Latera v. Isle at Mission Bay Homeowners Ass’n: The Homeowner’s First Amendment Right to Receive Information

Zelica Marie Grieve*
Latera v. Isle at Mission Bay Homeowners Ass’n: The Homeowner’s First Amendment Right to Receive Information

TABLE OF CONTENTS

I. INTRODUCTION .................................................. 531
II. GROWTH OF THE SATELLITE INDUSTRY ......................... 532
III. LATERA V. ISLE AT MISSION BAY HOMEOWNERS ASS’N, INC. 534
    A. Statement of the Case ................................... 535
    B. Appellate Court’s Decision ............................. 536
IV. VALIDITY OF HOMEOWNER’S ASSOCIATION RESTRICTIONS 537
    A. Powers of the Homeowner’s Association ............... 538
    B. Test for Reasonableness ................................ 539
V. REASONABLENESS OF THE ISLE’S RESTRICTION
   PROHIBITING SATELLITE DISHES ............................... 542
    A. The Lateras’ Arguments ................................. 542
    B. The Isle’s Arguments ................................... 545
VI. CONSTITUTIONALITY OF THE ISLE’S RESTRICTION
    PROHIBITING SATELLITE DISHES ............................... 547
    A. Fundamental Right ....................................... 547
    B. State Action ............................................ 550
       1. The Lateras’ Arguments ............................... 553
       2. The Isle’s Arguments ................................. 554
VII. CONCLUSION .................................................. 555

I. INTRODUCTION

The Fourth District Court of Appeal of Florida recently decided a case concerning the enforceability of a homeowner’s association restriction against the installation of satellite dishes. Specifically, the court addressed whether the restriction violates the First Amendment. Latera v. Isle at Mission Bay Homeowners Ass’n, Inc. involves two competing interests:

1. Latera v. Isle at Mission Bay Homeowners Ass’n, 655 So. 2d 144 (Fla. 4th Dist. Ct. App. 1995).
2. Id. at 145.
3. Id.
the rights of homeowners to have free access to information, and the powers of homeowner's associations to establish and enforce rules regarding the "uses to which individually owned property may be put." This article addresses whether Florida courts should enforce a private homeowner's association's restrictive covenant prohibiting the installation of satellite dishes on homeowner's property.

Part II of this article will explore the growth of the satellite industry. Next, Part III will provide an overview of the Latera case. Part IV will then discuss the validity of homeowner's association restrictions. Specifically, this section will address certain powers of the homeowner's association, and how courts determine whether homeowner's associations have exercised these powers in a reasonable manner. Part V will evaluate the reasonableness of the restriction prohibiting satellite dishes in the Latera case. Specifically, this section will analyze the differing arguments put forth by the homeowners and the homeowner's association in the Latera case. Finally, Part VI will evaluate the constitutionality of the homeowner's association's restriction prohibiting satellite dishes in the Latera case. Specifically, this section will discuss whether the right to receive information via a satellite dish is a fundamental right. This section also analyzes arguments of both the homeowners and the homeowner's association regarding whether there is sufficient state action for the homeowners in Latera to claim a constitutional violation.

II. GROWTH OF THE SATELLITE INDUSTRY

The number of satellite dishes being used in United States homes increased from an estimated 900,000 units in 1984 to approximately 2.8 million units in 1991. Today, there are over 4.3 million home satellite units operating in United States homes, and system sales exceeded over 30,000 per month in 1993. Congress facilitated this growth of home

---

satellite dish use by encouraging the advancement of new technologies and services to the public.8

Modern satellite reception systems have the capability to receive a wide variety of program services. Satellites offer both educational and entertainment programming unavailable from any other source, including hundreds of domestic as well as international television and radio signals.9 Within the last twenty years, satellites have “revolutionized the world’s ability to communicate with itself.”10 Since cable systems have not fully utilized this programming, only by installing and maintaining a satellite dish antenna can one “realize the full potential of the communications revolution.”11 Although newer satellite dishes are smaller in design, the general size of dishes required to receive clear satellite signals ranges between eight and twelve feet in diameter.12 Satellite transmissions are microwave signals that must travel in a straight line from transmitter to receiver.13 Therefore, a direct, unobstructed line between the “orbiting communications satellites” and the home satellite dish antenna is vital for reception.14 Accordingly, since location of the satellite dish can impair its effectiveness, factors such as topography, landscaping, or building obstructions can limit or govern a homeowner’s placement of the dish.15 Since satellite dishes can be quite large and are required to be placed outdoors, many homeowner’s associations regulate or restrict the installation of satellite dishes for safety and aesthetic reasons.16 Consequently, the home satellite industry has consid-

   It shall be the policy of the United States to encourage the provision of new
technologies and services to the public. Any person or party (other than the
Commission) who opposes a new technology or service proposed to be
permitted under this chapter shall have the burden to demonstrate that such
proposal is inconsistent with the public interest.
Id.; see also id. § 701.
9. Brief of Amicus Curiae at 8, 9, 17, Latera (No. 93-2952).
10. Id. at 17.
11. Id.
12. Brief of Amicus Curiae at 9, Latera (No. 93-2952).
13. Id.
14. Id. at 10.
15. Id.
   Community Ass’n v. James, 5 Cal. Rptr. 2d 580, 581 (Ct. App. 1992); Esplanade Patio
   Homes Homeowners’ Ass’n v. Rolle, 613 So. 2d 531, 532 (Fla. 3d Dist. Ct. App. 1993)
   (directing lower court to enforce a valid restriction against satellite dishes in community);
   Killlearn Acres Homeowners Ass’n v. Keever, 595 So. 2d 1019, 1022 (Fla. 1st Dist. Ct. App.
ered these concerns and "has made great strides in recent years in encouraging creative landscaping to reduce or eliminate aesthetic objections to satellite dish installations, and by developing products that camouflage the antennas or conceal them in other structures, such as patio furniture, that is commonplace and generally accepted in most communities." 17

III. LATERA V. ISLE AT MISSION BAY HOMEOWNERS ASS'N, INC.

On August 15, 1991, Ken and Tina Marie Latera purchased a lot within the Isle at Mission Bay, a single family residential community which is one of ten subordinate communities organized under the control and authority of the Mission Bay Association. 18 Two officers of the Mission Bay Association assured the Lateras that they would be permitted to install a satellite dish on their property. 19 On July 22, 1991, the Lateras submitted plans for the installation of their satellite dish to the Mission Bay Design Review Committee and obtained oral approval prior to the purchase of their lot. 20 The Design Review Committee then gave the Lateras' plans an initial review and conditional approval on August 28, 1991. 21 The conditional approval required the Lateras to buffer the satellite dish with landscaping around the entire rear perimeter of the property and disguise the satellite dish as patio furniture. 22

The Design Review Committee granted tentative written approval on May 1, 1992, and final written approval on August 19, 1992, as all the

17. Brief of Amicus Curiae at 10, Latera (No. 93-2952).
18. Appellants' Initial Brief at 1, Latera (No. 93-2952).
19. The Lateras were told that a satellite dish would be permitted on the Lateras' property "under certain design restrictions devised to insure the ascetic integrity of the Mission Bay community." Id. The Lateras were also told that the Master Association's (Mission Bay) Design Review Committee would administrate the matter pursuant to the Mission Bay Design Review Standards Board. Id.
20. Id. at 2.
21. Id.
22. The landscaping was to include six-foot ficus trees to preclude the satellite dish from being seen from any neighboring lots or the street. Appellants' Initial Brief at 2, Latera (No. 93-2952).
Design Review Committee’s conditions had been satisfied. Then on April 24, 1992, the Isle at Mission Bay Homeowners Association (“Isle”), notified the Lateras that they were in violation of an Isle covenant which prohibited the installation of television-receiving satellite dishes. Consequently, the Isle’s attorney notified the Lateras on October 14, 1992, that the Isle fined them $1000 for failing to remove the satellite dish. Subsequently, on December 22, 1992, the Isle placed a claim of lien on the Lateras’ property for the $1000 fine. Finally, on February 1, 1993, the Isle filed suit to foreclose the lien and sought injunctive relief to enforce the Isle’s restrictive covenant.

