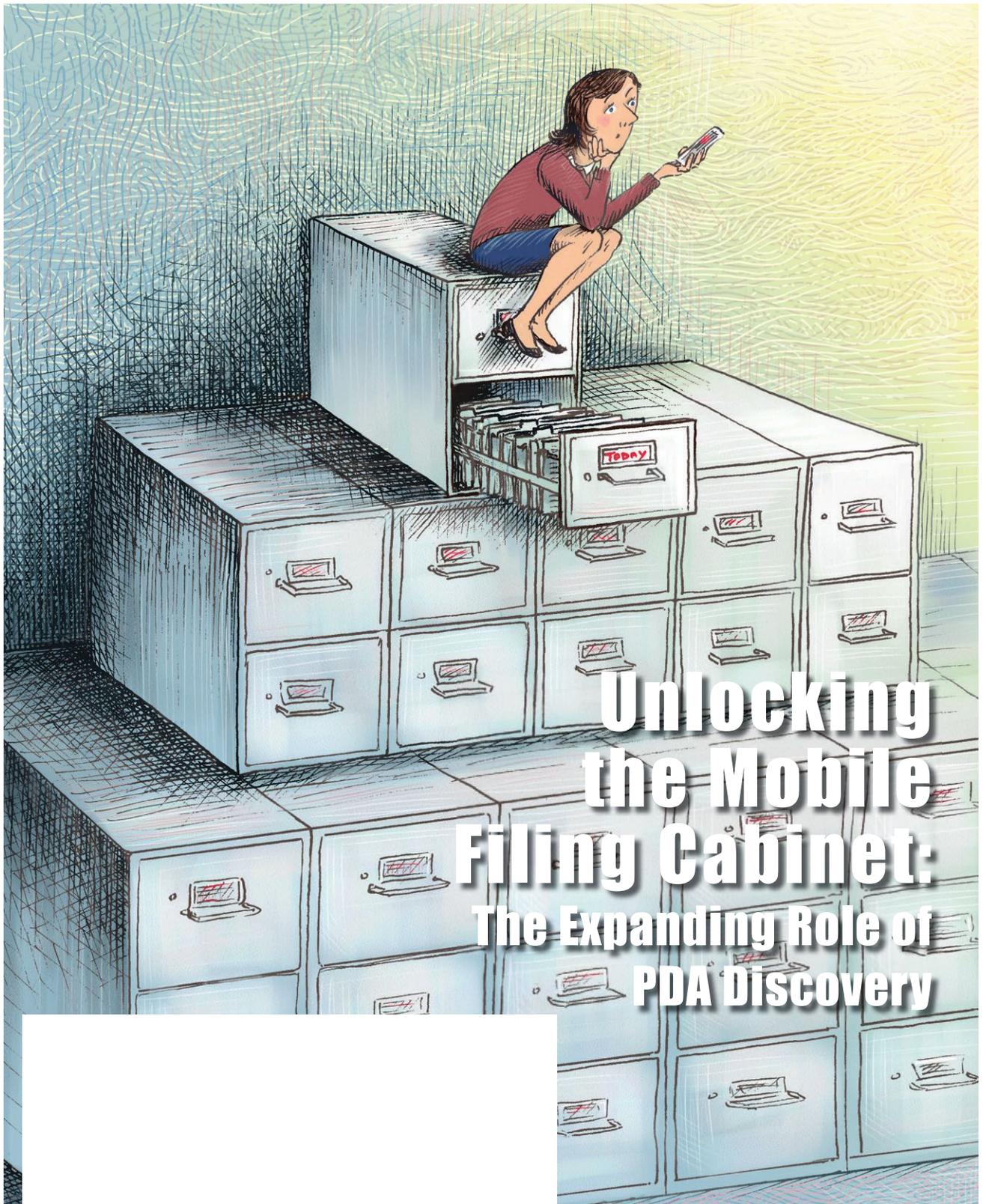


BAR JOURNAL

ADVANCING THE COMPETENCE AND PUBLIC RESPONSIBILITY OF LAWYERS



Unlocking the Mobile Filing Cabinet: The Expanding Role of PDA Discovery

Defending My Our Castle: A Look at Gun Regulation by Community Associations

On September 6, 2012, David Merritt, president of the Spring Creek Homeowners Association, called a homeowners association meeting to order. Approximately 30 minutes later, Merritt, and former president of Spring Creek Marvin Fisher, would be fatally shot by their neighbor, Mahmood Hindi.¹ The dispute between Hindi and Spring Creek involved an unapproved driveway and fence installed by Hindi. Hindi was charged with murder, but committed suicide in jail prior to his trial. The Hindi case may not be familiar to many Floridians, but the case of George Zimmerman certainly is. Zimmerman was allegedly acting as an unofficial neighborhood watch participant within Retreat at Twin Lakes, a Sanford townhouse development, when he had an altercation leading to the shooting death of Trayvon Martin. Zimmerman was found not guilty of criminal wrongdoing in the death of Martin. Martin's family later sued the homeowners association. The homeowners association and the Martins reached an undisclosed settlement in that case, however, there were reports that the association paid Martin's family upward of \$1 million to settle the dispute.²

The issue of gun control is ever-present in America, and engenders strong emotions and arguments on all sides. This article does not seek to advocate a position for or against gun control, or assume that gun regulation by community associations will prevent or cause additional harm to the residents governed by

such regulations. Rather, the article analyzes the legal basis upon which gun restrictions by Florida community associations would be examined by a court.

Both the United States and Florida constitutions state that the right of the people to keep and bear arms shall not be infringed.³ In general, the federal and state constitutions limit the powers of government, not private citizens or private corporations. In certain circumstances, courts have imposed constitutional restraints on private actors. These circumstances include state action through judicial enforcement, the performance of public functions, and state involvement.

