy”). From February 2011 until August 2013, the Congregation’s activities took place primarily at the home of Rabbi Yaakov Rich at 7119 Bremerton Court, and since August 2013, the same activities have taken place primarily at 7103 Mumford Court,<sup>2</sup> the home owned by Defendants Judith D. Gothelf and Mark B. Gothelf. The HOA has known about these activities since early 2011, but took no steps to try to stop them until sending a letter on October 14, 2013. The HOA

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<sup>1</sup> The Congregation is not a proper Defendant in this case because it is not, nor ever has been, a homeowner in the Highlands of McKamy. The Congregation therefore cannot be bound by the restrictive covenants at issue in this case. *See Jim Walter Homes, Inc. v. Youngtown, Inc.*, 786 S.W.2d 10, 11 (Tex. App.—Beaumont 1990, no writ) (holding that non-property owners have no duty to comply with restrictive covenants). Indeed, the HOA has intervened only against the Gothelfs. The Congregation has filed a no-evidence motion for summary judgment that is pending before the Court. *See* Defendant Congregation Toras Chaim’s No-Evidence Motion for Summary Judgment, filed March 7, 2014; Defendant Congregation Toras Chaim’s Reply in Support of No-Evidence Motion for Summary Judgment, filed June 26, 2014. The Congregation hereby incorporates all of its briefing and evidence submitted in support of its No-Evidence Motion for Summary Judgment.

<sup>2</sup> Avrohom Rich’s use of 7103 Mumford Court as his personal residence is the primary use of the property. Some of the Congregation’s religious activities also take place there. *See* Defendants’ Response to Plaintiff’s and Intervening Plaintiff’s Motions for Partial Summary Judgment, filed June 19, 2014.

sent this letter despite the conclusion of its counsel that the Highlands of McKamy's restrictive covenants lacked the "preferred language" for deeming the Congregation's presence in the neighborhood to be a violation.<sup>3</sup>

The Court has already denied two of Plaintiffs' attempts to shut down the Congregation's religious practice by (1) denying a request for a temporary injunction on April 10, 2014, and (2) denying the HOA's motion for summary judgment on August 20, 2014, on the issue of whether Defendants are in breach of the Highlands of McKamy's restrictive covenants. Discovery has since closed, and based on the application of Texas law to the undisputed facts (and in some instances the complete absence of facts) Defendants are entitled to summary judgment based on several independent grounds.

First, although Defendants are not at this time moving for summary judgment on the issue of whether their activities at 7103 Mumford Court violate the Highlands of McKamy's restrictive covenants,<sup>4</sup> Defendants are entitled to complete summary judgment on all of their affirmative defenses, each of which has been established as a matter of law and which independently foreclose Plaintiffs' claims:

- Interpreting the restrictive covenants to prevent the Congregation's religious activities would violate the Texas Religious Freedom Restoration Act ("Texas RFRA"), Tex. Civ. Prac. & Rem. Code §§ 110.001, *et seq.*, because it would place a substantial burden on the Congregation members' religious practice, would not further any compelling interest, and would not be the least restrictive means of furthering any interest that may exist.
- Interpreting the restrictive covenants to prevent the Congregation's religious activities would violate the federal Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc, *et seq.*, because it would

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<sup>3</sup> Exhibit V at 4.

<sup>4</sup> Defendants are not in violation of the restrictive covenants. *See* Defendants' Response to Plaintiff's and Intervening Plaintiff's Motions for Partial Summary Judgment, filed June 19, 2014. If this case proceeds to trial, the evidence will show, among other things, that Avrohom Rich's use of 7103 Mumford Court as his personal residence is the primary use of the property.



place a substantial burden on the Congregation members' religious practice, would not further any compelling interest, and would not be the least restrictive means of furthering any interest that may exist. Interpreting the restrictive covenants to prevent the Congregation's religious activities would also violate RLUIPA because it would treat the Congregation's religious activities on unequal terms with other non-residential uses that are or have taken place in the Highlands of McKamy.

- The HOA may not enforce the Highlands of McKamy's restrictive covenants against Defendants because the HOA's decisions to intervene in this suit and to attempt to enforce the restrictive covenants were arbitrary, capricious, or discriminatory under § 202.004 of the Texas Property Code.
- Plaintiffs have waived and/or abandoned their right to enforce the residential use restriction because the HOA has never attempted to prevent other non-residential uses of homes within the Highlands of McKamy.
- The doctrine of laches bars the HOA's claims because the HOA unreasonably delayed in challenging the Congregation's activities, and the Gothelfs and the Congregation relied on the HOA's non-opposition to their detriment.
- The doctrine of unclean hands bars Schneider from asserting claims to enforce the restrictive covenants in the Highlands of McKamy because he is himself in violation of the restrictive covenants he seeks to enforce. In direct contravention of the residential-only provision of the restrictive covenants, Schneider maintains a shed in his yard. *See* Exhibit B at Article VI.1.<sup>5</sup>

Second, independent of Defendants' affirmative defenses, summary judgment is also proper as to certain of Plaintiffs' claims for additional reasons:

- Defendants are entitled to summary judgment on Plaintiffs' claim for a permanent injunction to the extent an injunction would prohibit the Congregation's religious activities at 7103 Mumford Court. The Court must balance the equities before issuing a permanent injunction, and the undisputed facts reflect that no balancing of the equities could reasonably be resolved in favor of Plaintiffs. An injunction prohibiting the Congregation from meeting at 7103 Mumford Court would end community religious life for approximately thirty families. By contrast, Plaintiffs complain of alleged harms such as parking and dogs barking. Even if Plaintiffs were to prevail at trial, any injunction should be narrowly tailored to address specific alleged harms (such as parking), rather than shutting down the synagogue entirely.

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<sup>5</sup> Exhibit A identifies the evidence attached to this Motion. Defendants hereby incorporate all Exhibits attached to this Motion.

- Defendants are entitled to a no-evidence summary judgment on Schneider's claim for statutory damages under Tex. Prop. Code § 202.004(c). The statute does not permit individual homeowners to recover damages.
- Defendants are entitled to a no-evidence summary judgment on Schneider's claim for \$50,000 due to an alleged decline in value of his home. Schneider has no evidence that his home has lost value.

This case should be put to rest now. Defendants should not have to incur the burden and expense of going to trial in a case that never should have been filed. Defendants respectfully request that the Court grant Defendants' Motion for Summary Judgment.<sup>6</sup>

## **II. STATEMENT OF FACTS**

### **A. The Congregation's Formation**

The Congregation is a small community of Orthodox Jews in far North Dallas in existence since 2007. Exhibit C at 27:25-28:2; Exhibit D at 16:7-16:9, 41:15-42:7, 55:17-56:12. There is only one other congregation of Orthodox Jews in the entire Dallas-Fort Worth area that shares the Congregation's particular outlook on spiritual life: the Ohr HaTorah Shul, which is located approximately seven miles south of the Highlands of McKamy. Exhibit D at 41:15-42:7, 74:3-75:3. While a member of the Ohr HaTorah Shul, Rabbi Yaakov Rich discovered that several families living around the Highlands of McKamy wanted to join an Orthodox Jewish synagogue that shared the same focus as the Ohr HaTorah Shul. Exhibit D at 74:3-75:3. Orthodox Jews are prohibited from driving on the Sabbath; these families therefore must live within walking distance of a synagogue to attend prayer services on the Sabbath. Exhibit C at 28:20-29:2; Exhibit D at 30:20-31:4, 39:25-40:4, 74:16-75:3, 84:1-84:13; Exhibit F at 72:9-73:4.

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<sup>6</sup> If this Motion is granted in its entirety, it would dispose of all of Plaintiffs' claims. The Motion does not address Defendants' contention that they are entitled to attorneys' fees and expenses. *See* Defendants' First Amended Answer, filed October 1, 2014, at ¶¶ 8-10. Defendants intend to present evidence and argument regarding attorneys' fees and expenses at a later time.

When Rabbi Rich started the Congregation in 2007, locating it in and around the Highlands of McKamy was facilitated by the fact that the area had already been established as an eruv.<sup>7</sup> Exhibit D at 76:11-76:17. Creating an eruv is an extensive process that requires approval from and a leasing agreement with the city. Exhibit D at 74:21-76:10. The eruv that encompasses the Highlands of McKamy is called the Far North Dallas Eruv and is approximately two square miles. Exhibit E (map of Far North Dallas Eruv); Exhibit F at 72:9-73:4. The eruv had been created by the members of another Orthodox Jewish synagogue, Ohev Shalom, but that synagogue does not share the same particular outlook on the spiritual life as the Congregation. Exhibit D at 38:21-39:2, 41:15-42:7, 66:1-67:11, 74:3-74:15, 75:23-76:17.

**B. Rabbi Rich Begins Hosting Congregation Activities**

From 2007 until 2011, the Congregation met at a small home on Hillcrest Road (outside the Highlands of McKamy). Exhibit C at 27:25-28:4; Exhibit D at 42:23-43:3, 63:2-63:17. In February 2011, Rabbi Rich's home in the Highlands of McKamy became the primary location for the Congregation. Exhibit C at 28:3-28:10; Exhibit D at 63:2-63:5. By then, most of the members lived east of Hillcrest Road, so the Rabbi's home in the middle of the Highlands of McKamy was more centrally located with respect to where the Congregation's members lived than the Hillcrest home. Exhibit D at 66:1-67:22, 76:21-77:11. The main activities of the Congregation took place at 7119 Bremerton Court for two and a half years—from February 2011 to August 2013. Exhibit C at 28:3-28:14; Exhibit D at 63:2-63:5. During that time, members of the HOA board were fully aware of the Congregation's activities at 7119 Bremerton Court, yet the HOA never claimed that this activity was somehow not permitted under the restrictive

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<sup>7</sup> An eruv is a ritual enclosure that allows Orthodox Jews to carry certain objects outside of their homes on the Sabbath. Exhibit D at 74:21-76:10, 91:5-91:23; Exhibit F at 72:9-73:4. The enclosure is formed by integrating a number of private and public properties into one larger private domain utilizing PVC piping and wires connected to telephone and electric poles. Exhibit D at 74:21-76:10.

covenants. Exhibit C at 33:20-34:14; Exhibit D at 77:12-78:11; Exhibit G (deposition notice to HOA); Exhibit H (HOA's designation of Carolyn Peadon as representative to testify for the HOA); Exhibit I at 6:3-6:9, 9:3-10:2, 22:1-13 (Ms. Peadon's testimony).

**C. The Congregation Moves to 7103 Mumford Court**

In the spring of 2013, a longtime friend of Rabbi Rich, Mark Gothelf (and his mother, Judith Gothelf), purchased a home in the Highlands of McKamy at 7103 Mumford Court, planning to have the home occupied by a resident and also permitting it to be used for the Congregation's activities. Exhibit D at 23:10-24:2; Exhibit F at 10:8-11:7, 73:17-74:7. Avrohom Moshe Rich moved into the home on September 16, 2013, and has since that time used the house as his personal residence. Exhibit D at 79:8-79:17. Avrohom Rich's use of 7103 Mumford Court is the primary use of the property.<sup>8</sup> The Congregation began meeting there in August 2013. Exhibit C at 28:11-28:14; Exhibit D at 79:18-79:23. No changes have been made to the exterior of the home, and no changes are planned. Exhibit J at 70:25-71:7, 75:1-75:17; Exhibit K.