A. Statement of the Case

The Lateras raised four affirmative defenses in their Answer to the Isle’s Complaint. The third affirmative defense alleged “that an absolute

23. Id.
24. Id. at 3. Article eleven, section ten of the Isle’s declaration of covenants, entitled, “Antennas,” provides that “[n]o television or other outdoor antenna system or facility, shall be erected or maintained on any lot.” Answer Brief of Appellee at 1, Latera (No. 93-2952) (emphasis omitted). Article eleven, section eighteen of the Isle’s Declaration entitled, “Additional Restrictions”, provides: “[a]dditional restrictions on the use of lots and the property generally are contained in the Master Declaration. In the event of any conflict between the restriction in this Declaration and those in the Master Declaration, the more restrictive restriction shall control.” Id. (emphasis omitted). The Lateras only sought permission to install their satellite dish from the Mission Bay Master Association, when apparently they also needed the approval of the Isle. Id. at 2-3.
25. Appellants’ Initial Brief at 3, Latera (No. 93-2952).
26. Id.
27. Answer Brief of Appellee at 7, Latera (No. 93-2952).
28. The first affirmative defense alleged was estoppel, laches, and unclean hands on the part of the Isle, as the Lateras went through great expense to seek and did receive approval from the Master Association’s Design Review Committee. Appellants’ Initial Brief at 4, Latera (No. 93-2952). In response to this defense, the Isle alleged that the Lateras: waived and/or were estopped to contest the application of Article XI, Section 10 of THE ISLE’s Declaration, due to their failure to submit any plans for review or approval to THE ISLE and due to the fact that the Defendants knew, or should have known of the restriction contained in THE ISLE’s recorded Declaration.
Answer Brief of Appellee at 8-9, Latera (No. 93-2952).

The second affirmative defense alleged was that the restriction was ambiguous in the context of the other governing documents, as the Isle’s Declaration did not specifically address a restriction against satellite dishes, while the Master Association’s documents
restriction was unenforceable as a matter of law," and that "the Isle's attempt to impose an absolute restriction without a balancing of the equities or hardships [was] unconscionable and therefore arbitrary, unreasonable and unenforceable."29 The Lateras' fourth affirmative defense alleged "[c]onstitutional violations, including the Lateras' First Amendment right to free access to information, which the Isle's access to cable did not satisfy."30 The Lateras also relied on a federal governmental policy to facilitate the use of satellite dishes.31 However, in rejecting these defenses, the trial court granted the Isle's motion for summary judgment without any opinion.32

B. Appellate Court's Decision

On appeal from the final summary judgment order, the appellate court addressed the issue of "whether a restriction against the installation of satellite dishes violates the First Amendment."33 The court rejected the First Amendment argument regarding the Lateras' rights to privacy and free access to information, reasoning that "the right to install a satellite dish has

specifically discussed the acceptability of satellite dishes upon conditional approval provided certain design restrictions were complied with. Appellants' Initial Brief at 4, Latera (No. 93-2952).

29. Id. at 5 (emphasis omitted).
30. The other constitutional violation alleged concerned the Lateras' right to privacy. Id. (emphasis omitted).
31. Id.
32. Id. A thirty-minute hearing was held on the Isle's motion for summary judgment. Both parties submitted memoranda and the court reviewed the file, in addition to listening to argument of both counsel. Appellants' Initial Brief at 5, Latera (No. 93-2952).
33. Latera, 655 So. 2d at 145. The court also addressed the issue of "whether a satellite dish is an 'antenna' within the meaning of the covenant." Id. at 144-45. The court rejected the Lateras' argument that a satellite is different than an antenna because a satellite only receives microwaves, whereas an antenna can receive or transmit electromagnetic waves. Id. at 145. Rather, the court ruled that there was no valid difference between a satellite dish and an antenna, and thus held that a satellite dish is an "antenna" within the meaning of the covenant. Id. (citing Breeling, 423 N.W.2d at 471 (holding restriction prohibiting antennas includes satellite dish)). The Breeling court also held that a homeowner's claim that enforcement of a restrictive covenant abridges the First Amendment right of freedom of speech is without merit. Breeling, 423 N.W.2d at 470. The Latera court also cited DeNina v. Bammel Forest Civic Club, Inc., 712 S.W.2d 195, 198 (Tex. Civ. App. 1986) and Gannels v. North Woodland Hills Community Ass'n, 563 S.W.2d 334, 338 (Tex. Civ. App. 1978). Latera, 655 So. 2d at 145.
not been recognized as a 'fundamental right.' Accordingly, the court stated:

[a]s the Supreme Court [of the United States] has consistently held, a policy which does not affect a fundamental right is accorded a “strong presumption of validity,” and such policy must be upheld against a constitutional challenge “if there is any reasonably conceivable state of facts that could provide a rational basis” for such a policy.

The appellate court also found no merit in the Lateras’ argument that the covenant was unreasonably or arbitrarily applied. Therefore, the appellate court affirmed the final summary judgment order which required the Lateras to take down their satellite dish and enjoined them from further violating the Isle’s restrictive covenant prohibiting satellite dishes.

IV. VALIDITY OF HOMEOWNER’S ASSOCIATION RESTRICTIONS

Florida has a large amount of community association development. Thus, Florida courts are continuously faced with dilemmas concerning the enforceability of homeowner’s association’s restrictions regulating the use of homeowner’s property. The interests of the association in maintaining the integrity of the community and the market value of homes within the community often conflict with the interests of the homeowners within the association. Usually the interests of the homeowners include the desire

34. Id. at 146 (citing Burson v. Freeman, 504 U.S. 191 (1992) (discussing the right to free speech); Zablocki v. Redhail, 434 U.S. 374 (1978) (discussing the right to marry); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (discussing the right to procreate)). The court in Latera distinguished Gerber v. Longboat Harbour North Condominium, 724 F. Supp. 884 (M.D. Fla. 1989) (involving a covenant abridging right to free speech), vacated in part, 757 F. Supp. 1339 (M.D. Fla. 1991) and Franklin v. White Egret Condominium, Inc., 358 So. 2d 1084 (Fla. 4th Dist. Ct. App. 1977) (involving covenant abridging right to marry and procreate on the basis that the rights involved in these cases have been regarded as “fundamental rights”)), aff’d, 379 So. 2d 346 (Fla. 1979).