The seminal case concerning state action involves a central component to all community associations in Florida, namely, restrictive covenants. *Shelley v. Kraemer*, 334 U.S. 1 (1948), concerned two sets of private restrictive covenants (one in Missouri and one in Michigan). Both sets of restrictive covenants prohibited non-Caucasian persons from occupying the real property encumbered by the restrictive covenants. Preceding *Shelley*, the U.S. Supreme Court had invalidated restrictive state laws and local ordinance that prohibited residential occupancy based on race.⁴ The *Buchanan v. Warley*, 245 U.S. 60 (1917), and *Harmon v. Tyler*, 273 U.S. 668 (1927), cases were based upon the 14th Amendment to the U.S. Constitution being the conduit, which makes the U.S. Constitution's fundamental rights apply to actions by state government.

Interestingly, *Shelley* expressly

states that private restrictions that are to be voluntarily abided by cannot form a basis for challenge under the 14th Amendment.⁵ The operative distinction in *Shelley* is that property owners sought enforcement of the racially motivated restrictions through a state court.⁶ This additional step of state judicial enforcement caused the Missouri and Michigan courts to be state actors enforcing racially motivated restrictive covenants, thus, subjecting enforcement of the restrictive covenants to the constitutional scrutiny. The *Shelley* Court concluded that judicial enforcement of those covenants denied the petitioners equal protection under the law, an action violative of the 14th Amendment to the U.S. Constitution.⁷

Florida state courts and federal courts located in Florida have addressed the issue of state action through judicial enforcement of private restrictive covenants. In *Harris v. Sunset Islands Property Owners, Inc.*, 116 So. 2d 622 (Fla. 1959), the Florida Supreme Court reviewed the validity of restrictive covenants for a planned community in Dade County. The restrictive covenants stated that in order to own a lot within the Sunset Islands development, one had to be a member in good standing of Sunset Islands Property Owners, Inc. At the time, Mr. and Mrs. Harris purchased their lot, the association's bylaws stated "the only ground upon which an owner or lessee of property on said [i]slands may be denied membership in this corporation shall be that the applicant is not a Gentile or is not

of the Caucasian race or has been convicted of a felony.⁷⁸

Mr. and Mrs. Harris were of the Jewish faith. Following their purchase of the parcel, the association filed suit to compel the Harrises to vacate the property alleging that they were not members of the corporation in good standing. Relying on *Shelley*, the Florida Supreme Court held that the restriction for the Sunset Islands development was invalid.