Although the home's address is on Mumford Court and the front of the home faces that street, 7103 Mumford Court actually sits on the corner of Frankford Road and Meandering Way, both major streets that run for miles through North Dallas. Exhibit D at 67:12-67:22; Exhibit L (map reflecting location of 7103 Mumford Court); Exhibit M (map reflecting that Frankford Road stretches for over eleven miles across Dallas); Exhibit N (map reflecting that Meandering Way stretches for over five miles across Dallas).<sup>9</sup> Thus, attempts to characterize 7103 Mumford Court as being tucked away in the middle of a quiet neighborhood are simply inaccurate.

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<sup>8</sup> See Defendants' Response to Plaintiff's and Intervening Plaintiff's Motions for Partial Summary Judgment, filed June 19, 2014. Defendants hereby incorporate their June 19, 2014 filing, including all evidence cited therein, in its entirety.

<sup>9</sup> The Court can take judicial notice of Exhibits L, M, and N under Tex. R. Evid. 201.

**D. Congregation Activities at 7103 Mumford Court**

The activities that take place at Mumford Court are the same activities that took place at 7119 Bremerton Court for two and a half years. Exhibit C at 28:15-29:2; Exhibit D at 79:24-80:16. On non-Sabbath days, the Congregation has morning, afternoon, and evening prayer meetings, attended by no more than ten to twelve people on average. Exhibit C at 29:5-30:1; Exhibit D at 80:17-81:13. Usually, about five members drive to these prayer meetings. Exhibit D at 81:14-81:23. Three cars typically park in the backyard driveway, and three cars park in front of 7103 Mumford Court. Exhibit C at 30:2-31:3; Exhibit D at 81:24-82:10. It is most often the case that no cars are parked in front of other houses. Exhibit C at 30:18-31:3. Also, between two and six people study at the home during the day. Exhibit C at 29:15-29:23; Exhibit D at 80:17-81:13.

Once a week, on the evening before the Sabbath, approximately twenty people gather at the home to pray. Exhibit D at 83:16-83:25. On Saturday morning, approximately thirty people gather to pray. *Id.* Afternoon and evening prayer on the Sabbath usually attracts about twenty people. *Id.*<sup>10</sup> Because Orthodox Jews cannot drive on the Sabbath, all of the Congregation's members walk to 7103 Mumford Court for the events on Friday evening and Saturday. Exhibit C at 28:20-29:2; Exhibit D at 30:20-31:4, 39:25-40:4, 74:16-75:3, 84:1-84:13; Exhibit F at 72:9-73:4.

**E. The Congregation Has Nowhere Else to Go**

If the Gothelfs are enjoined from hosting Congregation activities at 7103 Mumford Court, multiple families in the Highlands of McKamy will be without a spiritual gathering place. Exhibit C at 31:4-33:19; Exhibit D at 41:15-42:7, 66:1-68:4. In the years before operating at

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<sup>10</sup> Thus, although approximately thirty families identify with the Congregation, even the most highly attended prayer gatherings each week average no more than about twenty to thirty attendees.

7103 Mumford Court, the Congregation explored a move to another location. *Id.* It discovered that all of the commercially zoned properties within walking distance of its members were unavailable. *Id.* Other areas within walking distance of the Congregation's members were also ruled out as unsuitable for various reasons.<sup>11</sup> *Id.* Thus, the Congregation has nowhere else to go if it is prevented from conducting activities in the Highlands of McKamy. *Id.* Indeed, as Rabbi Rich testified regarding the effect of an injunction on the Congregation and its members:

Asking the activities to stop would be similar to asking a person to stop eating. Let me explain what I mean.

You see, we believe that there are physical needs and there are spiritual needs. And just like our bodies need nourishment every day, our souls need nourishment every day. That's our prayer and that is our Torah study.

And if our members were asked . . . that they could not participate actively in Torah study or prayer, it would individually be a terrible disaster for those individuals, force people to have to relocate and immediately shut down the Congregation, without question.

Exhibit C at 31:12-32:1.

**F. The Alleged Harms Due to the Congregation's Presence in the Neighborhood are Trivial**

In contrast to the harm that would result from prohibiting the Congregation's activities in the Highlands of McKamy—ending community religious life for thirty families—the alleged harms from the Congregation's presence in the community are trivial. At the temporary injunction hearing on April 10, 2014, and in depositions since that time, Plaintiffs have repeatedly had the opportunity to testify at to what they perceive as the negative effects of the Congregation's presence in the Highlands of McKamy. *See* Exhibit C at 8:10-9:3, 13:12-16:5, 17:2-18:6, 20:13-21:19, 22:7-23:5 (temporary injunction hearing testimony of witnesses called

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<sup>11</sup> For example, it would have been very disrespectful to Ohev Shalom and its rabbi and a violation of the Congregation's religious beliefs for the Congregation to center its activities in close proximity to another Orthodox Jewish synagogue. Exhibit C at 31:4-33:19; Exhibit D at 41:15-42:7, 66:1-68:4.

by Plaintiffs); Exhibit J at 65:18-69:18, 82:6-82:23 (Schneider's deposition testimony); Exhibit O at 46:8-48:17 (HOA board member Ted Day's deposition testimony); Exhibit P at 16:9-18:5 (HOA board member Michael Donohue's testimony). Setting aside speculative alleged harms regarding what Plaintiffs fear *could* happen in the future, the only specific evidence of actual alleged harms is:

- A pile of dirt that has since been removed was on the property at 7103 Mumford Court at one time. Exhibit C at 8:10-9:3; Exhibit K.
- Neighbors were forced to look at a window air-conditioning unit. Exhibit C at 8:10-9:3.
- People and cars come and go from the home at 7103 Mumford Court. Exhibit C at 8:10-9:3, 14:21-15:6, 20:16-21:6; Exhibit J at 66:2-66:12, 82:6-82:23; Exhibit O at 46:8-46:14, 48:6-48:17; Exhibit P at 16:23-17:15.
- It sometimes looks "unusual" and "odd" when Congregation members exit the home. Exhibit J at 82:6-82:23.
- When Jewish worshipers come to 7103 Mumford Court, it causes dogs to bark, which sometimes causes teenage children to wake up. Exhibit C at 14:3-14:13.
- A neighbor has had to stop his vehicle to allow a woman pushing a baby carriage to cross the street. Exhibit C at 14:14-14:17.
- A neighbor has had to stop his vehicle to allow a blind person to cross the street. Exhibit C at 14:21-15:3.
- The synagogue allegedly causes parking issues on Mumford Court, which the Congregation has taken steps to address. Exhibit C at 14:21-15:3, 15:19-16:5, 17:2-17:12, 20:16-21:6, 30:2-31:3; Exhibit O at 46:8-46:14, 48:6-48:17.
- There are speculative concerns—with no evidence—that the Congregation affects home values in the neighborhood. *E.g.*, First Amended Petition, filed April 2, 2014, at 18; Exhibit J at 67:13-67:18.



**G. Plaintiff Schneider, His Relentless Pursuit of the Congregation, and Takeover of the HOA Board**

Schneider and his wife Laura are the two owners of the home at 7035 Mumford.<sup>12</sup> Exhibit J. at 83:5-83:12. In December 2013, he sued Defendants for allegedly violating a residential-only restrictive covenant despite the fact that a shed he admits is in his yard blatantly violates the same residential-only restrictive covenant. Exhibit J at 23:21-25:13; Exhibit S.

Article VI.1 of the HOA's restrictive covenants provides:

RESIDENTIAL USAGE: No structure shall be erected, placed, altered, used for or permitted to remain on any residential building lot other than one detached single family dwelling not to exceed three stories and one private garage for not more than four automobiles and servants' quarters if they are employed on the premises. No temporary structures may be placed on lot except during construction. Metal storage buildings, sheds or structures are not permitted. Only new structures shall be constructed on any lot and no house or structures shall be moved onto a lot.

Exhibit B at Article VI.1.

After suing, Schneider then attempted to get the HOA to join his suit, even stating that he could help keep the HOA's costs down by serving as "lead counsel" if the HOA were to intervene. Exhibit T at 1. The HOA's board at the time did not decide to intervene, having concluded that the HOA had no right to stop the Congregation from worshipping in homes in the neighborhood. Exhibit U at 3 (HOA minutes reflecting "Conclusions: The HOA cannot stop the building from being used for worship"). The HOA's counsel had also concluded that the restrictive covenants did not have the "preferred language" for deeming Defendants to be in violation. Exhibit V at 4 ("With the appropriate set of facts and the appropriate language in the deed restrictions, courts have ruled that use of a residence as a church did violate the deed

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<sup>12</sup> Laura Schneider is not a plaintiff in this suit.

restrictions. Unfortunately, The Highlands Declaration and other governing documents do not contain the preferred language.”).

Schneider then waged a proxy campaign to get himself and four likeminded neighbors (collectively, the “Schneider Board”) elected as the new HOA board. Exhibit J at 39:8-40:1; Exhibit O at 17:18-19:6; Exhibit P at 19:17-20:17; Exhibit W (Schneider’s promotional flier). Upon the takeover, one of the first acts of the Schneider Board was to cause the HOA to intervene in Schneider’s lawsuit. Exhibit X at 4-5. The Schneider Board also adopted a “new policy” to enforce the residential-only restrictive covenant, implying that the HOA did not have such an enforcement policy prior to that time. Exhibit P at 21:4-21:20 (Schneider Board member Donohue answering “Correct” when asked if “a new policy was adopted to enforce deed-use restrictions” in February 2014); Exhibit Y (HOA minutes reflecting that the Schneider Board adopted a policy of enforcement on February 3, 2014).

The HOA membership was upset with the decision to intervene and demanded a special meeting for the neighborhood to discuss potential bylaw changes. Exhibit O at 35:23-37:1; Exhibit P at 24:14-25:21; Exhibit Z at 4. Schneider scheduled the meeting to occur on the Jewish Sabbath, and refused to move the date to accommodate members of the Congregation. *Id.* Regrettably, this decision is not the only instance of Schneider expressing hostility to the faith of Orthodox Jews:

- He has published a paper on his web site that criticizes Orthodox Jewish views of the Torah. Exhibit J at 32:16-35:9 (Schneider testifying that he views the Torah as the “word of man” and as a compilation of writings by multiple human authors).
- He recently filed a pro se lawsuit against another one of his neighbors for building a temporary structure (called a “Sukkah”) in celebration of a Jewish holiday. Exhibit AA.

- He has referred to a Sukkah as a “strange-looking thing,” “unusual structure,” and “eyesore” and stated that he was “disturbed and dismayed” by its presence. Exhibit AA.
- He has stated that Jewish residents of the Highlands of McKamy should “[g]o outside the neighborhood to celebrate.” Exhibit BB.

#### **H. The HOA’s Conflicted and Delayed Involvement in this Suit**

Although it was forced into this suit by the Schneider Board, the HOA’s own corporate representative deponent testified that she would have preferred that the HOA not do so. Exhibit G (deposition notice to HOA); Exhibit H (HOA’s designation of Carolyn Peadon as representative to testify for the HOA); Exhibit I at 16:23-17:8 (“I would have preferred not to resort to litigation.”), 29:2-29:6 (expressing concern about the appropriateness of expending HOA funds on this litigation), 25:14-26:8. This testimony is attributable to the HOA as an entity, thus putting the HOA in the awkward position of having testified under oath that it should not have intervened in a suit in which it remains a party. *Id.* Furthermore, despite being aware of the Congregation’s activities in the Highlands of McKamy since early 2011, the HOA did not take any action to oppose those activities until October 14, 2013, in a letter sent to the Gothelfs. Exhibit F at 55:7-55:22; Exhibit CC (October 14, 2013 letter). The HOA sent this letter despite concluding that it had no right to stop the Congregation from worshiping in homes in the neighborhood. Exhibit U at 3. Moreover, its counsel had concluded that (1) the restrictive covenants lacked “preferred language,” and (2) the HOA may be barred from opposing the Congregation’s activities for failing to object for approximately three years. Exhibit V at 4, 6.