35. Latera, 655 So. 2d at 146 (citing Heller v. Doe, 113 S. Ct. 2637, 2642 (1993)).

36. Id. at 145.

37. Id.

38. See HYATT, supra note 5, at 3.

to freely use and enjoy their property without any "unnecessary and burdensome interference" by the association.\textsuperscript{40}

A. \textit{Powers of the Homeowner's Association}

A simple decision to use one's property as he or she desires can become complicated when the property is within the confines of a community association.\textsuperscript{41} The community association is empowered by a recorded declaration of covenants, conditions, restrictions,\textsuperscript{42} and/or association bylaws\textsuperscript{43} to impose restrictions on the use and occupancy of property.\textsuperscript{44} Community association covenants or rules address typical public concerns such as the maintenance of common areas and facilities, common services, architectural standards, and appropriate maintenance by individual property owners.\textsuperscript{45} In addition to these concerns, homeowner's associations may also attempt to regulate private aspects of the lives of association members.\textsuperscript{46}

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item A community association is a generic term used to describe all forms of mandatory membership in a housing association. \textsc{Hyatt}, supra note 5, at 10. \textit{See also} FLA. STAT. § 468.31(1) (1993). The individual unit owners automatically become members subject to the association's procedures and powers upon purchase or conveyance of the property unit. \textsc{Hyatt}, \textit{supra} note 5, at 10. Common types of community associations include homeowner's associations and condominium associations. \textit{See id.} at 2, 13, 19. The major difference between condominium and homeowners' associations is the ownership of common property, or those parts of the community other than the individually owned homes, units, or lots. \textit{Id.} at 20. Under a condominium association, the common property is owned in common by all the unit owners, while under a homeowner's association the association has title to the common property and the property owners have membership interests in the common property. \textit{Id.} A second difference is that under Florida law, condominium associations are governed by different legislation than homeowner's associations. \textit{See Ch. 95-274, § 52-63, 1995 Fla. Sess. Law Serv. 1882, 1998-2005 (West)} (governing homeowner's associations). \textit{See also} FLA. STAT. §§ 718.101-718.1255 (1993) (governing condominium associations).

\item The declaration is the basic creating document in a community association. \textsc{Hyatt}, \textit{supra} note 5, at 356. This document may include plans for development and ownership, proposed operation methods, and rights and responsibilities of owners within the association. \textit{Id.} Terms of the declaration are recorded in the land records and, therefore, continue to apply to each subsequent property owner. \textit{Id.} at 357.

\item The association bylaws usually provide rules and procedures for operating and governing the association. \textit{Id.}

\item \textit{See id.} at 12.

\item \textit{Note, The Rule of Law in Residential Associations, 99 Harv. L. Rev. 472, 473 (1985).}

\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
At times, though, it is permissible for the association to regulate private aspects of the lives of association members in order for the association to fulfill its responsibilities. Associations have a broad range of responsibilities, which may include: overall management of the land and community; providing repair services and maintenance for streets, parks, lighting systems, and recreational facilities; and employing appropriate means of security. Also, the documents creating the association usually include standards for architecture and the environment, as well as a system to establish and enforce these standards, which reflect the aesthetics of the community. Therefore, when the association properly performs these duties, the association preserves the nature and character of the development. Consequently, homes within a community association are likely to be worth more. Many homeowners are enticed by the assurance and confidence of a homeowner’s association. However, homeowners often learn that the restrictions homeowner’s associations establish sometimes prove to be unreasonable or serve no useful purpose to association values.

B. Test for Reasonableness

When evaluating whether the interests of the homeowner’s association or the interests of the individual property owner should prevail, a starting point is the realization of the proposition set forth in Sterling Village Condominium, Inc. v. Breitenbach. The court noted that “[e]very 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.” Consistent with this principle, the Supreme Court of Florida has

---

47. See id. at 473-74.
48. HYATT, supra note 5, at 12-13.
49. Id.
50. Gunnels, 563 S.W.2d at 338.
51. Id.
52. See James, 5 Cal. Rptr. 2d at 582; White Egret Condominium, Inc. v. Franklin, 379 So. 2d 346, 352 (Fla. 1979); Harbour Watch Homeowners Ass’n v. Derderian, 618 So. 2d 315, 316 (Fla. 2d Dist. Ct. App. 1993); Kies v. Hollub, 450 So. 2d 251, 255 (Fla. 3d Dist. Ct. App. 1984); Hidden Harbour Estates, Inc. v. Basso, 393 So. 2d 637, 640 (Fla. 4th Dist. Ct. App. 1981); Voight v. Harbour Heights Improvement Ass’n, 218 So. 2d 803, 806 (Fla. 4th Dist. Ct. App. 1969).
53. 251 So. 2d 685, 688 (Fla. 4th Dist. Ct. App.), cert. denied, 254 So. 2d 789 (Fla. 1971).
54. Id. See also Basso, 393 So. 2d at 638-39. Although these cases involve condominium associations, they can be analogized with cases involving homeowner’s
acknowledged the need for reasonable restrictions relating to the use, occupancy, and transfer of units in order to protect the interests of other unit owners. Courts have often referred to these principles when they have ruled on the enforceability of various community association restrictions limiting the free use and enjoyment of property subject to the declarations of the associations.

Although the Florida courts have never ruled on the validity of a private covenant prohibiting the installation of a satellite dish, they have reviewed a broad range of covenants. These covenants include: age restrictions; restrictions against replacing screen enclosures with glass; restrictions against having pets; restrictions prohibiting horses, detached barns, or wire fences; restrictions against displaying “for sale” signs; restrictions against parking commercial vehicles in uncovered streets or driveways; restrictions against construction of tennis court lighting, as homeowner's associations and condominium associations are types of community associations. See HYATT, supra note 5, at 2. Likewise, both the Lateras and the Isle cited cases involving condominium associations in support of their arguments. Although condominium associations and homeowner's associations are governed by different statutes, the associations are treated similarly under Florida law. See supra note 41. However, homeowner's associations are not as heavily regulated as condominium associations. See supra text accompanying note 41.

55. Franklin, 379 So. 2d at 350 (finding condominium restriction prohibiting residency of children under twelve enforceable if not arbitrarily and selectively applied).
56. Basso, 393 So. 2d at 638-39.
57. See Franklin, 379 So. 2d at 351. The court asserted that age restrictions are enforceable as a “reasonable means to accomplish the lawful purpose of providing appropriate facilities for the differing housing needs and desires of the varying age groups.” Id. Furthermore, the court acknowledged that age restrictions can not be used arbitrarily or unreasonably. Id.; see also Constellation Condominium Ass’n v. Harrington, 467 So. 2d 378, 383 (Fla. 2d Dist. Ct. App. 1985) (upholding age restriction not unreasonably or selectively applied); Coquina Club, Inc. v. Mantz, 342 So. 2d 112, 114 (Fla. 2d Dist. Ct. App. 1977).
58. See, e.g., Breitenbach, 251 So. 2d at 688 (upholding requirement of association approval to substitute glass for screen because the alteration is material and substantial).
59. See, e.g., Wilshire Condominium Ass’n v. Kohlbrand, 368 So. 2d 629, 631 (Fla. 4th Dist. Ct. App. 1979) (holding that “a restriction against the replacement of dogs is reasonably consistent with principles that promote the health, happiness and peace of mind of unit owners living in close proximity”); see also Pines of Boca Barwood Condominium Ass’n v. Cavouti, 605 So. 2d 984, 985 (Fla. 4th Dist. Ct. App. 1992).
61. See, e.g., Derderian, 618 So. 2d at 316 (affirming that prohibition against “for sale” signs places unlawful burden on homeowner’s right to sell property).
62. See Cottrell v. Miskove, 605 So. 2d 572, 573 (Fla. 2d Dist. Ct. App. 1992). The court upheld the restriction, reasoning that “[f]ailure to enforce the restriction would thwart
skateboard ramp, or a swimming pool and deck; restrictions requiring association approval before selling a unit; restrictions against maintaining a shallow water well; and restrictions prohibiting the use of alcoholic beverages in the clubhouse and adjacent areas. In determining the validity of these various association use restrictions, the courts have split the cases into two categories. Cases involving the association declaration are classified as category one restrictions, and cases involving board of directors’ rules are classified as category two restrictions.