Following *Harris*, other Florida state and federal courts have addressed implication of the state action doctrine through judicial enforcement of covenants. In *Quail Creek Property Owners Association, Inc. v. Hunter*, 538 So. 2d 1288 (Fla. 2d DCA 1989), a homeowner challenged a restriction that limited signs that could be placed on parcels in the community, claiming that the restriction violated the First and 14th amendments to the U.S. Constitution. Although the *Hunter* opinion never discussed *Shelley*, the court's holding is exactly in-line with *Shelley* by holding "that neither the recording of the protective covenant in the public records, nor the possible enforcement of the covenant in the courts of the state, constitutes sufficient 'state action' to render the parties' purely private contracts relating to the ownership of real property unconstitutional."⁷⁹ As discussed, the *Shelley* Court stated that private restrictions (abhorrent as some may be) alone were not enough to implicate constitutional scrutiny. Rather, there must be the additional step of having a private restrictive covenant sought enforced by a court before state action becomes present.¹⁰

So what is to be gleaned from the confluence of *Shelley*, *Harris*, *Hunter*, and *Loren*? Interestingly, it may be that the determination of whether state action can be present with respect to private restrictive covenants rests upon whether a potentially unconstitutional provision in the covenants is sought to be enforced in the courts. In *Shelley* and *Harris*, the courts found state action present when 1) the provi-

sion in the covenants violated equal protection and 2) that provision was sought to be enforced through the courts. In contrast, in *Hunter* and *Loren v. Sasser*, 309 F.3d 1296 (11th Cir. 2002), the courts were asked to declare particular provisions of restrictive covenants as facially unconstitutional. In those cases, both courts held that potential enforcement of recorded restrictive covenants is not sufficient to present state action, thus, rendering moot any constitutional analysis.

The other two ways in which state action may be found present are the "public function" test and the "state involvement" test.

Under the public function test, state action will be found when the functions of a private individual or group are so impregnated with a governmental character as to appear municipal in nature. Where the requirements of this test are met, the private activity under question will be subject to constitutional limitations....Under the state involvement test, there must be a sufficiently close nexus between the state and the challenged activity such that the activity may be fairly treated as that of the [s]tate itself.¹¹

In *Brock v. Watergate Mobile Home Park Association, Inc.*, 302 So. 2d 1380 at 1381 (Fla. 4th DCA 1987), certain residents claimed 42 U.S.C. §1983 violations by the mobile home park community association's board of directors for acts that the residents believed violated their civil rights. The court found that the mobile home park community association failed to meet either test, and, therefore, was not a state actor. Given the private nature and functions of most community associations in Florida, it is likely that the vast majority of these entities would fail to meet either test as well.¹²

An exception likely exists for community development districts (CDDs) created pursuant to F.S. Ch. 190. Certainly CDDs would meet both the public function and state involvement tests. CDDs have the power to tax.¹³ CDDs have the power of eminent domain.¹⁴ CDD employees may even participate in the state retirement system "in the same manner as if such employees were state employees."¹⁵

With perhaps the limited excep-

tion for CDDs, is there reason for community association counsel to concern themselves as to whether the Second Amendment to the U.S. Constitution or Fla. Const. art. I, §8 are implicated by a covenant or board-made rule that limits or prohibits firearms? The answer appears to be yes; or at least, maybe. In *Shelley* and *Harris*, courts have shown the inclination to find state action present if the questioned restrictive covenant is sought to be enforced in the courts.

Even without a community association seeking to enforce a firearm regulation in court, there is an additional reason to analyze whether any proposed firearm regulation abridges a fundamental constitutional right. Florida courts have held that restrictions contained in recorded covenants "will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right."¹⁶ Accordingly, if a provision of the covenants violates a fundamental constitutional right or is contrary to public policy, it may be found invalid by a Florida court without need to resort to a "state action" analysis.

For example, if a community association adopted a covenant or enacted a board-made rule prohibiting all firearms within any home subject to the jurisdiction of the association, it is the authors' opinion that the court would either find state action present (if suit were filed to enforce) or examine the provision under the *White Egret / Basso* standard, which appears to permit independent substantive review for the deprivation of constitutional rights or violation of public policy as a matter of black letter law. The chances of a community association's success is slight in the authors' opinion given the recent U.S. Supreme Court holdings in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010), both holding that outright bans on handguns within its citizens' homes violates the U.S. Constitution.