As a result of sentiments within the neighborhood that the HOA should not be involved in this suit, the homeowners voted to remove Schneider from the board on July 20, 2014, and the remaining members of the Schneider Board were only narrowly retained. Exhibit J at 51:10-53:12; Exhibit O at 21:23-25:17; Exhibit P at 30:25-33:6.

## **I. The HOA's History of Non-Enforcement of the Restrictive Covenants and Singling Out of the Congregation**

When the HOA suddenly decided to oppose the religious activities of its own members, it was the first time that the HOA had brought an enforcement action in court in the HOA's 35-year history since 1979. Exhibit I at 14:12-15:5, 17:17-17:20; Exhibit J at 58:1-61:16; Exhibit O at 55:10-55:13. Indeed, the HOA was required to implement a "new policy" to enforce the residential-only restrictive covenant in February 2014. Exhibit P at 21:4-21:20; Exhibit Y. This is true notwithstanding the fact that there are currently numerous non-residential uses of property in the Highlands of McKamy, and there have been others over the years. For example:

- There is an eldercare facility at 7038 Lattimore Dr. known as the Weismer House. Exhibit C at 39:18-40:9; Exhibit D at 88:15-89:16; Exhibit J at 56:9-57:9; Exhibit O at 51:3-51:12; Exhibit DD (HOA minutes reflecting HOA knew of use in 2006); Exhibit EE (letter reflecting HOA knew of use in 2001); business web site at <http://www.weismerhouse.com>.
- There is a residential care facility at 6806 Rocky Top Circle known as Wellington Residential Care. Exhibit C at 39:18-40:9; Exhibit D at 88:15-89:16; Exhibit J at 56:9-57:9; Exhibit O at 51:3-51:12; Exhibit FF (letter reflecting HOA knew of use in 2011); business web site at <http://www.wellingtonresidentialcaredallas.com>.
- A home on Bremerton Court regularly conducts swimming lesson camps. Exhibit C at 39:18-40:9; Exhibit D at 88:15-89:16; Exhibit I at 18:5-19:1; Exhibit O at 51:13-51:19; Exhibit GG at 2 (minutes reflecting HOA knew of use in 2013).
- A used car business with a revolving inventory of cars operates on Judi Street. Exhibit HH.
- A seven-day per week music school that has hosted a recital operates on Judi Street. Exhibit HH.
- The wife of the HOA's secretary ran a court reporting business from her home. Exhibit P at 38:13-38:19; 40:9-40:24; Exhibit II (reflecting business address on Mumford Street); business web site at <http://www.bradfordcourtreporting.com>.
- An HOA board member has mentioned a garage rental apartment near his home. Exhibit JJ (2013 email from Ted Day mentioning "a garage near my home has been converted to a rental apartment").

- Schneider testified that an attorney in the neighborhood runs his law practice from his home. Exhibit J at 60:19-61:8.
- A former neighborhood resident operated a sales business from her home. Exhibit P at 38:2-38:12.
- A business training center was formerly operated at 7031 Bremerton Drive. Exhibit KK (HOA board minutes reflecting knowledge of existence of business training center in 2007 and 2008).
- Schneider maintains a shed in his yard in direct violation of the residential-only restrictive covenant. Exhibit J at 23:21-25:13; Exhibit S.

Under its “new policy” or otherwise, the HOA has never brought an enforcement action regarding any of these other non-residential uses, arbitrarily singling out the Congregation’s activities. Exhibit I at 14:12-15:5, 17:17-17:20; Exhibit J at 58:1-61:16; Exhibit O at 55:10-55:13.

#### **J. Plaintiffs’ Claims**

In the two operative Petitions in this case, Plaintiffs assert the following claims:

- The HOA brings a claim against Mark and Judith Gothelf for breach of the restrictive covenants. *See* Petition in Intervention, filed March 13, 2014, at 9-10. The HOA does not seek monetary damages in connection with the claim, but rather asks the Court to enter a declaratory judgment. *Id.* The Court has denied the HOA’s motion for summary judgment on this claim. Schneider brings the same claim against the Gothelfs and the Congregation. *See* First Amended Petition, filed April 2, 2014, at 12.
- The HOA brings a claim for a temporary and permanent injunction to prohibit the Gothelfs from permitting the Congregation and its members to practice their religion at 7103 Mumford Court. *See* Petition in Intervention, filed March 13, 2014, at 10-12. The Court has denied the HOA’s request for a temporary injunction, leaving only the request for permanent injunctive relief to be adjudicated. Schneider brings the same claim against the Gothelfs and the Congregation. *See* First Amended Petition, filed April 2, 2014, at 13-16.<sup>13</sup>
- The HOA brings a claim against the Gothelfs for a discretionary statutory penalty of up to \$200 per day for alleged violations of the restrictive covenants. *See*

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<sup>13</sup> Schneider also brings a second, duplicative claim seeking a permanent injunction. *See* First Amended Petition, filed April 2, 2014, at 18-19 (“Count 5 – Likelihood of Future Violations”).

Petition in Intervention, filed March 13, 2014, at 12-13. Schneider brings the same claim against the Gothelfs and the Congregation, although the relevant statute does not authorize individual homeowners to pursue damages. *See* First Amended Petition, filed April 2, 2014, at 16-18.

- The HOA brings a claim against the Gothelfs to recover its attorneys' fees and costs. *See* Petition in Intervention, filed March 13, 2014, at 13.
- Schneider brings a purported claim against Defendants for \$50,000 in compensatory damages for allegedly causing his home to decline in value. *See* First Amended Petition, filed April 2, 2014, at 18. It is unclear what legal cause of action (if any) Schneider sues under, as the title of the claim is simply "Count 4 – Damage to Schneider's Property," and nothing within the text of the count identifies a specific cause of action. *Id.*

Each of these claims requires Plaintiffs to show that Defendants have breached the restrictive covenants. Thus, if there has been no breach and/or if Defendants establish an affirmative defense on the issue of breach, all of Plaintiffs' claims necessarily fail.

### **III. SUMMARY JUDGMENT GROUNDS**

Defendants are entitled to summary judgment on the following independent grounds:

- Defendants are entitled to summary judgment on all of Schneider's claims, and the Gothelfs are entitled summary judgment on all of the HOA's claims because Defendants have established their affirmative defense under the Texas Religious Freedom Restoration Act.
- Defendants are entitled to summary judgment on all of Schneider's claims, and the Gothelfs are entitled summary judgment on all of the HOA's claims because Defendants have established their affirmative defense under the Religious Land Use and Institutionalized Persons Act.
- The Gothelfs are entitled to summary judgment on all of the HOA's claims because Defendants have established their affirmative defense that the HOA's actions were arbitrary, capricious, or discriminatory under the Texas Property Code.
- Defendants are entitled to summary judgment on all of Schneider's claims, and the Gothelfs are entitled summary judgment on all of the HOA's claims because Defendants have established their affirmative defense that the Highlands of McKamy's residential use restriction has been waived and/or abandoned.

- The Gothelfs are entitled to summary judgment on all of the HOA's claims because Defendants have established the affirmative defense of laches.
- Defendants are entitled to summary judgment on all of Schneider's claims because Defendants have established the affirmative defense of unclean hands.
- Defendants are entitled to summary judgment on Schneider's claim for a permanent injunction, and the Gothelfs are entitled to summary judgment on the HOA's claim for a permanent injunction to the extent Plaintiffs seek injunctive relief that would prohibit the Congregation from meeting at 7103 Mumford Court. No balancing of the equities could possibly support the issuance of such an injunction.
- Defendants are entitled to summary judgment on Schneider's claim for statutory damages under the Texas Property Code because the law does not permit individual homeowners to recover such damages. Therefore, no evidence supports the claim.
- Defendants are entitled to summary judgment on Schneider's claim for an alleged decline in value of his home because there is no evidence that supports the claim.

#### **IV. ARGUMENT AND AUTHORITIES**

##### **A. Summary Judgment Standards**

Texas Rule of Civil Procedure 166a governs the propriety of summary judgments. Entry of summary judgment is appropriate where the summary judgment record establishes that there are no genuine issues of material fact, and that movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). A defendant moving for summary judgment must conclusively negate at least one essential element of each of the plaintiff's causes of action, or conclusively establish an affirmative defense. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). When moving for summary judgment on a plaintiff's claim, once a defendant presents evidence entitling it to summary judgment by negating an element of the claim, the burden shifts to the plaintiff to present evidence raising a fact issue on the negated element. *Lection v. Dyll*, 65 S.W.3d 696, 701 (Tex. App.—Dallas 2001, pet. denied). When moving for summary judgment

on an affirmative defense, the defendant has the burden to conclusively establish that defense. *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999).

Under Texas Rule of Civil Procedure 166a(i), a party may also move for summary judgment on the ground that there is no evidence of one of the essential elements of a claim on which an adverse party would have the burden of proof at trial. A no-evidence motion for summary judgment “is essentially a motion for a pretrial directed verdict. Once such a motion is filed, the burden shifts to the nonmoving party to present evidence raising an issue of material fact as to the elements specified in the motion.” *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). “The Court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.” Tex. R. Civ. P. 166a(i).

**B. Defendants are Entitled to Summary Judgment on Each of Their Affirmative Defenses.**

Defendants have asserted six independent affirmative defenses, each of which independently entitles Defendants to summary judgment. *See* Defendants’ First Amended Answer, filed October 1, 2014, at ¶¶ 2-7. Each defense is entirely dispositive as to all claims of one or both Plaintiffs. *See supra* Section III. Thus, although Defendants contend that each defense has been established as a matter of law, Defendants need only win summary judgment on a single defense as to each Plaintiff in order for Plaintiffs’ claims to be dismissed in their entirety.

**1. Interpreting the restrictive covenants to prevent the Congregation’s religious activities would violate the Texas Religious Freedom Restoration Act.**

Texas RFRA prohibits the government from “substantially burden[ing] a person’s free exercise of religion” unless the burden “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that interest.” Tex. Civ. Prac. & Rem. Code § 110.003. This prohibition against governmental burden of the free exercise of religion applies



whether or not the government itself is a party to the action. Tex. Civ. Prac. & Rem. Code § 110.004 (“A person whose free exercise of religion has been substantially burdened . . . may assert that violation as a defense in a judicial or administrative proceeding without regard to whether the proceeding is brought in the name of the state or by any other person.”).

**a. Texas RFRA applies to this litigation.**

Texas RFRA applies to this litigation in three independent ways: (i) Plaintiffs are seeking to enforce state statutes that are subject to Texas RFRA, (ii) judicial enforcement of restrictive covenants is itself state action subject to Texas RFRA, and (iii) homeowners’ associations are quasi-governmental entities that are themselves subject to Texas RFRA.

**i. Plaintiffs are seeking to enforce state statutes that are subject to Texas RFRA.**

Texas RFRA “applies to each law of this state unless the law is expressly made exempt from the application of this chapter by reference to this chapter.” Tex. Civ. Prac. & Rem. Code § 110.002(c). Each of Plaintiffs’ claims is based in state law that has not been exempted from Texas RFRA. Fundamentally, Plaintiffs are seeking to enforce restrictive covenants, both the creation and the enforcement of which are authorized by Tex. Prop. Code §§ 5.001 *et seq.* and 202.001 *et seq.* None of these statutes, however, has been exempted from Texas RFRA and are thus subject to the limitations imposed by Texas RFRA. This is true even though the state is not a party to this litigation. Tex. Civ. Prac. & Rem. Code § 110.004.

