SIGNS OF THE TIMES

By Pamela Babcock | Illustration by Robert Neubecker

Community associations are facing a perfect storm for free-speech battles as the presidential election nears. Ensure your sign restrictions are reasonable and uniformly enforced.

THE SIGNS THAT RALLY support for a favorite candidate or cause typically begin to dot yards a few months ahead of an election. They may grow like weeds without careful attention.

The issue can be contentious in any election season, but the upcoming Nov. 3 presidential vote and a host of issues facing the country are creating the perfect storm for heated exchanges and free-speech battles.

The U.S has been reeling from the COVID-19 pandemic, record unemployment, and protests over the police killing of a black man in Minneapolis in May. Months ahead of the election, news and social media are already filled with headline-grabbing stories of neighbors refusing to remove their Trump 2020 or Black Lives Matter signs and boards claiming the owners are running afoul of community restrictions.

It's a sign of the times, so to speak. And the issue will only grow as the election nears.

"I have little doubt that we will witness a spate of community association disputes regarding yard signage this year as we approach Election Day," says James A. Gustino, a Winter Garden, Fla., attorney. "Emotions have been inflamed beyond anything I have personally experienced in 36 years of practicing law, and boards should be prepared to address the issue with professionalism and tact."

To head off acrimony between residents and the board, the risk of being plastered on the local news, and the potential for costly litigation, it pays to ensure you've developed reasonable sign restrictions and that they are enforced uniformly. Some experts recommend involving residents in discussions when rules about signs are formulated or revised.

THE FREE SPEECH ARGUMENT

One of the first responses many residents make when told a sign isn't allowed is to argue that it's a violation of their First Amendment rights to freedom of speech, even if the sign goes against the association's rules. But that's often not the case. Community associations have significant discretion because they aren't government entities and, as such, aren't bound by the same constitutional restrictions.

Since a community association is private and not an official form of "government," federal First Amendment freedom of speech protections typically don't apply to private association restrictions or covenants that may limit such rights, according to attorney Edward Hoffman Jr., cofounder and managing partner of Barrow Hoffman in Pennsylvania.

But what about the states? How do they apply freedom of speech protections to community associations?

Most do not consider a community association a "state actor" and will not interfere or overturn private association restrictions or covenants that may limit speech. "There are states that have actually found in favor of homeowners in matters concerning freedom of speech in a community association," Hoffman says. (Read Hoffman's article, "Stars and Stripes and Sleepless Nights," on p. 21 for advice on flag displays.)

In recent years, several states have enacted legislation granting greater rights to residents to display political signs. Gustino recommends checking the state's highest court rulings and specific "freedom of speech" verbiage in the state's constitution.

Although most federal and state courts don't protect political signs from association enforcement, the New Jersey Supreme Court issued a pair of decisions in 2012 and 2014 protecting political speech, and those opinions could influence other state courts considering similar legal issues.

DECIDING ON RESTRICTIONS

Boards often restrict signs because clutter detracts from a community's appearance or they could become safety hazards, perhaps by blocking the view of traffic.

When it comes to developing sign rules, associations generally have complete control over common elements but should follow any state statutes and the language of the governing documents regarding private property, says James H. Slaughter, a partner with Law Firm Carolinas in Greensboro, N.C., and a fellow and past president of CAI's College of Community Association Lawyers (CCAL).

For example, North Carolina regulates the display of political signs related to elections and prohibits an association from restricting them based on various conditions, including the size of the sign, how many days before an election it can be put up, and how many days after an election it can remain before being removed.

"Beyond that, we generally tell associations they need to enforce the language of their governing documents or change the language," Slaughter says.

He adds that association documents typically fall into one of three categories: no regulation of signs, other than what a state or local government body might require; certain signs allowed (such as

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security, for sale, for rent, or construction signs); or a prohibition on all signs on individual lots.

Most boards don't want to be in the business of "approving" language or sign content. "That almost always leads to inconsistency and capriciousness based on the particular board at the time," Slaughter says. He notes that one community's documents banned all signs but spelled out it would make an exception for "Thank You, Jesus" signs while prohibiting those "for other religious beliefs."

Because political views can become quite charged and potentially lead to costly litigation or unnecessary friction at the least, Gustino recommends clients permit political signs but enact reasonable time, place, and manner restrictions, such as they can be put up only 45 days prior to an election, must be removed three days after votes are cast, can't contain profanity, and must be limited in number so they don't create a sight obstruction or other safety concern. He advocates involving community members when crafting restrictions and posting approved rules prominently via email blasts, special notices on the community website, and on entry signs to encourage compliance.

To avoid potential problems, Valencia Lakes Homeowners Association, an active adult community in Wimauma, Fla., bans all signs. "That allows us to avoid the issue of being discriminatory in what types of signs to allow," explains Randy King, a director on the board. "Our attorney told us a total ban on all signage was more likely to be upheld and, as that is what is in our governing documents, we believe our position is defendable."

ENFORCEMENT LANDMINES

Associations often get tripped up when they don't enforce restrictions uniformly or engage in selective enforcement, such as allowing a sign supporting one side of an issue or candidate while disallowing a sign advocating the opposing view.

It also can be a slippery slope when an association that typically bans signs turns a blind eye—even when the signs convey positive messages such as "Congratulations, Class of 2020 Graduate" or "Thank You First Responders." It becomes much more difficult to stop other signs that are general or contain political statements, says Slaughter.