In *Heller*, Justice Scalia writing

for the Court stated:

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.¹⁷

Heller dealt with a District of Columbia handgun restriction and *McDonald* applied the *Heller* holding to the states through the 14th Amendment. However, *Heller* also made it clear that there are limits on the scope of the Second Amendment by stating:

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose....Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.¹⁸

In considering firearm regulation short of a complete ban, a community association would need to show that any proposed firearm restriction does not violate a fundamental constitutional right or violate public policy.

F.S. §790.25(1) states:

The [l]egislature finds as a matter of public policy and fact that it is necessary to promote firearms safety and to curb and prevent the use of firearms and other weapons in crime and by incompetent persons without prohibiting the lawful use in defense of life, home, and property...including the right to use and own firearms for target practice and

Florida courts have consistently recognized that community associations have an interest in promulgating restrictions that are beneficial to the health, happiness, and peace of mind of the community's residence.

marksmanship on target practice ranges or other lawful places, and lawful hunting and other lawful purposes.

Further, F.S. §790.25(3)(n) states that it is “lawful for the following persons to own, possess, and lawfully use firearms and other weapons, ammunition, and supplies for lawful purposes:...(n) A person possessing arms at his or her home or place of business....” However, the mere fact that something is declared legal by statute does not necessarily mean that a community association could not ban that activity.¹⁹ It would appear there is a difference between otherwise lawful activity (which can be regulated by community associations) and rights conferred as a matter of public policy.

There are other statutory provisions that a community association considering the adoption of firearm regulations must take into account. F.S. §790.052 confers the right upon certain law enforcement officers to carry firearms off-duty at the direction of their superior officer. F.S. §790.06 regulates concealed weapons. The concealed carry statute, F.S. §790.06(12)(a)1-15, specifies categories of places where licensed persons cannot bring their firearm. The list includes obvious places like government buildings, schools, and churches, but does not restrict the right to

carry on residential private property or shared-use facilities located within planned community developments. Finally, F.S. §790.251(4) forbids any public or private employer to prohibit “any customer, employee, or invitee from possessing any legally owned firearm when such firearm is lawfully possessed and locked inside or locked to a private motor vehicle in a parking lot and when the customer, employee, or invitee is lawfully in such area.”

Community association firearm regulation also presents a troubling potential vignette outside of the academic debate of constitutional and public policy principles. What happens if an “overzealous” board member, manager, employee, or a self-appointed “do-gooder” enters upon the property of a community resident for a purpose arguably relevant to association business (*e.g.*, inspecting an alleged covenant violation) and is shot? Although in a slightly different context, the case of *State v. Vino*, 100 So. 3d 716 (Fla. 3d DCA 2012), paints a worrisome picture. Ernesto Vino was charged with aggravated assault with a firearm, unlawful discharge of a firearm in public, and improper exhibition of a firearm following a March 9, 2009, incident involving Florida Power & Light (FPL) employee entry onto his property. Mr. Vino moved to have the charges dismissed, claiming immunity pursuant to Florida’s “Stand Your Ground” law.²⁰

In order to successfully invoke the Stand Your Ground immunity, the court must conduct a pretrial evidentiary hearing and determine if the preponderance of the evidence warrants immunity. The defendant bears the burden of proof that the immunity attaches to the actions taken.²¹ The accounts of what occurred on March 9, 2009, were conflicting between the FPL employees and Mr. Vino. FPL employees entered onto Mr. Vino’s residential mobile home property at 10 a.m. for the purpose of shutting off the power supply to Mr. Vino due to nonpayment of power bills. In order to shut off the power, the FPL employees had to enter into Mr. Vino’s

In order to
successfully invoke
the Stand Your
Ground immunity,
the court must
conduct a pretrial
evidentiary hearing
and determine if
the preponderance
of the evidence
warrants immunity.

fenced yard.²² The FPL employees stated that they honked and yelled over the fence “FPL” before using a ladder to scale Mr. Vино’s fence. Once the FPL employees were in Mr. Vино’s yard, Mr. Vино exited his home with a loaded rifle. The FPL employees testified that Mr. Vино cursed at them, struck one of them with the rifle, and then fired a shot from his rifle as they climbed back over the fence to exit Mr. Vино’s yard. Conversely, Mr. Vино testified that he was awoken from sleep by his dogs barking, looked out the window, and saw a ladder with two men scaling his fence, which caused him to secure his rifle and exited the front door and hid behind his truck discharging his rifle once into the ground for the purpose of demonstrating “he was serious.”²³ Mr. Vино stated that the FPL employees did not identify themselves prior to his discharging his weapon, and further denied striking the FPL employee or firing the rifle as the FPL employees were leaving. Mr. Vино’s testimony was supported by the testimony of his neighbors.