**ii. Judicial enforcement of restrictive covenants is itself state action subject to Texas RFRA.**

Not only are the underlying statutes themselves subject to Texas RFRA, but any judicial enforcement of Plaintiffs’ claims is itself state action subject to Texas RFRA. The principle that judicial enforcement of restrictive covenants is state action subject to constitutional protections

was first applied by the United States Supreme Court in *Shelley v. Kraemer*, 334 U.S. 1 (1943). In that case, the Court refused to enforce restrictive covenants that limited the use or occupancy of a building on the basis of race because judicial action enforcing them would be state action that would violate the Fourteenth Amendment to the United States Constitution. The Court noted that judicial enforcement had long been considered state action in other contexts as well. *Shelley*, 334 U.S. at 16-18 (see, e.g., *American Federation of Labor v. Swing*, 312 U.S. 321 (1941) (refusing to enforce a common-law policy that would restrain peaceful picketing because judicial enforcement of the policy would offend the Constitution)); see also *Shaver v. Hunter*, 626 S.W.2d 574, 578-79 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.) (subjecting the state's action in enforcing a restrictive covenant to constitutional scrutiny); *Gerber v. Long Boat Harbour*, 757 F. Supp. 1339, 1341 (M.D. Fla. 1991) (“[J]udicial enforcement of private agreements contained in a declaration of condominium constitutes state action and brings the heretofore private conduct within the scope of the Fourteenth Amendment, through which the First Amendment guarantee of free speech is made applicable to the state.”).

That judicial enforcement is state action subject to Texas RFRA is an even easier case. Texas RFRA itself includes a definition of state action that is very broad, applying to “any ordinance, rule, order, decision, practice, or other exercise of governmental authority,” which encompasses judicial action. Accordingly, at least one Texas court has suggested that judicial enforcement of restrictive covenants would be subject to Texas RFRA. See *Voice of the Cornerstone Church Corp. v. Pizza Prop. Partners*, 160 S.W.3d 657, 672 n.10 (Tex. App.—Austin 2005, no pet.) (“Cornerstone did not raise the Texas Religious Freedom [Restoration] Act below in its pleadings, summary-judgment response, or briefing. See Tex. Civ. Prac. & Rem. Code § 110.004 (person whose free exercise of religion has been violated under act may assert

violation as defense in judicial or administrative proceeding). . . . Thus, we have no occasion here to consider the potential implication of the Act or the merit of ExxonMobil's contention that it does not apply to courts. *See id.* § 110.001(a)(2) (defining 'Government agency' to include 'any agency of this state . . . including a department'), .002(a) (Act 'applies to any . . . order, decision, practice or other exercise of governmental authority.')

(second and third ellipses in original)).

**iii. Homeowners' associations are quasi-governmental entities that are themselves subject to Texas RFRA.**

Finally, homeowners' associations themselves are subject to Texas RFRA because of their quasi-governmental nature. *See Mayad v. Cummins Lane Owners Ass'n*, 1988 Tex. App. LEXIS 1973, at \*4 (Tex. App.—Houston [1st Dist.] Aug. 11, 1988, no writ) (“[A]n owners association is a ‘quasi-governmental’ entity with the power to charge individual owners assessments to fund common expenses.”); *Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos.*, 617 N.E.2d 1075, 1080 (Ohio 1993) (“An owners’ association acts as a ‘quasi-governmental entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government.”) (quoting Hyatt & Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 Wake Forest L. Rev. 915, 918 (1976)); *Colo. Homes v. Loerch-Wilson*, 43 P.3d 718, 722 (Colo. Ct. App. 2001) (homeowners associations serve “quasi-governmental functions”).

In *Marsh v. Alabama*, 326 U.S. 501 (1946), the Supreme Court struck down a privately-owned town's restrictions on distributing flyers and recognized that Constitutional protections can limit even private property rights when the property is taking on the nature of a governmental entity. The *Marsh* Court stated,

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment “lies at the foundation of free government by free men” and we must in all cases “weigh the circumstances and . . . appraise the . . . reasons . . . in support of the regulation . . . of the rights.” *Schneider v. State*, 308 U.S. 147, 161. In our view, the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State’s permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute.

*Marsh*, 326 U.S. at 509 (ellipses in original).

Here, the HOA is “govern[ing] a community of citizens” in just such a way that it is violating their most fundamental rights—rights that Texas RFRA was intended to protect. *See Barr v. City of Sinton*, 295 S.W.3d 287, 305-06 (Tex. 2009) (noting that Texas RFRA protects “fundamental, constitutional rights” that are superior to the interests protected by zoning ordinances); *see also E. Tex. Baptist Univ. v. Sebelius*, 2013 U.S. Dist. LEXIS 180727 at \*77-78 (S.D. Tex. Dec. 27, 2013) (holding, in interpreting the Federal Religious Freedom Restoration Act, upon which Texas RFRA is based, that “[p]rotecting constitutional rights and the rights under RFRA are in the public’s interest”). If fully private property, as in *Marsh*, is limited in its ability to restrict fundamental liberties, how much more should a quasi-governmental entity such as the HOA be limited in its ability to restrict fundamental liberties.

- b. Preventing the Congregation from meeting at 7103 Mumford Court would completely prevent thirty families from being able to worship, which is a substantial burden on their religious exercise.**

There is no bright-line rule for what constitutes a “substantial burden.” The Texas Supreme Court has held that Texas RFRA, “like its federal cousins, ‘requires a case-by-case, fact-specific inquiry.’” *Barr*, 295 S.W.3d at 302 (quoting *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004)).

*Barr*, however, provides an example of a situation that the Texas Supreme Court held to be a substantial burden. In that case, Barr, on the basis of his religious convictions, operated a halfway house in two homes. The City of Sinton, Texas, wanted Barr to relocate, but finding a viable alternative location for the halfway house was unlikely. *Barr*, 295 S.W.3d at 302. The Texas Supreme Court held that prohibiting Barr from exercising his faith through operating the halfway house was a substantial burden. Furthermore, the Texas Supreme Court held that “evidence of *some* possible alternative, irrespective of the difficulties presented, does not, standing alone, disprove substantial burden.” *Id.* The Court noted that “[i]n a related context, the [United States] Supreme Court has observed that ‘one is not to have the exercise of his liberty of expression in appropriate places abridges on the plea that it may be exercised in some other place.’” *Id.* (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939)). The *Barr* Court also pointed to an example similar to the present case in *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 294 (5th Cir. 1988), in which Starkville, Mississippi, violated the Free Exercise Clause by attempting to use zoning restrictions to keep Muslim students from worshipping in a home in a residential area of Starkville. “‘By making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of their religion.’ . . . Although the zoning ordinance did not foreclose all locations, the court determined ‘relatively impecunious Muslim students’ were left with ‘no practical alternatives for establishing a mosque in the city limits.’” *Id.* at 304 (quoting *Islamic Ctr.*, 840 F.2d at 299-300).

The Texas Supreme Court also rejected the idea that the size of the relevant location alleviates the substantial burden, stating, “The City argues that its zoning restrictions on locating Barr’s ministry inside city limits could not have been a substantial burden because the City is so

small that excluding the ministry from inside the city limits was inconsequential. But size alone is not determinative. . . . [In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), t]he Supreme Court did not consider the small size of the municipality to be important and specifically rejected the argument that the adult entertainment business at issue could simply move elsewhere.” *Id.* at 302-03.

The City of Sinton also argued that relocating Barr’s halfway house was not a substantial burden because the parolees could be disbursed among other homes. The Texas Supreme Court rejected this argument, too, holding that “a burden on a person’s religious exercise is not insubstantial simply because he could always choose to do something else.” *Id.* at 303.

In the present case, the Congregation must meet within walking distance of its members and within the North Dallas Eruv. *See supra* Sections II.A., II.D., II.E.; Exhibit C at 28:20-29:2; Exhibit D at 30:20-31:4, 39:25-40:4, 74:16-75:3, 84:1-84:13; Exhibit F at 72:9-73:4. After searching for a suitable location to replace Rabbi Rich’s home, which is within the HOA, 7103 Mumford Court was determined to be the only viable location that was available to the Congregation. Exhibit C at 31:4-33:19; Exhibit D at 41:15-42:7, 66:1-68:4. If the Congregation cannot meet at 7103 Mumford Court, then, because of the restrictions placed upon the Congregation by their Orthodox Jewish religious beliefs, they will be unable to have communal worship. *Id.*; *see supra* Section II.E. The practical abolition of the Congregation’s members’ religious worship is a much more significant burden than that in *Barr*, and is similar to the burden in *Islamic Ctr.*

**c. Plaintiffs do not have a compelling interest in prohibiting the Congregation from meeting at 7103 Mumford Court.**

Because Plaintiffs’ action would substantially burden Defendants’ religious freedoms, Plaintiffs have the burden of showing that their interests are compelling. The Texas Supreme

Court noted that, “[b]ecause religious exercise is a fundamental right, that justification can only be found in ‘interests of the highest order’, to quote the Supreme Court in [*Wisconsin v. Yoder*], 406 U.S. 205, 215 (1972)], and to quote *Sherbert v. Verner*, 374 U.S. 398, 406 (1945)], only to avoid ‘the gravest abuses, endangering paramount interest[s].’” *Barr*, 295 S.W.3d at 306.

Not only must a compelling interest be an interest “of the highest order,” the Texas Supreme Court pointed to the United States Supreme Court’s holding that:

“RFRA requires the Government to demonstrate that the compelling interest is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” To satisfy this requirement, the Supreme Court stated, courts must “look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemption to particular religious claimants.”

*Id.* at 306 (quoting *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31, 439 (2006) (brackets in original)). “In this regard, there is no basis for distinguishing RFRA from [Texas ] RFRA; the same requirement verbatim is in both.” *Id.*

The Texas Supreme Court held that interests such as “preserv[ing] the public safety, morals, and general welfare” are “the kind of ‘broadly formulated interest’ that does not satisfy the scrutiny mandated by [Texas ] RFRA.” *Id.* The Court went on to note, particularly relevantly to the present litigation, “[T]he compelling interest test must be taken seriously. Courts and litigants must focus on real and serious burdens to neighboring properties, and not assume that zoning codes inherently serve a compelling interest, or that every incremental gain to city revenue (in commercial zones), or incremental reduction of traffic (in residential zones), is compelling.” *Id.* at 307 (quoting Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 784 (1999)).

Plaintiffs have not shown any compelling interest in preventing the Congregation from meeting at 7103 Mumford Court. Their stated interests have included being forced to wait while a blind man and a woman pushing a stroller crossed the street and general concerns about parking. *See supra* Section II.F. None of these concerns are “real and serious burdens to neighboring properties” that would constitute “an interest of the highest order” and avoid “the gravest abuses, endangering paramount interests.”

Any assertion by Plaintiffs that they have a compelling interest in prohibiting the Congregation from meeting at 7103 Mumford Court is further undercut by their refusal to stop other uses within the Highlands of McKamy IV and V that are non-residential. *See supra* Section II.I.; Exhibit I at 14:12-15:5, 17:17-17:20; Exhibit J at 58:1-61:16; Exhibit O at 55:10-55:13. As the Supreme Court noted, “a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal citations omitted). In this case, Plaintiffs have never sued to prohibit non-residential uses within the HOA, and thus the same claimed “harms” Plaintiffs allege here abound throughout the neighborhood without any attempt to curb them. *See supra* Section II.I.; Exhibit I at 14:12-15:5, 17:17-17:20; Exhibit J at 58:1-61:16; Exhibit O at 55:10-55:13. Their efforts to stop the Congregation and the Gothelfs are thus unique, demonstrating that the interests are manufactured and not compelling.