Courts view category one use restrictions with a strong presumption of validity, as they are considered “covenant[s] running with the land,” which homeowners knew of or should have been aware of at the time they purchased their homes. Other homeowners are entitled to rely on these restrictions, especially since these very same restrictions may have influenced their decision to purchase within the community. Therefore, the clear intention of all property owners of the subdivision . . . who have purchased property in reliance upon the restrictive covenants.” Id. at 574.

63. See Kies, 450 So. 2d at 256. The association covenants did not expressly prohibit a tennis court lighting system. Id. Moreover, there was no evidence showing the lighting system created a nuisance or was detrimental to community aesthetics. Id. The court further stated that “covenants imposed by a general plan, restraining the free use of real property, although generally valid and enforceable, are not favored in the law and will not be honored by the courts unless the restraint is within reasonable bounds.” Id. at 255.

64. See Lathan v. Hanover Woods Homeowners Ass’n, 547 So. 2d 319, 320 (Fla. 5th Dist. Ct. App. 1989). The court allowed the homeowner to maintain the skateboard ramp due to conflict regarding whether architectural review board approval was necessary before erecting the skateboard ramp, since vague restrictions are construed in favor of the property owner in order to promote the free use of land. Id. at 321.

65. See, e.g., Palm Point Property Owners’ Ass’n v. Pisarski, 608 So. 2d 537, 538 (Fla. 2d Dist. Ct. App. 1992) (finding the property owners’ association did not have standing to maintain an action to enforce the restrictive covenants), review granted, 618 So. 2d 1369 (Fla. 1993).

66. See, e.g., Lyons v. King, 397 So. 2d 964, 965 (Fla. 4th Dist. Ct. App. 1981). The court asserted that the association did not arbitrarily or unreasonably invoke its right of first refusal since the prospective purchasers of the unit intended to lease the unit instead of occupying it. Id. at 967-68.

67. Basso, 393 So. 2d at 640. The court held that the association “failed to demonstrate a reasonable relationship between its denial of the Bassos’ application [to maintain a well] and the objectives which the denial sought to achieve.” Id.

68. See, e.g., Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 182 (Fla. 4th Dist. Ct. App. 1975) (upholding the restriction on the use of alcoholic beverages noting widespread use of such restrictions in governmental and private sectors).

69. Basso, 393 So. 2d at 639; see also Cavouti, 605 So. 2d at 985.

70. See Basso, 393 So. 2d at 639; Cavouti, 605 So. 2d at 985.

71. Answer Brief of Appellee at 26, Latera (No. 93-2952).
restrictions placed by the associations in their recorded declarations of covenants, conditions, and restrictions will not be invalidated unless they are “clearly ambiguous,” applied arbitrarily, or violative of public policy or a fundamental constitutional right.

Category two restrictions, those imposed by the association board, must be “reasonably related to the promotion of the health, happiness and peace of mind of all the unit owners” in order to be valid and enforceable. Therefore, unlike declaration restrictions which may still be valid even if they seem somewhat unreasonable, unreasonable restrictions imposed by an association board will not be enforced by courts.

V. REASONABLENESS OF THE ISLE’S RESTRICTION PROHIBITING SATELLITE DISHES

A. The Lateras’ Arguments

Florida courts have never ruled that a homeowner’s association restriction absolutely prohibiting satellite dishes was unreasonably or arbitrarily applied. Nevertheless, the Lateras asserted that the absolute restriction against satellite dishes was arbitrary and unreasonable as applied to their property. Their argument is based on the fact that the satellite was not visible to other residents and the Isle was attempting to enforce the restriction without considering its underlying purpose or the interests of the parties. Therefore, the Lateras argued that the Isle’s attempt to enforce the satellite restriction was “unconscionable” as an “absolute rule.”

The purpose of the Isle’s restriction against satellites is to “maintain property value by insuring aesthetics.” The Lateras’ satellite dish complied with this purpose, as the Lateras made all feasible steps to insure that the satellite dish was “unobtrusive and harmonious with community

72. Harrington, 467 So. 2d at 381.
73. Basso, 393 So. 2d at 640; Cavouti, 605 So. 2d at 985.
74. Cavouti, 605 So. 2d at 985 (citing Basso, 393 So. 2d at 640). See also Norman, 309 So. 2d at 182, for the proposition that “the test is reasonableness. If a rule is reasonable the association can adopt it; if not, it cannot.” The court further stated that what is considered unreasonable will depend on the facts and circumstances of each particular case. Id.
75. See Basso, 393 So. 2d at 640.
76. Appellants’ Initial Brief at 20, Latera (No. 93-2952).
77. Id.
78. Id.
79. Id. at 21.
aesthetics."\textsuperscript{80} The Lateras satellite dish in no way conflicted with community aesthetics within the Isle at Mission Bay since it could not even be seen. Furthermore, the Lateras' satellite was disguised as patio furniture and was secluded within eight-foot hedges and a fence.\textsuperscript{81} The Isle, however, did not take this into account, nor did it evaluate whether the Lateras' alleged violation of the restrictive covenant contravened the purpose for imposing the restriction in the first place. Likewise, the Isle did not take into account the equities or hardships of the parties. Therefore, the Lateras maintained that the Isle's attempted enforcement of the restrictive covenant was unreasonable and arbitrary.\textsuperscript{82} As support for this argument, the Lateras relied on the case of \textit{Kies v. Hollub}\textsuperscript{83} for the proposition that "covenants... restraining the free use of real property... are not favored in the law and will not be honored by the courts unless the restraint is within reasonable bounds."\textsuperscript{84} If an otherwise valid restrictive covenant is being exercised in an unreasonable or arbitrary manner, it is unenforceable.\textsuperscript{85} Similarly, the Lateras maintained that even if the Isle's restriction against satellites may otherwise be valid, it should not have been enforced in their case because it was exercised in an unreasonable and arbitrary manner.\textsuperscript{86}

The Lateras also cited an analogous California case, \textit{Portola Hills Community Ass'n v. James},\textsuperscript{87} where the court held that a private restriction prohibiting a homeowner from installing a satellite dish was unreasonable.\textsuperscript{88} The court refused to enforce the restrictive covenant that completely banned satellite dishes within the community association\textsuperscript{89} because it was not visible to other association residents or to the public.\textsuperscript{90} The court balanced the intent of the homeowner's association as a whole against the

\begin{thebibliography}{99}
\bibitem{80} Id.
\bibitem{81} Appellants' Reply Brief at 15, \textit{Latera} (No. 93-2952).
\bibitem{82} Appellants' Initial Brief at 21, \textit{Latera} (No. 93-2952).
\bibitem{83} 450 So. 2d 251, 255 (Fla. 3d Dist. Ct. App. 1984).
\bibitem{84} Id. (citing Soranaka v. Cook, 343 So. 2d 51, 52 (Fla. 2d Dist. Ct. App. 1977)).
\bibitem{85} Appellants' Initial Brief at 21-22, \textit{Latera} (No. 93-2952).
\bibitem{86} Id. at 22.
\bibitem{87} 5 Cal. Rptr. 2d at 583.
\bibitem{88} Appellants' Initial Brief at 23, \textit{Latera} (No. 93-2952).
\bibitem{89} The covenant reads: "'13. Satellite Dish: Absolutely no satellite dish of any nature will be acceptable on the exterior of the units or lots anywhere within the Association. Cable television has been provided for this purpose.'" \textit{James}, 5 Cal. Rptr. 2d at 581 (emphasis omitted).
\bibitem{90} The ten-foot satellite dish was hidden in the back of the homeowner's two-story house, and surrounded by a high slope in the back, six-foot fences, and substantial shrubbery. \textit{Id.} at 582 n.2.
\end{thebibliography}
homeowner and concluded it was not reasonable to put an outright ban on satellite dishes. Additionally, the court made reference to a federal government policy to "foster the use of satellite dishes." The court based its decision on the fact that prohibiting a satellite that can not be seen does not promote "any legitimate goal of the association." The Latera court could have justifiably relied on this same reasoning to preclude enforcement of the Isle's restriction against satellite dishes.