The trial court examined the statutory language, F.S. §776.013(3), of Stand Your Ground immunity, which states:

A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.

The trial court apparently gave more weight to Mr. Vино’s version of the incident and concluded that Mr. Vино was immune from prosecution with respect to the assault and improper exhibition of a firearm charges, but allowed the charge of unlawful discharge of a firearm to proceed. The state appealed the dismissals. In affirming the trial court’s rulings, the *Vино* court stated that its review of the facts adduced at the pretrial hearing was reviewed under a competent substantial evidence standard but that the trial court’s

legal conclusions would be reviewed de novo.²⁴ The *Vино* court concluded that there was not a basis to overturn the factual findings of the trial court and further agreed with the legal conclusions of the trial court.

So where does this leave community associations? Are there any firearms regulations that community associations can adopt that have a chance to withstand judicial scrutiny? Although there is no Florida caselaw on point, the authors believe there is legal support for the proposition that a community association could prohibit (with certain exceptions, such as off-duty law enforcement officers carrying a firearm under the authority of F.S. §790.052) firearms at meetings or other gatherings held in common area places within the community.²⁵ Further, the authors believe that a community association could enact a restriction that firearms may only be discharged within a community in a lawful, defensive manner. In fact, F.S. Ch. 790 was amended in 2016 to prohibit recreationally discharging a firearm outdoors, including target shooting, in an area that the person knows or reasonably should know is primarily residential in nature and that has a residential density of one or more dwelling units per acre.²⁶ However, the statutory amendment

expressly does not apply to 1) lawfully defending life or property or performing official duties requiring the discharge of a firearm; or 2) if, under the circumstances, the discharge does not pose a reasonably foreseeable risk to life, safety, or property; or 3) to a person who accidentally discharges a firearm.²⁷

Other restrictions are more questionable. For instance, may a community association prohibit persons with a concealed weapons license to otherwise lawfully carry the concealed weapon on the common areas for self-defense purposes? Such a restriction might not offend *Heller* because it does not, arguably, constitute home defense; however, the restriction may violate the public policy espoused in F.S. §790.25(1). If so, then such restriction could be deemed invalid by the courts pursuant to *Basso* and *White Egret*.

Florida courts have consistently recognized that community associations have an interest in promulgating restrictions that are beneficial to the health, happiness, and peace of mind of the community’s residence.²⁸ As one Florida court stated:

Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less. The individual ought not be permitted to disrupt the integrity of the common scheme through his desire for change, however laudable that change might be. *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So. 2d 685, 688 (Fla. 4th DCA 1971).

In summary, while an absolute ban on gun ownership is unlikely to pass constitutional muster, the authors believe that certain regulations on guns even within a home (*e.g.*, no discharge of weapons except for lawful self-defense) would be upheld. It is more likely that restrictions regulating the possession and use of firearms on common property would satisfy the enforceability tests established by law, but even then, the public policies evident in Florida’s “pro-gun” statutory schemes would be a factor in any judicial consideration of the restriction. □

¹ CBS News, *Suspect Admits to Gunning Down Neighbor: Cops* (Sept. 7, 2012), <http://www.cbsnews.com/news/suspect-admits-to-gunning-down-neighbor-cops/>.

² Rene Stutzman, *Trayvon Martin's Parents Settle Wrongful-Death Claim*, ORLANDO SENTINEL, Apr. 5, 2013, available at http://articles.orlandosentinel.com/2013-04-05/news/os-trayvon-martin-settlement-20130405_1_trayvon-martin-benjamin-crump-george-zimmerman.

³ See U.S. CONST. amend. II and FLA. CONST. art. I, §8.