**d. Prohibiting the Congregation from meeting at 7103 Mumford Court is not the least restrictive means of furthering any compelling interest.**

To avoid summary judgment, not only must Plaintiffs show that they have a compelling interest in prohibiting the Congregation from meeting at 7103 Mumford Court, Plaintiffs must also show that their actions in prohibiting the Congregation from meeting at 7103 Mumford



Court are the “least restrictive means” of achieving their compelling interest. Tex. Civ. Prac. & Rem. Code § 110.003. “The least-restrictive-means standard is exceptionally demanding. . . .” *Hobby Lobby Stores, Inc. v. Burwell*, 134 S. Ct. 2751, 2781 (2014). In order to satisfy the least-restrictive-means test, Plaintiffs must show that they lack any other means of achieving any compelling interest “without imposing a substantial burden on the exercise of religion by the objecting parties.” *Id.* at 2782. Plaintiffs have been unwilling to even discuss alternatives to completely prohibiting the Congregation from meeting at 7103 Mumford Court, but even if Plaintiffs had an interest that qualified as compelling, a resolution short of stopping the religious exercise of the members of the Congregation could be found. For example, Plaintiffs could have sought to limit parking near 7103 Mumford Court, ensure that the home maintains its exterior character, etc. Instead, Plaintiffs seek the broadest possible relief—a complete shutdown of the Congregation that would prohibit any gathering at all.

**2. Interpreting the restrictive covenants to prevent the Congregation’s religious activities would violate the Religious Land Use and Institutionalized Persons Act.**

There is a second, independent statute that forecloses Plaintiffs’ claims—a statute that Congress enacted to prohibit the very actions taken by Plaintiffs here. RLUIPA “is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with [the Supreme] Court’s precedents.” *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). Following the Supreme Court’s refusal to apply Federal RFRA against the states, Congress enacted a more measured attempt to ensure that state and local governments protect the rights of religious institutions and adherents in two particular contexts where Congress concluded that constitutional rights were most threatened by laws of general applicability: land use regulation and religious exercise by institutionalized persons. *Cutter*, 544 U.S. at 715; 42 U.S.C. §§ 2000cc, 2000cc-1. As Congress recognized, land use

regulations pose a particularly serious risk to religious freedom because “[t]he right to assemble for worship is at the very core of the free exercise of religion,” and “[c]hurches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements.” 146 Cong. Rec. 16698 (2000). Importantly, Congress specifically described “[t]he right to build, buy, or rent such a space [a]s an indispensable adjunct of the core First Amendment right to assemble for religious purposes.” *Id.*

To protect this right, RLUIPA imposes several limitations, divided into two categories, on government land-use restrictions relevant here. *First*, the “Substantial Burden Clause” uses the same fundamental test that is employed by Texas RFRA. *Second*, under the category of “Discrimination and exclusion,” the “Equal Terms Clause” provides that “No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.” RLUIPA § 2000cc(b)(1). *Third*, the “Nondiscrimination Clause” prohibits any government from “impos[ing] or implement[ing] a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.” RLUIPA § 2000cc(b)(2). *Finally*, the “Unreasonable Limitation Clause” prohibits governments from “impos[ing] or implement[ing] a land use regulation that . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.” RLUIPA § 2000cc(b)(3)(B). Congress specifically provided that RLUIPA “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.” RLUIPA § 2000cc-3(g). Plaintiffs violate all four of these restrictions.

**a. RLUIPA applies to this litigation.**

RLUIPA applies to this litigation for the same reasons that Texas RFRA applies to this litigation as discussed in Section IV.B.1.a. above. Furthermore, while the application of RLUIPA to restrictive covenants has yet to be litigated, the United States Court of Appeals for the Eleventh Circuit itself raised the issue that RLUIPA may apply to restrictive covenants. *Konikov v. Orange County*, 410 F.3d 1317, 1324 n.3 (11th Cir. 2005) (noting that a restrictive covenant “originating from” a neighborhood homeowners’ association “might constitute a constitutional violation and substantial burden in violation of RLUIPA”).

**b. Plaintiffs have violated RLUIPA’s Substantial Burden Clause.**

RLUIPA’s Substantial Burden Clause has the same basic test that Texas RFRA uses. This clause provides that “[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution – (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.” RLUIPA § 2000cc(a)(1). Because this test is the same as the test used by Texas RFRA, and because Plaintiffs have substantially burdened Defendants’ religious exercise, do not have a compelling interest to do so, and have not used the least restrictive means, Defendants are entitled to prevail under the Substantial Burden Clause of RLUIPA.

**c. Plaintiffs have violated RLUIPA’s Equal Terms Clause.**

RLUIPA’s Equal Terms Clause prohibits the government from “treat[ing] the Church on terms that are less than equal to the terms on which it treats similarly situated nonreligious institutions.” *The Elijah Grp. v. City of Leon Valley, Tex.*, 643 F.3d 419, 424 (5th Cir. 2011).

The test is one of strict liability: if a restrictive covenant treats a church on less than equal terms than a similarly situated nonreligious institution, Plaintiffs have no opportunity to offer a justification for the disparity. *See, e.g., id.* (finding a violation of RLUIPA’s Equal Terms Clause after determining that a church was treated on less than equal terms with a nonreligious institution, without any analysis of possible justification); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 269 (3d Cir. 2007) (same). The only concern of the Equal Terms Clause is whether “secular and religious institutions are treated equally.” *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667, 671 (2d Cir. 2010); *see also Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172 (9th Cir. 2011) (“Both because the language of the equal terms provision does not allow for it, and because it would violate the ‘broad construction’ provision, we cannot accept the notion that a ‘compelling governmental interest’ is an exception to the equal terms provision, or that the church has the burden of proving a ‘substantial burden’ under the equal terms provision.”).

In the present case, Plaintiffs have acknowledged that while there are non-residential uses within the HOA, no enforcement action has been brought against any such uses. *See supra* Section II.I.; Exhibit I at 14:12-15:5, 17:17-17:20; Exhibit J at 58:1-61:16; Exhibit O at 55:10-55:13. The only enforcement action brought under the residential use provision of the restrictive covenants has been against Defendants in violation of RLUIPA’s Equal Terms Clause.

**d. Plaintiffs have violated RLUIPA’s Nondiscrimination and Unreasonable Limitation Clauses.**

Because of Plaintiffs’ refusal to enforce their restrictive covenants against anyone except Defendants, their enforcement is both discriminatory against Defendants’ religious exercise and unreasonable, in violation of RLUIPA.

**3. The HOA's claims are barred because the HOA has arbitrarily singled out Defendants.**

The Texas Property Code also independently forecloses the HOA's claims. Under that statute, a homeowners' association may not enforce a restrictive covenant if the decision to do so is arbitrary, capricious, or discriminatory. *See* Tex. Prop. Code § 202.004(a). The Property Code prevents homeowners' associations from enforcing a restrictive covenant against a property owner when the association has not enforced similar alleged violations against others in the neighborhood. *Leake v. Campbell*, 352 S.W.3d 180, 190 (Tex. App.—Fort Worth 2011, no pet.) (enforcement against one owner but not others committing similar alleged violations is evidence of arbitrariness); *Nolan v. Hunter*, 2013 Tex. App. LEXIS 11990, at \*12-14 (Tex. App.—San Antonio Sept. 25, 2013, no pet.) (homeowners association's opposition to a fence was arbitrary, capricious, or discriminatory when there were other similar fences in the neighborhood).

Here, this lawsuit is the only enforcement action the HOA has ever brought since it was formed in 1979. *See supra* Section II.I.; Exhibit I at 14:12-15:5, 17:17-17:20; Exhibit J at 58:1-61:16; Exhibit O at 55:10-55:13. Yet, there are numerous non-residential uses of property in the neighborhood that the HOA has never attempted to stop. *See supra* Section II.I. As catalogued above, non-residential uses such as an eldercare facility, a residential care facility, swimming camps, a court reporting business, a music school, a used car business, and others have occurred freely in the neighborhood. *See supra* Section II.I. Only after Schneider took over the board and the Schneider Board implemented a "new policy" in early 2014 did the HOA decide to get involved in this suit. *See supra* Section II.G. The "new policy," however, has not been enforced against anyone other than Defendants. The HOA's action can only be described as arbitrary as a

matter of law, and thus the Gothelfs are entitled to granted summary judgment for this reason alone.

**4. Plaintiffs have waived and/or abandoned their right to enforce the residential use restriction because the HOA has never attempted to prevent other non-residential uses of homes within the Highlands of McKamy.**

The common law doctrine of waiver precludes both Plaintiffs' claims as a matter of law. Until this case, the HOA had never filed suit to enforce its residential-only restrictive covenant since its founding in 1979. *See supra* Section II.I.; Exhibit I at 14:12-15:5, 17:17-17:20; Exhibit J at 58:1-61:16; Exhibit O at 55:10-55:13. The HOA has had this hands-off approach for years despite the existence of numerous non-residential uses of property in the neighborhood. *See supra* Section II.I. As a result of the HOA's inaction, Article VI.1 of the restrictive covenants has therefore been waived and is no longer enforceable.

"A party asserting waiver of a restrictive covenant or deed restriction must prove . . . that the party seeking enforcement of the covenant or restriction has acquiesced in such substantial violations to amount to abandonment of the covenant or restriction." *Loch 'N' Green Vill. Section Two Homeowners Ass'n v. Murtaugh*, 2013 Tex. App. LEXIS 6613, at \*14 (Tex. App.—Fort Worth May 30, 2013, no pet.). "Among the factors to be considered are the number, nature and severity of the existing violations, any prior acts of enforcement, and whether it is still possible to realize to a substantial degree the benefits sought to be obtained by way of the covenants." *Wildwood Civic Ass'n v. Martin*, 1995 Tex. App. LEXIS 1575, at \*13 (Tex. App.—Houston [1st Dist.] July 13, 1995, no writ). "Evidence showing multiple violations of a restrictive covenant in a subdivision is more than sufficient to uphold a trial court's finding that the restrictive covenant has been abandoned." *Glenwood Acres Landowners Ass'n v. Alvis*, 2007

Tex. App. LEXIS 6060, at \*7 (Tex. App.—Tyler July 31, 2007, no pet.).<sup>14</sup> “Waiver may be proved by a party’s express renunciation of an actually or constructively known right or by silence or inaction for so long a period as to show an intention to yield the known right.” *Loch ‘N’ Green*, 2013 Tex. App. LEXIS 6613, at \*14 (citation omitted). “[L]ong-term acquiescence in violations of . . . restrictions” supports granting summary judgment on the issue of waiver. *Id.* at \*20-22 (granting summary judgment on waiver based on failure to attempt to enforce restrictions over a period of years).