The Lateras also relied on Voight v. Harbour Heights Improvement Ass'n, which involved covenants reserving the right of the association to approve or disapprove proposed construction plans for lots within the community. The Voight court concluded that the association's veto power could not be exercised unreasonably or arbitrarily. The final argument asserted by the Lateras was that equity may refuse to enforce restrictions where there has been a change in circumstances which renders enforcement unreasonable. Accordingly, the Lateras asserted that circumstances have changed regarding satellite dishes in that their size, appearance, and ability to be disguised have been altered substantially since the Isle's documents were drafted. The Lateras further argued that "[s]ince dishes merely collect signals and do not omit any interference, as an antenna might do, such wholesale restriction, in light of the continuing progress in technology is archaic and renders strict enforcement unreasonable."

91. The homeowner installed the satellite dish after seeking approval from the Architectural Control Committee, which was denied. Id. at 582.
92. Id. The court noted that restrictions regulating satellites for aesthetic reasons would be appropriate. Id. at 583.
93. James, 5 Cal. Rptr. 2d at 582 n.2.
94. Id. at 583.
95. 218 So. 2d at 805. The court stated:
   covenants restraining the free use of real property, although not favored, will nevertheless be enforced where the intention of the parties is clear and the restrictions and limitations are confined to a lawful purpose and within reasonable bounds, but such covenants are strictly construed in favor of the free and unrestricted use of real property.
96. Appellants' Reply Brief at 14, Latera (No. 93-2952).
97. Voight, 218 So. 2d at 805.
98. Appellants' Initial Brief at 24, Latera (No. 93-2952) (citing Edgewater Beach Hotel Corp. v. Bishop, 163 So. 214 (Fla. 1935)).
99. Id.
100. Id. at 24-25 (citing Noble v. Kisker, 183 So. 836 (Fla. 1938)).
B. *The Isle’s Arguments*

In arguing that the satellite restriction is enforceable, the Isle first asserted that property owners’ interests “must yield . . . where ownership is in common or cooperation with others,”\(^{101}\) and that courts regard restrictions within recorded declarations to be “of paramount importance in defining the rights and obligations of unit owners.”\(^{102}\) The Isle relied on *White Egret Condominium, Inc. v. Franklin*,\(^{103}\) a case wherein the Supreme Court of Florida acknowledged the necessity of reasonable use restrictions within a condominium association.\(^{104}\) The Isle also emphasized the strong presumption of validity courts give to restrictions recorded in association declarations.\(^{105}\) Covenants recorded in association declarations are strongly presumed valid mainly because other homeowners justifiably rely on these restrictions.\(^{106}\) Presumably, a homeowner knows of these restrictions before purchasing property within the association and can decide at that time whether they want to be subject to them.\(^{107}\) Thus, the proper time to object to a restriction is before making the decision to buy within a community, rather than after.\(^{108}\)

The Association maintained that other homeowners in the association chose “to live in a community that would not be cluttered by unsightly or aesthetical displeasing ‘outdoor television antenna systems . . . ’.”\(^{109}\)

\(^{101}\) Answer Brief of Appellee at 24, *Latera v. Isle* at Mission Bay Homeowners Ass’n: The Homeowner’s F

\(^{102}\) Id. (citing Breitenbach, 251 So. 2d at 685).

\(^{103}\) Id. (citing Pepe v. Whispering Sands Condominium Ass’n, 351 So. 2d 755, 757-58 (Fla. 2d Dist. Ct. App. 1977)). The court in *Pepe* stated:

A declaration . . . is more than a mere contract spelling out mutual rights and obligations of the parties thereto—it assumes some of the attributes of a covenant running with the land, circumscribing the extent and limits of the enjoyment and use of real property. Stated otherwise, it spells out the true extent of the purchased, and thus granted, use interest therein. Absent consent, or an amendment of the declaration . . . as may be provided for in such declaration, . . . this enjoyment and use cannot be impaired or diminished. *Pepe*, 351 So. 2d at 757-58.

\(^{104}\) The court held that “a condominium restriction or limitation does not inherently violate a fundamental right and may be enforced if it serves a legitimate purpose and is reasonably applied.” *Id.* at 350.

\(^{105}\) Answer Brief of Appellee at 25-26, *Latera* (No. 93-2952).

\(^{106}\) *Id.* at 26.

\(^{107}\) *Id.*

\(^{108}\) *Id.*

\(^{109}\) *Id.* at 29. The Isle also claimed the homeowners should be protected from hazards that could occur should “outdoor television antenna systems or facilities’ break loose in a
Consistent with the principle that the interests of the homeowner’s association in the aesthetics of its community outweighed the interests of the individual property owners,\(^1\) the Association relied on *Woodbridge Homeowners Ass’n, Inc. v. Desmond.*\(^1\) In *Woodbridge,* the court stated that a satellite dish disguised as patio furniture was still a satellite dish and thus subject to the association’s declaration that prohibited satellite dishes.\(^12\)

Finally, the Isle maintained that if it allowed the Lateras to maintain their satellite dish in violation of the restrictions, then the Isle could not enforce this restriction against other homeowners under the “doctrine of selective enforcement.”\(^13\) Accordingly, the Isle argued the result would be the association “mushroom[ing]” into “a ‘satellite dish’ farm,” which would not be fair to the other homeowners who purchased their homes relying upon the Isle’s declarations.\(^14\) Overall, the Isle’s position con-
concerned serving the interests of the homeowners who purchased homes in the Isle in reliance on the declaration restrictions.115

VI. CONSTITUTIONALITY OF THE ISLE’S RESTRICTION PROHIBITING SATELLITE DISHES

A. Fundamental Right

The Lateras’ local cable company only carries a limited number of satellite services.116 Without access to a satellite dish, the Lateras will not be able to receive the unique programming available only through satellite reception.117 The Lateras have a First Amendment right to free access to information.118 Therefore, by denying the Lateras the opportunity to receive unique satellite programs, the Isle abridged the Lateras’ First Amendment rights.