⁴ See *Buchanan v. Warley*, 245 U.S. 60 (1917); *Harmon v. Tyler*, 273 U.S. 668 (1927).

⁵ *Shelley*, 334 U.S. at 13. (“We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the [14th] Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that

there has been no action by the [s]tate and the provisions of the [a]mendment have not been violated.”).

⁶ *Id.* at 19 (“It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.”).

⁷ For an extensive national review of constitutional principles relating to regulation of firearms in community associations, the authors recommend Christopher J. Wahl, *Keeping Heller Out of the Home: Homeowners Associations and the Right to Keep and Bear Arms*, 15 U. PA. J. CONST. L. 1003 (2014).

⁸ *Harris*, 116 So. 2d at 623.

⁹ *Hunter*, 538 So. 2d at 1289.

¹⁰ See also *Loren v. Sasser*, 309 F.3d 1296 (11th Cir. 2002) (holding that threat of judicial enforcement of deed restriction banning “for sale” signs does not amount

to state action). Compare *Gerber v. Longboat Harbour North Condominium, Inc.*, 724 F. Supp. 884 (M.D. Fla. 1989), and *Goldberg v. 400 E. Ohio Condo. Ass’n*, 12 F. Supp. 2d 820, 821 (N.D. Ill. 1998).

¹¹ *Brock v. Watergate Mobile Home Park Association, Inc.*, 302 So. 2d at 1381 (Fla. 4th DCA 1987) (citations omitted).

¹² Some commentators have opined that *Shelley* and its progeny are limited to invalidation of racially restrictive covenants as violative of the Constitution’s Equal Protection Clause. See Wahl, *Heller Out of the Home: Homeowners Associations and the Right to Keep and Bear Arms*, 15 U. PA. J. CONST. L. at 1009-10 (2014).

¹³ FLA. STAT. §§190.011(13) and 190.021(1).

¹⁴ FLA. STAT. §190.011(11).

¹⁵ FLA. STAT. §190.011(2).

¹⁶ *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637 at 640 (Fla. 4th DCA 1981) (citing *White Egret Condominium, Inc. v. Franklin*, 379 So. 2d 346 (Fla. 1979)).

¹⁷ *Heller*, 554 U.S. at 635 (internal cites omitted).

¹⁸ *Id.* at 626 (internal cites omitted).

¹⁹ See *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180 (Fla. 4th DCA 1975) (holding that prohibition against alcoholic beverages at a condominium’s clubhouse was reasonable and enforceable).

²⁰ FLA. STAT. §§776.013-776.032.

²¹ *Vino*, 100 So. 3d at 717.

²² FPL has the statutory authority to enter onto a private residential parcel for the purpose of shutting off power. FLA. STAT. §361.01.

²³ *Vino*, 100 So. 3d at 718.

²⁴ *Id.* at 719.

²⁵ *Lake Hamilton Lakeshore Owners Ass’n, Inc. v. Neidlinger*, 182 So. 3d 738 (Fla. 2d DCA 2015) (“An ‘activity can constitute a judicially abatable nuisance notwithstanding full compliance with either legislative mandate or administrative rule.’”) (internal citations omitted).

²⁶ FLA. STAT. §790.15(4).

²⁷ On June 9, 2016, the Ninth Circuit Court of Appeal issued its opinion in *Peruta v. County of San Diego, et al.*, No. 10-56971, 2016 WL 3194315 (2016), holding that the Second Amendment does not extend to guarantee the right to carry a concealed weapon in public. At the time of submission of this article, it is unknown whether the U.S. Supreme Court will hear the appeal.

²⁸ See, e.g., *Basso*, 393 So. 2d at 640; see also *Norman*, 309 So. 2d at 181-82.

Joseph E. Adams is the managing shareholder of Becker & Poliakoff’s Ft. Myers and Naples offices. His practice has primarily focused on community association law since 1987.

Jay L. Roberts is a senior attorney in Becker & Poliakoff’s Ft. Walton Beach office. His practice has primarily focused on community association law since 2008.

This column is submitted on behalf of the Real Property, Probate and Trust Law Section, Deborah Packer Goodall, chair, and Doug Christy and Jeff Goethe, editors.