Courts commonly find that a provision has been waived where, as here, there are multiple similar uses coupled with a history of non-enforcement. *See, e.g.:*

- *Loch ‘N’ Green*, 2013 Tex. App. LEXIS 6613, at \*12-22 (granting summary judgment on waiver where association had not sought to enforce other alleged violations);
- *Glenwood Acres*, 2007 Tex. App. LEXIS 6060, at \*5-7 (finding waiver where association had not enforced mobile home prohibition against others);
- *Lay v. Whelan*, 2004 Tex. App. LEXIS 5777, at \*12-17 (Tex. App.—Austin July 1, 2004, pet. denied) (finding waiver where there were similar alleged violations and no evidence of prior enforcement actions);
- *Wildwood*, 1995 Tex. App. LEXIS 1575, at \*11-15 (finding waiver where association had not enforced maintenance fee provision against another homeowner);
- *Foxwood Homeowners Ass’n v. Ricles*, 673 S.W.2d 376, 379-80 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.) (affirming finding of waiver based on “similar violations” and where association was “inconsistent” in its enforcement efforts);

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<sup>14</sup> When a provision of a restrictive covenant has been waived, the waiver also applies in suits by individual homeowners—such as *Schneider*—in addition to applying to suits by homeowners’ associations. *See Cowling v. Colligan*, 312 S.W.2d 943, 945 (Tex. 1958) (holding in suit brought by individual homeowners that courts can refuse to enforce residential-only restrictive covenants based on “acquiescence of the lot owners . . . of substantial violations within the restricted area”); *Baker v. Brackeen*, 354 S.W.2d 660, 663 (Tex. Civ. App.—Amarillo 1962, no writ) (finding waiver in suit brought by individual homeowners). This makes sense, as the doctrine of waiver would be rendered a nullity if homeowners’ associations could evade its application merely by having an individual property owner bring a suit in his own name.

- *Baker*, 354 S.W.2d at 663 (finding waiver of residential-only provision where homeowners had not sought to enforce provision in the past).

Here, the numerous instances of non-residential uses of property that the HOA has never brought enforcement actions to stop—both current and past—in the Highlands of McKamy are more than sufficient to find that the residential-only restrictive covenant has been waived. As catalogued above, non-residential uses such as an eldercare facility, a residential care facility, swimming camps, a court reporting business, a music school, a used car business, and others have occurred freely in the neighborhood. *See supra* Section II.I. The residential-only provision has been waived as a matter of law, and the Court should grant Defendants summary judgment, dismissing all claims by both Plaintiffs, for this additional reason.

#### **5. The doctrine of laches bars the HOA's claims.**

The HOA's claims further fail under the common law defense of laches. A defendant establishes the defense of laches by showing "(1) unreasonable delay in asserting one's legal or equitable rights and (2) a good faith change of position by another to his detriment because of the delay." *Houston Lighting & Power Co. v. City of Wharton*, 101 S.W.3d 633, 639 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

The HOA unreasonably delayed in asserting its legal rights in this case. As noted above, the same Congregation activities that the HOA now challenges have taken place with the HOA's knowledge at homes within the Highlands of McKamy since February 2011. Exhibit C at 33:20-34:14; Exhibit D at 77:12-78:11; Exhibit G (deposition notice to HOA); Exhibit H (HOA's designation of Carolyn Peadon as representative to testify for the HOA); Exhibit I at 6:3-6:9, 9:3-10:2, 22:1-13 (Ms. Peadon's testimony). The HOA did not take a position against these activities until October 14, 2013, well over two and half years after the Congregation's activities first started in the Highlands of McKamy. Exhibit F at 55:7-55:22; Exhibit CC (October 14,



2013 letter). And the HOA did not take legal steps against the Congregation until March 2014, over three years after the Congregation began having its prayer and study activities at homes within the Highlands of McKamy. *See* Petition in Intervention, filed March 13, 2014. This delay is unreasonable as a matter of law. *See Henke v. Fuller*, 2005 Tex. App. LEXIS 3141, at \*8-12 (Tex. App.—San Antonio Apr. 27, 2005, no pet.).

In good faith reliance on the HOA's non-opposition, the Gothelfs purchased a home in the Highlands of McKamy, in part so that the Congregation and its members could use it to practice their religion. Exhibit D at 89:17-90:15. Moreover, in the months before the HOA first opposed the Congregation's activities, some of the Congregation's members purchased property in the area with the good faith belief that the Congregation would be able to have its activities in the neighborhood. Exhibit D at 90:16-90:24. The Gothelfs, the Congregation, and some of its members have thus all changed their position to their detriment in good faith reliance on the HOA's non-opposition. The defense of laches therefore precludes the HOA's claims as a matter of law. *See, e.g., Huntington Park Condo. Ass'n v. Van Wayman*, 2008 Tex. App. LEXIS 1480, at \*11-13 (Tex. App.—Corpus Christi Feb. 28, 2008, no pet.) (affirming trial court's application of laches where association did not sue until years after homeowner acted); *Henke*, 2005 Tex. App. LEXIS 3141, at \*8-12 (suit barred by laches where plaintiffs had not objected to defendant's prior similar use of property within the neighborhood and defendant had spent money in good faith reliance on this non-opposition).

**6. The doctrine of unclean hands bars Schneider's claims.**

"Under the doctrine of unclean hands, a court may refuse to grant equitable relief to a plaintiff who has been guilty of unlawful or inequitable conduct regarding the issue in dispute." *Lazy M Ranch v. TXI Operations, LP*, 978 S.W.2d 678, 683 (Tex. App.—Austin 1998, pet. denied); *see also Jamison v. Allen*, 377 S.W.3d 819, 823-24 (Tex. App.—Dallas 2012, no pet.)

(holding that homeowners could not sue to enforce a restrictive covenant when they were in violation of the same covenant); *Foxwood Homeowners Ass'n v. Ricles*, 673 S.W.2d 376, 379 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (“Injunctive relief is an equitable remedy and the complaining party must come into court with clean hands . . .”).

Schneider is himself in violation of the residential-only restrictive covenant that forms the basis of his claims. He admits that he has a shed in his yard, and the residential-only restrictive covenant unambiguously prohibits sheds. Exhibit B at Article VI.1; Exhibit J at 23:21-25:13; Exhibit S. Schneider therefore comes to the Court with unclean hands. It is unconscionable to permit Schneider to sue on a covenant provision when he is indisputably in violation of that same covenant. *See Jamison*, 377 S.W.3d at 823-24. The Court should hold that the doctrine of unclean hands bars Schneider’s claims as a matter of law.

**C. Defendants are Entitled to Summary Judgment on Certain of Plaintiffs’ Claims for Additional Independent Reasons**

Independent of their affirmative defenses, Defendants are also entitled to summary judgment on certain of Plaintiffs’ claims for other independent reasons.

- 1. Plaintiffs’ claims for a permanent injunction fail as a matter of law to the extent Plaintiffs seek an injunction that would prohibit the Congregation from meeting at 7103 Mumford Court.**

The HOA brings a claim for a permanent injunction to prohibit the Gothelfs from permitting the Congregation and its members to practice their religion at 7103 Mumford Court. *See* Petition in Intervention, filed March 13, 2014, at 10-12. Schneider brings the same claim against the Gothelfs and the Congregation. *See* First Amended Petition, filed April 2, 2014, at 13-16. These claims fail as a matter of law based upon an application of the proper factors to the undisputed facts here.

A permanent injunction is an equitable remedy that can only be issued by the Court, not a jury. *Priest v. Tex. Animal Health Comm'n.*, 780 S.W.2d 874, 876 (Tex. App.—Dallas 1989, no writ); *see also* Tex. R. Civ. P. 683. Among other requirements, in order to issue an injunction the Court must balance the equities to determine whether the harm from not issuing the injunction would exceed the harm from issuing the injunction. *Reliant Hosp. Partners, LLC v. Cornerstone Healthcare Grp. Holdings, Inc.*, 374 S.W.3d 488, 503 (Tex. App.—Dallas 2012, pet. denied). Even where a defendant has committed a primary violation of some kind, the Court should still refuse to enjoin the conduct if the balancing of the equities weighs against doing so. *See, e.g., Storey v. Cent. Hide & Rendering Co.*, 226 S.W.2d 615, 617-19 (Tex. 1950) (balancing equities to conclude that operation of jury-found nuisance could not be enjoined where there was nowhere the defendant could have moved and an injunction would have put the defendant out of business); *Georg v. Animal Def. League*, 231 S.W.2d 807, 808-11 (Tex. Civ. App.—San Antonio 1950, writ ref'd n.r.e.) (affirming denial of injunctive relief even where jury had found for plaintiff as to some claims); *see also Cowling v. Colligan*, 312 S.W.2d 943, 946 (Tex. 1958) (holding that court can refuse to enforce a residential-only restriction by injunction if the decision arises from a “balancing of equities” or of “relative hardships” where the harm from the injunction would be significantly greater than the harm from declining to enjoin). Moreover, where—as here—a homeowners’ association attempts to enforce a restrictive covenant only after a significant period of inaction, the prior inaction should factor into the Court’s balancing of the equities analysis. *Indian Beach Prop. Owners’ Ass’n v. Linden*, 222 S.W.3d 682, 691 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (balancing of equities weighed against injunction where homeowners’ association delayed taking action).

Issuing the permanent injunction requested by Plaintiffs would effectively end community religious life for the approximately thirty families in the Congregation. *See supra* Section II.E.; Exhibit C at 31:4-33:19; Exhibit D at 41:15-42:7, 66:1-68:4. If the Gothelfs are enjoined from hosting the Congregation’s prayer and study activities at 7103 Mumford Court, the Congregation’s members would have nowhere else to go within walking distance of their homes and would therefore not be able to pray in community as their religious beliefs require. *Id.* Plus, Congregation members have purchased homes within walking distance of 7103 Mumford Court in reliance on the ability to practice their religious beliefs there. Exhibit D at 90:16-90:24. The ability to worship in community is of central importance to Orthodox Jews. Thus, the permanent injunction that Plaintiffs propose would bring about severe and irreparable harm to the religious liberty of the Congregation and its members.

In contrast to ending community religious life for thirty families, Plaintiffs complain of such “harms” as having to stop to let blind people and mothers cross the street, barking dogs, and street parking issues (which the Congregation has already taken steps to minimize). *See supra* Section II.F.; Exhibit C at 30:2-31:3. Also, as explained above, the HOA permits multiple non-residential uses of property in the neighborhood (including Schneider’s own violation of the restrictive covenants) and delayed taking action regarding the Congregation for years. *See supra* Sections II.G., II.H., II.I., IV.B.

Accordingly, no balancing of the equities could possibly favor Plaintiffs to such a degree that would justify an injunction prohibiting the Congregation from meeting at 7103 Mumford Court. As the HOA’s counsel has acknowledged,<sup>15</sup> even should the Court be of the opinion that some of the alleged harms from the Congregation’s presence in the Highlands of McKamy are

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<sup>15</sup> Exhibit V at 1-2 (HOA’s counsel acknowledging that even if the use of 7103 Mumford Court were found to violate the restrictive covenants, an injunction from the Court could either “order[] the owner to stop using the residence as a synagogue *or order[] the owner to limit/restrict certain aspects of the activities*” (emphasis added)).

significant, the Court could issue an injunction that is narrowly tailored towards those specific harms without taking the drastic and harsh step of enjoining the Congregation's religious practice altogether. Therefore, Defendants are entitled to summary judgment on Plaintiffs' claims for a permanent injunction to the extent Plaintiffs seek to prevent the Congregation from meeting at 7103 Mumford Court.

**2. No evidence supports Schneider's claim for statutory damages under Tex. Prop. Code § 202.004(c).**

Schneider purports to seek damages under § 202.004(c) of the Texas Property Code, even though he is an individual homeowner, not a homeowners' association. *See* First Amended Petition, filed April 2, 2014, at ¶¶ 1, 7-8, 42-43 & page 19. Under both the plain language of the statute and the unanimous case law interpreting the statute, however, individual homeowners may not recover damages.

Section 202.004 of the Texas Property Code applies only to associations or their designated representatives, not to individual homeowners:

ENFORCEMENT OF RESTRICTIVE COVENANTS. (a) An exercise of discretionary authority by a property owners' association or other representative designated by an owner of real property concerning a restrictive covenant is presumed reasonable unless the court determines by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious, or discriminatory.