The Due Process Clause of the Fourteenth Amendment protects First Amendment freedoms of press and speech from being abridged by state action.119 The Supreme Court of California in Weaver v. Jordan,120 stated that the First Amendment right of freedom of speech and press includes the right to receive information.121 In Weaver, the Supreme Court of California concluded that the “Free Television Act,” which banned subscription television when homeviewers were charged, violated the constitutional guarantees of free speech and press.122 The court emphasized that “the rights of free speech and press are worthless without an effective means of expression,” and that the First Amendment protects “amusement and entertainment as well as the exposition of ideas.”123 Most importantly, the Weaver court recognized that “[t]he right of freedom

115. Id. at 30.
116. Residents of the Isle at Mission Bay have access to cable television through West Boca Cablevision. The cable system, however, does not offer programs available on satellite, including “C-Span II (complete coverage of U.S. Senate proceedings and public affairs programming not duplicated on C-Span I), SCOLA (international programming from foreign television broadcasters) and NASA Select (complete coverage of all NASA launch and space flight activities).” Brief of Amicus Curiae at 9 n.21, Latera (No. 93-2952).
117. Id.
118. See U.S. Const. amend. I.
121. Id. at 294.
122. Id. at 299.
123. Id. at 294; see also Brief of Amicus Curiae at 11, Latera, (No. 93-2952).
of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, [and] the right to read . . . ."\textsuperscript{124}

Subsequently in \textit{Red Lion Broadcasting Co. v. F.C.C.},\textsuperscript{125} the Supreme Court of the United States stated "[i]t is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences . . . ."\textsuperscript{126} There are also many other Supreme Court cases recognizing or confirming the importance of the basic First Amendment right to receive information.\textsuperscript{127} Likewise, federal courts in Florida have recognized that the First Amendment encompasses the right to receive information.\textsuperscript{128} However, in \textit{Decker v. City of Plantation},\textsuperscript{129} the court noted that the "First Amendment right to receive information via a satellite dish is a relative right which may be outweighed by important governmental interests, such as the protection of community aesthetics."\textsuperscript{130}

Additionally, in \textit{Abbott v. City of Cape Canaveral},\textsuperscript{131} the United States District Court for the Middle District of Florida expressed the view that \textit{Red Lion} did not guarantee a person the right to receive access to the maximum amount of satellite programming available.\textsuperscript{132} Abbott claimed that a local Cape Canaveral ordinance regulating placement of satellite dishes violated his First Amendment rights since the placement of his satellite affected the amount of satellite programming he could receive.\textsuperscript{133}

\textsuperscript{124} Weaver, 411 P.2d at 294 (emphasis omitted) (quoting Griswold, 381 U.S. at 482).
\textsuperscript{125} 395 U.S. 367 (1969).
\textsuperscript{126} \textit{Id.} at 390.
\textsuperscript{127} See Brief of Amicus Curiae at 12, \textit{Latera} (No. 93-2952). The following Supreme Court cases were cited in the brief: Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (invalidating ordinance governing zoning restrictions on live entertainment); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978); \textit{Red Lion Broadcasting Co.}, 395 U.S. at 367 (challenging constitutional basis of the FCC Fairness doctrine); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (stating "the Constitution protects the right to receive information and ideas"); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (stating "the right of freedom of speech and press . . . necessarily protects the right to receive it").
\textsuperscript{128} See \textit{Abbott v. City of Cape Canaveral}, 840 F. Supp. 880, 886 (M.D. Fla.) (stating the "First Amendment may protect the right to receive suitable access to television broadcasts"), \textit{aff'd}, 41 F.3d 669 (11th Cir. 1994); \textit{Decker v. City of Plantation}, 706 F. Supp. 851, 854 (S.D. Fla. 1989).
\textsuperscript{129} 706 F. Supp. at 854.
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} 840 F. Supp. at 880.
\textsuperscript{132} \textit{Id.} at 886. The court reasoned that "[b]ecause the right to receive satellite television programming of one's choice is not a fundamental right, the proper standard of review is whether the ordinance is reasonably related to a legitimate state interest." \textit{Id.} (citing Johnson v. City of Pleasanton, 982 F.2d 350, 353 (9th Cir. 1992)).
\textsuperscript{133} \textit{Id.} at 882.
The court concluded that the ordinance was a “content-neutral” ordinance “regulating the time, place, and manner of expression.”134 Courts will uphold a content-neutral ordinance against First Amendment claims if it “furthers a substantial governmental interest and does not unreasonably limit alternative avenues of communication.”135 Accordingly, the court upheld the ordinance because it served a substantial government interest by protecting the health, safety, and aesthetic values of the community.136 Furthermore, Abbott failed to show a limitation on his alternative avenues of communication.137

Abbott is distinguishable from Latera because Abbott involved a city ordinance regulating the placement of a satellite dish in Abbott’s yard.138 Placement of a satellite dish can hinder the number of satellite signals that can be received.139 However, in Latera, the homeowner’s association completely banned the placement of satellite dishes anywhere on the homeowner’s property.140 Consequently, the Lateras were not confronted with the situation where they missed out on a few satellite programs because an ordinance required their satellite dish to be inconveniently placed.141 Rather, the homeowner’s association restriction prevented the Lateras from receiving access to all satellite programs with the exception of the few services they could obtain through their cable system.142 Therefore, the homeowner’s association’s restriction prohibiting satellites unreasonably limited the Lateras’ alternative avenues of communication.

134. Id. at 886.
135. See Johnson, 982 F.2d at 353.
136. Abbott, 840 F. Supp. at 886; see also Johnson, 982 F.2d at 353; Brief of Amicus Curiae at 13, Latera (No. 93-2952) (emphasis omitted) (noting “a rule or regulation restricting access to protected communication will never be sustained unless the regulation permits a reasonable alternative means of access to the same communication”).
138. Id.; see also Johnson, 982 F.2d at 354. The Johnson court found that a city ordinance setting height, screening, and setback requirements for satellite-receive-only antennas is a valid time, place, and manner regulation. Id. Furthermore, the Johnson court found that the city ordinance serves to prevent “installation of satellite antennas that unreasonably interfere with other individuals’ enjoyment of their land and which pose issues of public safety.” Id.
140. See Brief of Amicus Curiae at 10, Latera (No. 93-2952).
141. Latera, 655 So. 2d at 145.
142. See Johnson, 982 F.2d at 352; Decker, 706 F. Supp. at 853; Kessler v. Town of Niskayuna, 774 F. Supp. 711, 712 (N.D.N.Y. 1991); Keever, 595 So. 2d at 1020; Brophy v. Town of Castine, 534 A.2d 663, 664 (Me. 1987).
143. Latera, 655 So. 2d at 145.
Furthermore, the Isle’s restriction against satellites may serve to protect the welfare and aesthetic values of the Isle community.\textsuperscript{144} But as previously emphasized, the Lateras’ satellite dish did not harm community aesthetic values because it was not visible to the public. Therefore, an effective argument could be made that the Isle’s restriction is not a reasonable time, place, and manner restriction,\textsuperscript{145} and the Isle is not justified in depriving the Lateras of information they have a First Amendment right to receive.

