

# Eradicating Discriminatory Covenants in Community Associations

By Jonathan H. Katz, Esq.

*“Ghosts of these racial covenants continue to haunt the title to American real estate and trample the dignity of numerous ethnicities.”*

— Honorable George Fearing<sup>i</sup>



In October 2020, State Senator Troy Singleton introduced legislation that would authorize New Jersey community associations, without the vote of the members/owners, to remove from their documents “any restriction, covenant, or condition that prohibits or limits the conveyance, encumbrance, rental, occupancy, or use of real property” based on race, creed, national origin, marital status, sexual orientation, or other factors outlined in New Jersey’s Law Against Discrimination (“LAD”). The bill unanimously passed in the Assembly on June 24, 2021, passed in the Senate on June 30, 2021, and is currently awaiting Governor Murphy’s signature.

In order to understand the significance of this legislation, we need to discuss a little bit of history. Restrictive covenants were widely used to prohibit racial, ethnic, and religious minority groups from buying, leasing, or occupying homes throughout the United States into the first half of the 20th

century. Some covenants would generally bar “non-caucasian” groups while others would prohibit specific races, nationalities, or individuals with disabilities.<sup>ii</sup>

In 1948, the United States Supreme Court decision in *Shelley v. Kraemer*<sup>iii</sup> ruled that these discriminatory covenants were unenforceable. Twenty years later, in 1968, the Fair Housing Act was enacted to prohibit discrimination concerning the sale, rental, and financing of housing based on race, sex, religion, national origin, or other protected classes. New Jersey’s LAD, in its earliest iteration, was proposed in 1948 and enacted into law in 1949<sup>iv</sup> Like *Shelley*, those laws also made racially restrictive covenants illegal and unenforceable; however, many of those covenants still exist in documents that predate the Fair Housing Act and/or the New Jersey LAD.<sup>v</sup>

Over the last few years, there has been a push, supported by CAI National, to create a process by which community

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association boards can remove these unenforceable, discriminatory restrictions contained in their documents or covenants without the necessity of a vote of the owners. According to CAI, eleven (11) states have enacted legislation giving a community association the ability to remove discriminatory and unenforceable restrictive covenants in recent years, and several others, including New Jersey, have pending legislation.<sup>vi</sup>

Once this legislation is signed by Governor Murphy, the actual mech-

*“Once this legislation is signed...the actual mechanism of removing discriminatory restrictive covenants from association documents would be simple.”*

anism of removing discriminatory restrictive covenants from association documents would be simple. A simple majority vote of the governing body of the community association can amend the documents to remove any such discriminatory covenants or restrictions without a vote of the membership/owners. The legislation also requires that associations, upon a written request of a member alleging that a provision of the documents is discriminatory, must conduct a review of the documents and, within thirty (30) days, to determine whether any

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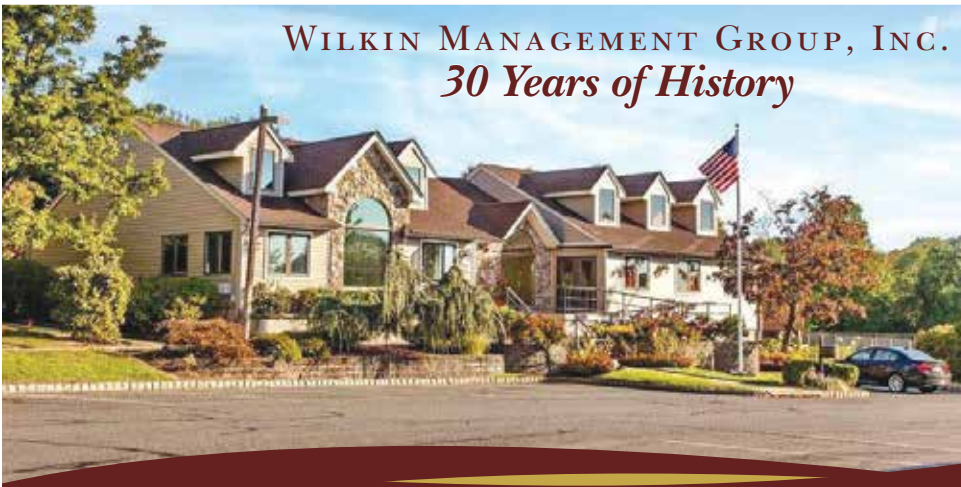


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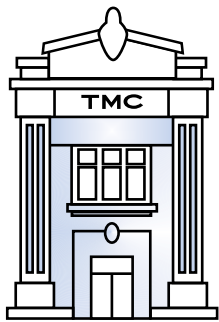


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such restriction should be removed and take such appropriate action.

While progress has been made over the last seventy-plus years since the Shelley case, there is still a lot of work ahead of us. To quote Judge Fearing in a case interpreting Washington State's version of this discriminatory covenant legislation: "The time has come to rip, from the pages of official records, white inscriptions of supremacy. The time has come to tear down monuments to slavery and racial segregation on display in this public square."<sup>vii</sup>

The change will not happen overnight, but by taking remedial action, having meaningful conversations, and educating our members, we can strive to make our communities more inclusive places where all races, cultures, and beliefs are welcome. This legislation is a step forward. ■

### **END NOTES:**

- i *May v. Spokane County*, 481 P.3d 1098, 1104 (Wash. Ct. App. 2021) (Fearing, J., dissenting).
- ii Dawn Bauman, CAE, "An Unfortunate Legacy: A Brief History of Racially Restrictive Covenants," <https://advocacy.caionline.org/history-of-racially-restrictive-covenants/>
- iii 334 U.S. 1 (1948).
- iv NJ State Library, "Civil Rights in New Jersey, 1945-2020: Discrimination Timeline Legislation," <https://libguides.njstatelib.org/discrimination/laws>
- v Laura Otto, "Overcoming Racism in Condominiums and HOAs," <https://hoaresources.caionline.org/overcoming-racism-in-condominiums-and-hoas/>
- vi CAI National, "Remove Discriminatory Restrictive Covenants," <https://www.caionline.org/Advocacy/Priorities/Restrictive/Pages/default.aspx>
- vii *May, supra*, 481 P.3d at 1114.

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