(b) A property owners' association or other representative designated by an owner of real property may initiate, defend, or intervene in litigation or an administrative proceeding affecting the enforcement of a restrictive covenant or the protection, preservation, or operation of the property covered by the dedicatory instrument.

(c) A court may assess civil damages for the violation of a restrictive covenant in an amount not to exceed \$200 for each day of the violation.

Tex. Prop. Code § 202.004.

Thus, courts unanimously hold that § 202.004 does not permit individual homeowners to recover damages:

- *Quinn v. Harris*, 1999 WL 125470 (Tex. App.—Austin Mar. 11, 1999, pet. denied). The court in *Quinn* held that the plain language of the statute precludes individual homeowners from recovery and therefore reversed the trial court’s award of statutory damages. *Id.* at \*7-8. The court also observed that permitting individual homeowners to recover under § 202.004 would lead to absurd results that the legislature could not have intended: “If appellees’ interpretation of section 202.004(c) were followed, each individual homeowner in a subdivision could recover up to \$200 per day from the time she filed suit until the judgment was signed. We do not believe the legislature intended this result.” *Id.* at \*8.
- *Hawkins v. Walker*, 233 S.W.3d 380 (Tex. App.—Fort Worth 2007, no pet.). In *Hawkins*, the court reversed the trial court’s judgment for homeowners under § 202.004, and held that the statute unambiguously precludes homeowners from seeking recovery. *Id.* at 388-90, 403. The court held that the “exclusive language [of the statute] evidences a legislative intent that only property owners’ associations or the designated representative of a property owner may sue for civil damages under the statute. Individual property owners are not identified in the statute as persons or entities who are authorized to bring suit under the statute.” *Id.* at 389.
- *Jacks v. Bobo*, 2009 WL 2356277 (Tex. App.—Tyler July 31, 2009, pet. denied). Relying on *Hawkins* and *Quinn*, the court held that “[b]oth courts that have addressed the question have held that an individual owner bringing suit on his own behalf and not as a representative designated by the other owners may not recover civil damages under subsection 202.004(c).” *Id.* at \*7. Accordingly, the court held that the trial judge erred in concluding that an individual homeowner can bring suit to recover civil damages under § 202.004(c). *Id.* at \*7-8.
- *Tanglewood Homes Ass’n, Inc. v. Feldman*, 436 S.W.3d 48 (Tex. App.—Houston [14th Dist.] 2014, pet. filed). The court in *Tanglewood* affirmed the trial court’s rejection of plaintiffs’ request for damages under § 202.004, holding that individual homeowners may not recover damages under the statute. *Id.* at 75-76.

In fact, Defendants are not aware of a single case that permitted individual homeowners to recover damages under § 202.004(c). Defendants are thus entitled to summary judgment on this claim by Schneider as a matter of law.

**3. No evidence supports Schneider’s claim based on his home’s alleged loss of value.**

Without identifying any particular cause of action under which he sues, Schneider asserts that he is entitled to \$50,000 because Defendants have allegedly caused his home to decline in

value. *See* First Amended Petition, filed April 2, 2014, at 18. This claim is meritless and should be summarily dismissed because Schneider has no evidence that his home has lost value.

The only record “evidence” that facially relates to the value of Schneider’s home is Schneider’s response to Defendants’ Request for Disclosure and his own deposition testimony. Exhibit D at 20:13-23:20 (Schneider’s deposition testimony); Exhibit LL (response to Request for Disclosure). Those sources reflect that the alleged reduction in value to Schneider’s home is based solely on his own conjecture without regard to market conditions and that he has no training and no expertise in real estate valuation. *Id.* The Texas Supreme Court prohibits this kind of testimony as to a home’s value, requiring instead that a property owner’s testimony be based on market data rather than another speculative measure. *Natural Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 155 (Tex. 2012). “An owner’s conclusory or speculative testimony will not support a judgment.” *Id.* at 158. Schneider makes no effort to base his claim on market conditions. Thus, there is no evidence that Schneider could present at trial in support of his claim, and Defendants are entitled to summary judgment on this claim as a matter of law.

#### V. PRAAYER

WHEREFORE, Defendants respectfully request that the Court:

- (1) grant their Motion for Summary Judgment in its entirety;
- (2) enter an order dismissing all of Plaintiffs’ claims with prejudice;
- (3) enter an order directing that Plaintiffs take nothing by way of their claims against

Defendants;

- (4) grant Defendants all other and further relief to which they may be entitled; and

(5) Defendants further request that, upon dismissing Plaintiffs’ claims, the Court receive evidence and argument regarding Defendants’ entitlement to recover attorneys’ fees and expenses at a later time.

Dated: January 9, 2015

Respectfully Submitted,

HAYNES AND BOONE, LLP

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CHAIM, INC., JUDITH D. GOTHELF, AND  
MARK B. GOTHELF**



**APPENDIX 2**

***SCHNEIDER v. GOTHELF***

**ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**



Having considered Intervening Plaintiff Highlands of McKamy IV and V Community Improvement Association's (the "HOA") No-Evidence Motion for Partial Summary Judgment, filed January 7, 2015 (the "HOA Motion"), Defendants' Judith D. Gothelf, Mark B. Gothelf and the Congregation Toras Chaim, Inc.'s ("Defendants") Response to the HOA Motion, the Court's record of the pleadings and proceedings in this case, and the parties' arguments before the Court, the Court concludes that the HOA Motion should be denied. The Court hereby **DENIES** the HOA Motion in its entirety.

Having considered Plaintiff David R. Schneider's No-Evidence Motion for Partial Summary Judgment, filed January 8, 2015 (the "Schneider Motion"), Defendants' Response to the Schneider Motion, the Court's record of the pleadings and proceedings in this case, and the parties' arguments before the Court, the Court concludes that the Schneider Motion should be denied. The Court hereby **DENIES** the Schneider Motion in its entirety.

Having considered Defendants' Motion for Summary Judgment, filed January 9, 2015 ("Defendants' Motion"), Plaintiff David R. Schneider's Response to Defendants' Motion and Amended Response to Defendants' Motion, the HOA's Response to Defendants' Motion, Defendants' Reply in support of Defendants' Motion, the Court's record of the pleadings and proceedings in this case, and the parties' arguments before the Court, the Court concludes that Defendants' Motion should be granted as a matter of law under both (1) the Texas Religious Freedom Restoration Act ("TRFRA"), and (2) the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The Court hereby **GRANTS** Defendants' Motion.

The Court further orders that all of Plaintiff David R. Schneider's claims in this lawsuit are **DISMISSED WITH PREJUDICE**.

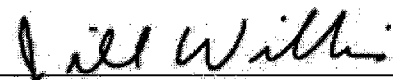
The Court further orders that all of Intervening Plaintiff Highlands of McKamy IV and V Community Improvement Association's claims in this lawsuit are **DISMISSED WITH PREJUDICE**.

The Court further orders that the Jury Trial set for February 23, 2015, is hereby cancelled.

The Court further orders that within 14 days of the date of this Order, the parties must confer and submit their proposal(s) to the Court regarding a new proposed Scheduling Order to address the issue of Defendants' recovery of attorneys' fees, expenses, and costs.

IT IS SO ORDERED.

February 12, 2015

  
\_\_\_\_\_  
The Honorable Jill Willis  
Collin County District Judge

**APPENDIX 3**

**RULES PROHIBITING THE USE OF  
ASSOCIATION FACILITIES  
FOR RELIGIOUS PURPOSES**

RULES PROHIBITING THE USE OF ASSOCIATION FACILITIES  
FOR RELIGIOUS PURPOSES

The Board of Directors hereby adopts the following rules and regulations prohibiting the use of Association facilities for religious purposes.

1. The Association's Common Area facilities shall not be used for the conduct of religious services.
2. The Association shall not rent out its Common Area facilities to any religious organizations for the conduct of religious services.
3. No religious displays shall be permitted upon the Association's Common Areas.

Enacted this day of \_\_\_\_\_, 20\_\_.

**APPENDIX 4**  
**LIMITED LICENSE AGREEMENT FOR ERUV**

**LIMITED LICENSE AGREEMENT  
FOR ERUV**

**THIS LIMITED LICENSE AGREEMENT**, dated June \_\_, 2018, is by and between WWWW Association, Inc. with offices c/o of XXXXXX, [Address] (hereinafter referred to as the “**Licensor**”), and YYYYYY Eruv LLC, c/o [Address] and ZZZZZZ, [Address] (hereinafter referred to as the “**Licensees**”).

WITNESSETH:

**WHEREAS**, Licensor is the owner of the common property located within the WWWW community (“the **Common Property**”), and pursuant to the Licensor’s Declaration and By-Laws, the Association is responsible for the administration of the Common Property and has the legal authority to permit installations on the Common Property, subject to certain restrictions and conditions; and

**WHEREAS**, Licensees request to use a portion of the Common Property, more particularly described below, for the limited purposes of installing portions of an “Eruv,” that is, an enclosure of an area that is deemed to extend the private domain of Jewish households into non-private areas, permitting activities on the Sabbath within the enclosed extended area that would otherwise be forbidden, as more particularly set forth below, without creating a landlord-tenant relationship; and

**WHEREAS**, Licensor has agreed to grant to Licensees a limited license as set forth herein;

**NOW, THEREFORE**, in consideration of the mutual promises hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

**ARTICLE I  
GRANT OF LICENSE; USE**

1.01 **Grant of License/Use.** Licensor hereby grants to Licensees and Licensees hereby accept from Licensor a nontransferable, non-exclusive, limited license subject to the terms and conditions set forth herein. The grant given to the Licensees hereunder by the Licensor for the use of the Licensed Area (defined below) shall be deemed to be a revocable License only.

A. **Licensed Area:** The licensed area is part of the property located within the WWWW community, located in the Township of [Municipality], New Jersey (the “**Property**”), as set forth in the attached Exhibits (the “**Licensed Area**”) and specifically includes an area on [Description of Specific Location, Street Name, Block and Lot Numbers] for the placement of eight (8) poles depicted in **Exhibit A**



and an area off [Description of Specific Location, Street Name, Block and Lot Numbers] for the placement of two (2) poles as more particularly shown on **Exhibit B**. The Licensed Area is the area actually occupied by the poles and under the wires and reasonably wide enough to allow installation of these portions of the Eruv, inspection, maintenance and repair of these portions of the Eruv, and, upon termination of this License Agreement, removal of the poles and wire. Licensees shall have no right to use any other part or parcel of the Property or to use the Licensed Area for any other purpose, nor shall the Licensees be permitted to make any additional installation or alter the installation as set forth in **Exhibit A** and **Exhibit B** by virtue of this Limited License Agreement. Licensees accept the Licensed Area in its "AS IS" and "WHERE IS" condition in all respects.

B. **Use.** This Limited License Agreement is provided solely for the installation, maintenance, repair and removal of the portions of the Eruv described in Section 1.01A, subject to the following conditions and requirements and for no other purposes whatsoever:

- (i) Licensees shall, at their sole cost and expense, comply with any and all state and local laws, ordinances, statutes, rules and regulations applicable to the installation and maintenance of the Eruv in the Licensed Area.
- (ii) Licensees shall install and maintain the Eruv at their sole cost and expense only as depicted in the attached **Exhibit A and B**.
- (iii) The poles utilized for these portions of the Eruv shall each be 10 feet high with a diameter of 2 5/8ths inches or 1 3/8ths inches and will be either scheduled 40 galvanized steel pipe or fencing pipe (depending on the specific need). The wires/lines strung from the pipes shall be dracon braided waxed nylon, 220 lb. test.