\textbf{B. State Action}

There are many cases involving satellite dishes which concern the federal law preemption\textsuperscript{146} of local ordinances which regulate satellite size and/or placement.\textsuperscript{147} Homeowners have alleged that zoning ordinances

\begin{itemize}
  \item \textsuperscript{144} Appellants’ Initial Brief at 21, \textit{Latera} (No. 93-2952).
  \item \textsuperscript{145} A time, place, and manner regulation will not be sustained unless there is reasonable alternative access to the same communication. Brief of Amicus Curiae at 13, \textit{Latera} (No. 93-2952) (citing Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) (stating “a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate”)). \textit{See also} Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 518 n.24 (1981); Consolidated Edison v. Public Serv. Comm’n, 447 U.S. 530, 535 (1980); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 97-98 (1977) (striking ordinance prohibiting “for sale” signs as alternative communication channels to list residence were likely to be more expensive and less effective); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (invalidating statute prohibiting the advertisement of prices for prescription drugs and rejecting in the process an argument that consumers could acquire the same information by simply making inquiries to pharmacists); \textit{Martin}, 319 U.S. at 146 (invalidating regulations prohibiting door to door distribution of circulars and handbills and rejecting arguments that communication is still possible); Schneider v. State, 308 U.S. 147 (1939).
  \item \textsuperscript{146} According to the F.C.C. regulation:
    \begin{itemize}
      \item State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations:
        \begin{itemize}
          \item Have a reasonable and clearly defined health, safety or aesthetic objective; and
          \item Do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment.
        \end{itemize}
    \end{itemize}
  \item \textsuperscript{147} \textit{See Loschiavo v. City of Dearborn}, 33 F.3d 548, 553 (6th Cir. 1994), \textit{cert. denied}, 115 S. Ct. 1099 (1995); \textit{Johnson}, 982 F.2d at 350; \textit{Abbott}, 840 F. Supp. at 880; \textit{Decker}, 706 F. Supp at 851. The \textit{Loschiavo} court concluded that homeowners “are entitled to bring a section 1983 action against the City of Dearborn to enforce their right to install a receive-
violate their First Amendment right to receive information, since the placement of a satellite can impact the amount of satellite signals that can be received. The state action issue does not arise in these cases, however, since the zoning ordinances in question constitute the requisite state action needed to assert a constitutional violation.

The state action issue does, however, arise in cases where private individuals assert that a homeowner’s association has violated their constitutional rights. For example, in Ross v. Hatfield, the court found a lack of state action where a covenant banning television antennas outside residences had not been judicially enforced, and no suit had ever been initiated to enforce the covenant. The Ross court acknowledged the uncertainty regarding the applicability of Shelley v. Kraemer to non-racial discriminatory covenants, but stated that Shelley required “actual judicial enforcement of the covenant before state action may be found.”

In Florida, the supreme court in Harris v. Sunset Islands Property Owners, Inc., opined that:

only satellite antenna for private viewing of satellite programming.” Loschiavo, 33 F.3d at 553. See also Kessler, 774 F. Supp. at 718, which granted plaintiff’s summary judgment motion because the Town of Niskayuna ordinance “operates to differentiate between TVROs [satellite television receive-only dish antennas] and other antenna facilities yet fails to state a legitimate objective for the distinction.” Therefore, the court found the ordinance was preempted by federal legislation. Id.; see, e.g., Carino v. Town of Deerfield, 750 F. Supp. 1156, 1164 (N.D.N.Y. 1990) (dismissing complaint because the state supreme court expressly considered and rejected the preemption argument), aff’d, 940 F.2d 649 (2d Cir. 1991); Alsar Tech. v. Zoning Board of Adjustment, 563 A.2d 83, 84 (N.J. Super. Ct. Law Div. 1989) (holding the Nutley ordinance is discriminatory and preempted by F.C.C. regulation due to unreasonable burden on satellite reception).


149. See Ross, 640 F. Supp. at 712.
150. Id. at 708.
151. Id. at 710.
152. 334 U.S. 1, 20 (1948) (holding that judicial enforcement of restrictive covenants discriminating against persons of different race from ownership of property denied petitioners equal protection).
154. 116 So. 2d 622 (1959) (involving covenants restricting sale and occupancy of land).
[t]he rule of Shelley v. Kraemer . . . has become so thoroughly grounded in the decisions of the state courts around the country as well as in the courts of the federal system that only a total blindness to the compelling and controlling aspects of the decision would enable us to avoid it.\footnote{155}

Accordingly, the Supreme Court of Florida acknowledged that judicial enforcement of a covenant in violation of the rights of property owners constitutes the requisite state action necessary for the property owner to assert a constitutional violation.\footnote{156}

Finally, in Brock v. Watergate Mobile Home Park Ass'n,\footnote{157} the Fourth District Court of Appeal discussed two tests used to determine whether conduct of private persons or groups constitutes state action subjecting them to constitutional limitations: the “public function test,” and the “state involvement test.”\footnote{158} The court stated that “[u]nder the public function test, state action will be found where the functions of a private individual or group are so impregnated with a governmental character as to appear municipal in nature.”\footnote{159} Additionally, the court stated that “[u]nder 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 State itself.”\footnote{160} Applying these tests, the court concluded that the homeowner's association did not act in such a public manner that its actions could be considered state action.\footnote{161}

In the instant case, the Lateras claimed that the Isle at Mission Bay Homeowner's Association deprived them of their constitutional right to receive information.\footnote{162} Since the Isle is not a governmental entity and is not acting on behalf of the government, there was an issue as to whether there was state action.\footnote{163} Because the Constitution limits state action that abridges First Amendment rights through incorporation of the Fourteenth

\footnote{155. Id. at 625.}
\footnote{156. See id. at 624 (recognizing that a state can only act through its executive, legislative, or judicial branches as expressed in Shelley).}
\footnote{157. 502 So. 2d 1380 (Fla. 4th Dist. Ct. App. 1987).}
\footnote{158. Id. at 1381.}
\footnote{159. Id.}
\footnote{160. Id.}
\footnote{161. Id.}
\footnote{162. Latera, 655 So. 2d at 146.}
\footnote{163. See Appellants' Initial Brief at 25, Latera (No. 93-2952); Answer Brief of Appellee at 31-35, Latera (No. 93-2952); Appellants' Reply Brief at 17, Latera (No. 93-2952).}
Amendment, a court cannot exercise jurisdiction over a claim alleging First Amendment infringement, unless it finds sufficient state action.164

1. The Lateras’ Arguments

The Lateras maintained that judicial enforcement of the Isle’s private restrictive covenant constituted state action and therefore, they were deprived of their constitutionally protected right to receive information.165 They relied on the well known principle established in Shelley that “acts of a state court enforcement of a private restrictive covenant constituted ‘state action.’”166 The Lateras noted that the Shelley opinion did not limit its findings to private restrictive covenants that are discriminatory in nature.167 Accordingly, the Lateras cited cases where courts applied the principle established in Shelley to other constitutionally protected activities,168 including the First Amendment right to free speech,169 and the First Amendment right to display an American flag.170

In Gerber v. Longboat Harbour North Condominium, the court found that a condo regulation prohibiting display of the American flag except on designated national holidays infringed upon the unit owner’s First Amendment rights.171 The court refused to enforce the covenant, reasoning that judicial enforcement would constitute sufficient state action depriving the owner of his constitutional rights within the meaning of the Civil Rights Act.172 The Isle sought judicial enforcement of a private restrictive covenant prohibiting satellite dishes.173 Therefore, according to the reasoning in Gerber, and consistent with Shelley, there was sufficient state

164. See Ross, 640 F. Supp. at 710.
165. Appellants’ Initial Brief at 25, Latera (No. 93-2952).
166. Id. (citing Shelley, 334 U.S. at 20).
167. Id.
168. Appellants’ Initial Brief at 25, Latera (No. 93-2952).
171. Id. at 887.
172. Id. Section 1983 of the Civil Rights Act provides:
   Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .
173. Answer Brief of Appellee at 7, Latera (No. 93-2952).
action in *Latera* for the homeowner to successfully allege a constitutional claim.