1.02 **No Lease or Right of Possession.** Licensees acknowledge, agree, promise, and covenant that:

- A. No lease or right of possession is created or implied by the grant of this License, and no landlord/tenant relationship is created;
- B. No easement is created or implied by the grant of this License;
- C. This License is being granted by Licensor to Licensees solely as an accommodation to allow Licensees to use the Licensed Area as set forth in Section 1.01 of this Agreement;
- D. At the end of the Term (hereinafter defined), or sooner upon the earlier termination of this Limited License Agreement as authorized in this License Agreement, Licensor shall have the right (i) to compel Licensees to remove the poles and wires and restore

the Property to its pre-existing condition or (ii) to remove the poles and wires itself and restore the property without the need to secure any court order(s) (the “**Licensor’s Self Help Remedy**”), and (iii) to prevent Licensees from having access to the Licensed Area. Licensees agree that as a material inducement to Licensor to enter into this Limited License Agreement, Licensees hereby grant to Licensor the Licensor’s Self Help Remedy, and further agree that Licensees shall not challenge the legality or enforceability of Licensor’s Self Help Remedy.

1.03 **Prohibited Activities.** Any use or activity not specifically granted by this License Agreement shall be prohibited.

1.04 **Maintenance.** Licensees shall maintain the installation and shall be responsible to make any repairs necessary to keep the installation in good condition so as not to be a danger or hazard to anyone in the vicinity. In the event Licensees fail to maintain the licensed area, Licensees shall be considered in Default in accordance with Article VI of this License Agreement, and Licensor shall have the right to terminate this License Agreement and implement the remedies of Section 1.02D.

## **ARTICLE II TERM**

2.01 **Term.**

- A. Subject to Paragraph 2.01(C) below, the Term of this License Agreement shall be for a period of five (5) years, commencing two weeks (14 days) from execution of this License Agreement and terminating on July 31, 2023, or on an earlier date as authorized in this License Agreement.
- B. Thereafter, at the expiration of the term, the License Agreement shall renew automatically for additional one (1) year terms, unless terminated sooner in accordance herewith.
- C. This Limited License Agreement may be terminated by Licensor for any reason or no reason at all upon ninety (90) days prior written notice to Licensees. However, Licensor may terminate this agreement on ten (10) days written notice in the event the Eruv is damaged and not repaired within the 10 day period or if it is causing harm to the Association or its residents.

## **ARTICLE III LICENSOR’S RETAINED RIGHTS/LICENSEES’ OBLIGATIONS**

3.01 **Licensor’s Rights.** In addition to any other rights granted to Licensor hereunder, Licensor and its agents shall have the right (but not the obligation) to:

- A. At the end of the Term, or sooner upon the earlier termination of this License Agreement, remove the poles and wires and any other property of the Licensees and prevent Licensees from having access to the Licensed Area, without the need to secure any court order(s);
- B. From time to time as Licensor in its sole and absolute discretion may determine, restrict access to and the use of the any portion of the Licensed Area;
- C. To enter the Licensed Area in any emergency at any time, and at other reasonable times, for any purpose whatsoever.

3.02 **Surrender.** At the end of the Term or the sooner termination of this Limited License Agreement, Licensees shall, at their sole cost and expense, remove all of Licensees' property and restore the Licensed Area to its pre-existing condition, and, if the Licensees' property is not removed and the Licensor's Property not restored after ten (10) days written notice, Licensor may remove the Licensees' property and dispose of it without further notice.

#### **ARTICLE IV LICENSE FEES; UTILITY AND OTHER PAYMENTS**

- 4.01 **License Fees.** Licensees shall not be charged a fee for use of the Licensed Area.
- 4.02 **Reimbursement of Fees and Costs.** Licensees shall be responsible for, and shall pay to Licensor, any and all reasonable costs and expenses incurred by Licensor for any and all damage to the Licensed Area arising out of (i) the installation, use and continued maintenance of the Licensed Area by Licensees and the employees, agents, contractors, invitees and guests of Licensees; (ii) the act or neglect of Licensees and the employees, agents, contractors, invitees and guests of Licensees.

#### **ARTICLE V INDEMNIFICATION; INSURANCE**

- 5.01. **Indemnity by Licensees.** Licensees shall indemnify, defend and hold Licensor and its employees, agents, servants, directors, officers and members harmless from and against all liability (statutory or otherwise), claims, suits, demands, damages, obligations, judgments, fines, penalties, liabilities, losses, costs, charges, interest and expenses (including reasonable attorneys' fees and disbursements incurred in the defense thereof) which Licensor or its employees, agents, servants, directors, officers and members may suffer, be claimed to be responsible for, or may pay or incur by reason of or arising out of any of the following:
  - A. Any breach by Licensees of this License Agreement;

- B. Any act or negligence on the part of the Licensees, or their employees, agents, servants, contractors, invitees and guests, and
- C. Licensees' access to or use of the Licensed Area.
- D. Any failure of Licensees to comply with state and local laws, ordinances, statutes, rules and regulations applicable to the installation or maintenance of the Eruv poles and wires in the Licensed Area.

5.02 **Insurance.** The Licensees agree that they will maintain for the entire time this Limited License Agreement remains in effect or Licensees use any or all of the Licensed Area, whichever is longer, a policy or policies of general liability insurance in the minimum amount of \$2,000,000.00 protecting the Licensor against claims for injuries or damage to persons and property as a result of such installation, use, maintenance and/or operations, which shall name Licensor and its managing agent, XXXXXX, as additional insureds. Licensees shall provide proof of such insurance to Licensor on a yearly basis and upon demand and Association must receive at least 30 days' prior notice of any cancellation and such cancellation shall be grounds to immediately cancel this agreement notwithstanding anything set forth herein to the contrary.

## **ARTICLE VI DEFAULT**

- 6.01 **Events of Default.** The following shall constitute "Events of Default" by Licensees under this License Agreement:
- A. If Licensees shall do or permit to be done any act or thing, or fail to perform any act or thing, which will constitute a breach or violation of any of the terms, covenants or conditions of this License Agreement.
  - B. If Licensees fail to reasonably maintain the poles and wires.
  - C. If the Licensees violates any state or local laws, ordinances, statutes, rules and regulations applicable to the installation or maintenance of the Eruv poles and wires in the Licensed Area.
- 6.02 **Effect of Default.** Notwithstanding the right to terminate this agreement pursuant to Article II, paragraph 2.01, if any Event of Default shall occur, Licensor, at any time thereafter during the continuance thereof, at its option shall have the right, but not the obligation, to (i) give Licensees written notice of Default and allow Licensees 10 days to cure the Default; (ii) if the Licensees fail to cure the Default within the ten days following notice, or in the event of any emergency, cure the Default and charge Licensees for its actual cost to cure such Default, in which case Licensees shall remit

payment to Licensor within ten (10) days of the date Licensor provides an invoice or bill to Licensees, and any payment not made by Licensees within ten (10) days of the date Licensor provides an invoice or bill to Licensees shall bear interest at the rate of ten percent (10%) per annum; (iii) terminate this Agreement upon ten (10) days prior written notice to Licensees; and/or (iv) seek any and all remedies available to Licensor at law and/or equity.

## **ARTICLE VII NOTICES**

- 7.01 **Notices.** Any notice required hereunder (“Notice”) shall be deemed sufficiently given or rendered if in writing and if the same shall refer specifically to this License Agreement and shall be sent by either (i) registered or certified mail, return receipt requested or (ii) overnight mail or courier with proof of receipt or (iii) hand delivered or (iv) e-mail with an electronic confirmation of receipt, and shall be deemed delivered five (5) days after postal deposit of registered or certified mail or on the date of receipt if sent by overnight mail or courier, hand delivered or sent by email.
- 7.02 **Notice shall be sent as follows:**

**As to the Licensees:**

YYYYYYY Eruv LLC

[Delivery Address & E-mail Address]

**As to the Licensor**

WWWWW Association, Inc.

[Delivery Address & E-mail Address]

## **ARTICLE VIII MISCELLANEOUS**

- 8.01 **Assignment.** The authorization granted hereunder shall not be assignable.
- 8.02 **No Nuisance.** Licensees shall not permit any objectionable or unreasonable activity to occur while in or on the Licensed Area which would create a public or private nuisance.
- 8.03 **Entire Agreement.** This Limited License Agreement contains the entire agreement by and between the parties relating to the subject matter hereof and supersedes all prior negotiations and agreements relating thereto.
- 8.04 **Modification.** This Limited License Agreement may only be amended or modified in writing, signed by each of the parties hereto.

- 8.05 **Governing Law.** This Limited License Agreement shall be governed by and construed under the laws of the State of New Jersey and shall inure to the benefit of and be binding upon the parties hereto and their respective legal representatives, successors and assigns.
- 8.06 **Authorization.** The parties hereto, by their signatures below, represent, covenant and warrant to each other that they have the full right and power to execute and enter into this Limited License Agreement.
- 8.07 **Counterparts.** This Agreement may be executed by electronic mail, fax, and in any number of counterparts, each of which shall constitute the same instrument.
- 9.08 **Severability.** If any paragraph or provision herein is held invalid by a court of competent jurisdiction, all other paragraphs or severable provisions of this Limited License Agreement shall not be affected thereby, but shall remain in full force and effect.

**IN WITNESS WHEREOF**, the parties hereunto set their hands and seals to this License Agreement as of the date first written above.

**WITNESS:**

**LICENSOR**  
**WWWWW Association, Inc.**

\_\_\_\_\_

\_\_\_\_\_  
 By:  
 Title:

**LICENSEE:**  
**YYYYYY Eruv LLC**

\_\_\_\_\_

\_\_\_\_\_  
 By:  
 Title:

**LICENSEE:**  
**ZZZZZZ**

\_\_\_\_\_

\_\_\_\_\_

# EXHIBIT A

## Survey A

# EXHIBIT B

## Survey B



## **APPENDIX 5**

### **SAMPLE POLICY FOR RELIGIOUS SYMBOLS, RELIGIOUS DISPLAYS & HOLIDAY LIGHTS AND DECORATIONS**

**SAMPLE POLICY FOR RELIGIOUS SYMBOLS, RELIGIOUS  
DISPLAYS & HOLIDAY LIGHTS AND DECORATIONS**

***RELIGIOUS SYMBOLS AND DISPLAYS***

Mezuzahs, Torans and/or other religious symbols are permitted to be installed or placed on doors, doorframes and/or in other locations in accord with applicable religious requirements and/or customs.

Sukkahs may be placed on a Limited Common Element deck or patio for the holiday of Sukkot, beginning one week prior to Sukkot. The sukkah must be removed no later than one week after the last day of Sukkot. Sukkahs may not be placed on an Association Common Element.

If a Unit Owner has questions about installing or displaying any type of religious symbol or display, the Unit Owner is encouraged to contact the Property Manager and/or the Executive Board.

***HOLIDAY LIGHTS AND DECORATIONS***

Holiday lights and decorations of a temporary nature are permitted on Limited Common Elements, Unit Exteriors and/or Common Elements adjacent to the Unit, provided that the installation of the lights or decorations does not damage any Limited Common Element, Unit Exterior and/or Common Element, including but not limited to trees, shrubs, gutters, or siding. Holiday lights and decorations must be removed within approximately 60 days of the holiday for which the lights and decorations were displayed.

Holiday lights and decorations for Christmas and/or Hanukkah may be displayed on or after Thanksgiving Day and must be removed no later than February 25<sup>th</sup> of the following year.

If a Unit Owner has questions about installing holiday lights and decorations, the Unit Owner is encouraged to contact the Property Manager and/or the Executive Board.