2. The Isle’s Arguments

In defense to the Lateras’ claim of a constitutional violation, the Isle maintained that there could be no violation of the Lateras’ constitutional rights without state action.\(^\text{174}\) The Isle argued there was no state action, stating that “it is now generally accepted that neither the recording of a non-discriminatory restrictive covenant in the Public Records nor its enforcement through the courts of this state constitutes sufficient ‘state action’ to render parties purely private contracts relating to the ownership of real property unconstitutional.”\(^\text{175}\) The Isle also reasoned that courts should enforce the private non-discriminatory covenants because the Lateras could have chosen not to purchase property within the association if they did not approve of the restriction against satellites.\(^\text{176}\) The Isle further asserted that the availability of a forum to resolve private conflicts does not constitute state action.\(^\text{177}\) Accordingly, the Isle maintained that in order to constitute state action, the court must use its power to “compel or legitimize” private actions, which is the equivalent of state encouragement.\(^\text{178}\)

\(^174\). *Id.* at 34.

\(^175\). Answer Brief of Appellee at 31, *Latera* (No. 93-2952) (citation omitted); *see also,* Quail Creek Property Owners Ass’n v. Hunter, 538 So. 2d 1288, 1289 (Fla. 2d Dist. Ct. App. 1989); *Rocek v. Markowitz*, 492 So. 2d 460 (Fla. 5th Dist. Ct. App. 1986); *Schreiner v. McKenzie* Tank Lines, 408 So. 2d 711 (Fla. 1st Dist. Ct. App. 1982), *decision approved,* 432 So. 2d 567 (Fla. 1983). *Contra* Appellants’ Reply Brief at 17, *Latera,* (No. 93-2952) (citing *Quail Creek*, 538 So. 2d at 1289). In *Quail Creek* the homeowners sought injunctive and declaratory relief from enforcement of a covenant prohibiting display of a “‘for sale’ sign. *Quail Creek*, 538 So. 2d at 1289. The homeowners never established that they attempted to display the sign, or that they were prevented from doing so by the association. *Id.* The court held 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.” *Id.* The Appellants’ Reply Brief quoted the above passage, placing emphasis on the word “possible.” Appellants’ Reply Brief at 17, *Latera* (No. 93-2952).

\(^176\). Answer Brief of Appellee at 32, *Latera* (No. 93-2952) (citing *Rocek*, 492 So. 2d at 461; *Franklin*, 379 So. 2d at 346).

\(^177\). *Id.* (citing *Schreiner*, 408 So. 2d at 718; *Girard v. 94th Street & 5th Ave. Corp.*, 396 F. Supp. 450 (S.D.N.Y. 1975), *order aff’d,* 530 F.2d 66 (2d Cir.), *and cert. denied,* 425 U.S. 974 (1976)).

\(^178\). *Id.* at 33 (citing *Schreiner*, 408 So. 2d at 720).
Additionally, the Isle argued that under Shelley judicial enforcement of private covenants may involve state action in some instances, but the applicability of Shelley remains undeveloped. According to the Isle, the court in Schreiner v. McKenzie Tank Lines rejected the proposition in Shelley which mandated that there was state action whenever a state court becomes involved or refuses to get involved in a private matter. Finally, the Isle argued that to recognize Shelley as creating state action whenever there is judicial involvement in a private matter would “obliterate the line between private and state actions.” The Isle further contended because its recorded declaration prohibiting satellites was not discriminatory, there was no state action even if judicially enforced. Consequently, the Isle maintained that there can be no constitutional violation of the Lateras’ rights.

VII. CONCLUSION

The Fourth District Court of Appeal failed to recognize that the right to receive information via a satellite dish is a constitutionally protected right. Further, the court failed to recognize that a restriction, premised on aesthetic reasons, prohibiting a satellite dish which is not visible is unreasonable and arbitrary. Because the court failed to make these findings, its decision was incorrect.

The Supreme Court of the United States has acknowledged that the right to receive information, including amusement and entertainment, is guaranteed by the First Amendment. The Supreme Court of the United States has also acknowledged that state action exists when courts enforce private covenants. Further, it is federal government policy to promote

179. Id. at 32 (citing Schreiner, 408 So. 2d at 719; Edwards v. Habib, 397 F. 2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969)).
180. 408 So. 2d at 711.
181. Answer Brief of Appellee at 33, Latera (No. 93-2952). In Schreiner, the court found there was no state action where an employee sought state court resolution of a private conflict involving constitutional violations against his employer. Schreiner, 408 So. 2d at 720.
182. Answer Brief of Appellee at 33, Latera (No. 93-2952).
183. Id. at 34.
184. Id.
185. Latera, 655 So. 2d at 146.
186. Id.
187. See Weaver, 411 P.2d at 294.
188. Shelley, 334 U.S. at 20.
new technology, including the use of satellite dishes.\textsuperscript{189} The satellite industry is a rapidly expanding industry which offers unique programming services that exceed the capabilities of ordinary cable systems.\textsuperscript{190} Therefore, satellite technology should not be hindered by the restrictions of homeowner’s associations prohibiting the erection and maintenance of satellite dishes. Accordingly, it was error for the \textit{Latera} court to enforce the Isle’s private restrictive covenant, which is in violation of the Lateras’ First Amendment rights.

The interests of homeowner’s associations in community aesthetics may sometimes justifiably outweigh the interests of individual property owners. But, notwithstanding the promotion of the homeowner’s associations’ goals, restrictive covenants should not infringe upon rights guaranteed by the United States Constitution. Homeowners should not have to give up every one of their freedoms simply by their decision to reside in a community regulated by a homeowner’s association. The aesthetics of the community can still be preserved, despite the installation of a satellite dish, because of the new technology rendering satellites smaller and capable of being disguised and sometimes even totally concealed.

Florida courts have consistently held that a private restrictive covenant will not be enforced if an association applies it unreasonably or arbitrarily.\textsuperscript{191} Since satellite dishes have developed into more aesthetically acceptable structures, these new satellite features should be considered in determining the reasonableness of an association’s restriction prohibiting them. The \textit{Latera} court could have justifiably relied on the reasoning that the prohibition of a satellite dish which cannot be seen does not promote any goal of the association. Accordingly, the \textit{Latera} court should have evaluated whether prohibiting a disguised satellite dish was unreasonable or arbitrary. The court was in error to find that such an argument was without merit.

The holding in the \textit{Latera} case is likely to have an adverse impact on future cases involving restrictive covenants imposed by homeowner’s associations, at least from the standpoint of a homeowner within a community association. The tests used by Florida courts in the past to determine the validity of these restrictions were formulated for a purpose: to limit the unreasonable exercise of power by associations.\textsuperscript{192} Unfortunately, the holding in \textit{Latera} does not coincide with this purpose. Rather,

\begin{itemize}
\item \textsuperscript{189} 47 U.S.C. § 157(a) (1988). See supra note 8 and accompanying text.
\item \textsuperscript{190} See supra notes 6-7 and accompanying text.
\item \textsuperscript{191} See \textit{Basso}, 393 So.2d at 640; \textit{Cavouti}, 605 So. 2d at 985.
\item \textsuperscript{192} See \textit{Basso}, 393 So. 2d at 639.
\end{itemize}
the *Latera* decision can be used in subsequent cases by homeowner’s associations as authority in support of the position that First Amendment rights of homeowners are not violated if the association precludes them from receiving information via a satellite dish. Further, according to *Latera*, courts will be justified in enforcing restrictive covenants without first evaluating the equities and hardships of the individual homeowner against the interests of the homeowner’s association, to determine whether a restrictive covenant was arbitrarily applied or is so unreasonable as to render it invalid. As a result, homeowners who choose to live within the confines of a community association which prohibits satellite dishes will have to sacrifice their First Amendment right to receive information, regardless of whether the restriction actually preserves the aesthetics of the community.

*Zelica Marie Grieve*