"We've had associations that have language prohibiting all signs, but then the board feels this is a 'good sign' that warrants an exception," Slaughter notes. "If documents don't permit an exception, you are then choosing what language is good and what is bad, which almost always leads to problems as different owners will have different opinions."

Boards that decide to enforce rules they've been lax about in the past should explain to residents the reasoning, along with its legal authority to do so "well in advance of the effective date of enforcement," Gustino says.

Remind residents of sign rules prior to election season or when they become effective. Boards considering adopting new sign rules or amending existing ones should invite feedback by publishing a draft of proposed changes and holding at least one meeting to gather community feedback and answer questions.

Fortunately, some communities seem to have avoided problems with political signs. Harbour Landings Estates Homeowners Association, a gated community with 59 lots in Cortez, Fla., bans all signs except for "For Sale" and alarm signs. Both are limited to one sign per lot, with size and height restrictions. Mike Bishop, secretary and chair of the community's architectural review board, says violators typically have been painters or repair companies doing work in the community.

LEGISLATING SIGNS

The Arizona state legislature is considering a bill (SB 1412) that would further limit a community association's power over residents' political activity and outlines actions that owners can take to voice their views in opposition to community policies. The state, like a few others, currently prohibits associations from banning political signs for federal, state, and local elections but sets limits on how long they can be up, when they need to be taken down, and the like.

SB 1412 expands the definition of political activity and would allow owners to put up political signs for community association issues and elections and stop associations from banning political meetings and events from being held in common areas. The statute, tabled when the recent session was cut short due to the COVID-19 pandemic, is expected to be reintroduced in 2021.

CAI's Arizona Legislative Action Committee (LAC) opposes the bill, saying homeowners who object to community policies "would be allowed to place signs of opposition in their front lawns, go door-to-door to discuss concerns with neighbors, circulate petitions for actions in the community, and require community associations to allow political fundraisers in common areas." The LAC contends that SB 1412 "takes away the association's ability to self-govern" and would create problems for neighbors who buy homes that "want the peaceful enjoyment of a community where conflict is not promoted, and civility is encouraged."

Brian W. Morgan, managing partner with Maxwell & Morgan in Mesa, Ariz., co-chair of the Arizona LAC, and a fellow in CAI's College of Community Association Lawyers (CCAL), says he is not opposed to signs per se, but maintains that communities should be allowed to decide "what's best for their particular community instead of the government getting involved and mandating what's best, especially on a local level."—P.B.

He adds, however, that a new homeowner once put up a "No Trespassing" sign. "It was the nicest 'No Trespassing' sign I have ever seen—really, a brass plaque," Bishop recalls. When made aware of the violation, the owner removed the sign without complaint.

DRIVING NEW RIFTS

It's no surprise that in these turbulent times, "Black Lives Matter," "Hate Has No Home Here," "Stay Home, Save Lives," and other signage supporting causes have caused rifts.

In June, Briar Chapel Community Association in Chapel Hill, N.C., made headlines when some residents questioned the timing of enforcement of a yard-sign policy, saying the rules hadn't been enforced until "Black Lives Matter" signs began appearing on lawns.

According to *WTVD,* the board notified residents that "yard art and garden flags are not allowed," and that noncompliant signs would need to be removed by July 1. But resident Mia King and others noted to the local television station that there are signs, flags, and "little lawn animals" in yards, which technically aren't supposed to be there and that had long been ignored.

The board later issued a mea culpa, noting that while "our intentions were procedural, we failed to appreciate the relevance of current events … and how our message would be received. We realize that our actions to address signage in the community have caused pain to some residents and for that we apologize." The board is reviewing its covenants and, for now, the signs are allowed to stay.

In a statement to CAI, Hope Derby Carmichael, a partner with Jordan Price Wall Gray Jones & Carlton in Raleigh, N.C., says the Briar Chapel Hill board is "working on engaging with the community in the coming months regarding the direction the community would like to take" on sign rules. Carmichael, president of the CAI North Carolina chapter and a CCAL fellow, notes that she is legal counsel for the association and that her response is not in her capacity as chapter president.

Such signs are far more challenging to regulate since—unlike political signs—social justice causes are not "transitory events," according to Gustino. In Florida, and in most states, such signs are subject to reasonable regulation by community associations. Nonetheless, "simply because community associations are empowered to enforce restrictions against those signs" doesn't mean it's wise to do so, Gustino says. He recommends boards survey homeowners for their opinions before embarking upon enforcement.

"Each community is unique, and the facts arising in one may vary greatly from the facts arising in another," Gustino says. The degree of "toleration" for speech on such subjects will also likely vary between communities. "There is simply no 'one-size-fits-all' advice in these circumstances," Gustino says, adding that when it comes to enforcement, he recommends clients "be at least as tolerant of social justice signs as they are of political signs."

Brian W. Morgan, managing partner with Maxwell & Morgan in Mesa, Ariz., and co-chair of the CAI Arizona Legislative Action Committee, says he began seeing an uptick in calls about social justice signs around June. "Mostly, it's managers saying, 'Hey, they're posting signs. We're getting complaints. … What should we do?'"

Morgan says most boards recognize the tension and anxiety many are feeling and are adopting a wait-and-see approach rather than taking aggressive action.

"With so much else going on in the world, is now really the best time to have complete and immediate enforcement of all signs, especially those related to social justice causes?" asks Morgan, a CCAL fellow.

He thinks not. Just as much of the world has been put on hold, Morgan says this just may be a good time for full enforcement to take a back seat. "We just need to let the world heal a little bit," Morgan says. "We need to let everybody breathe a little sigh of relief." **CG**

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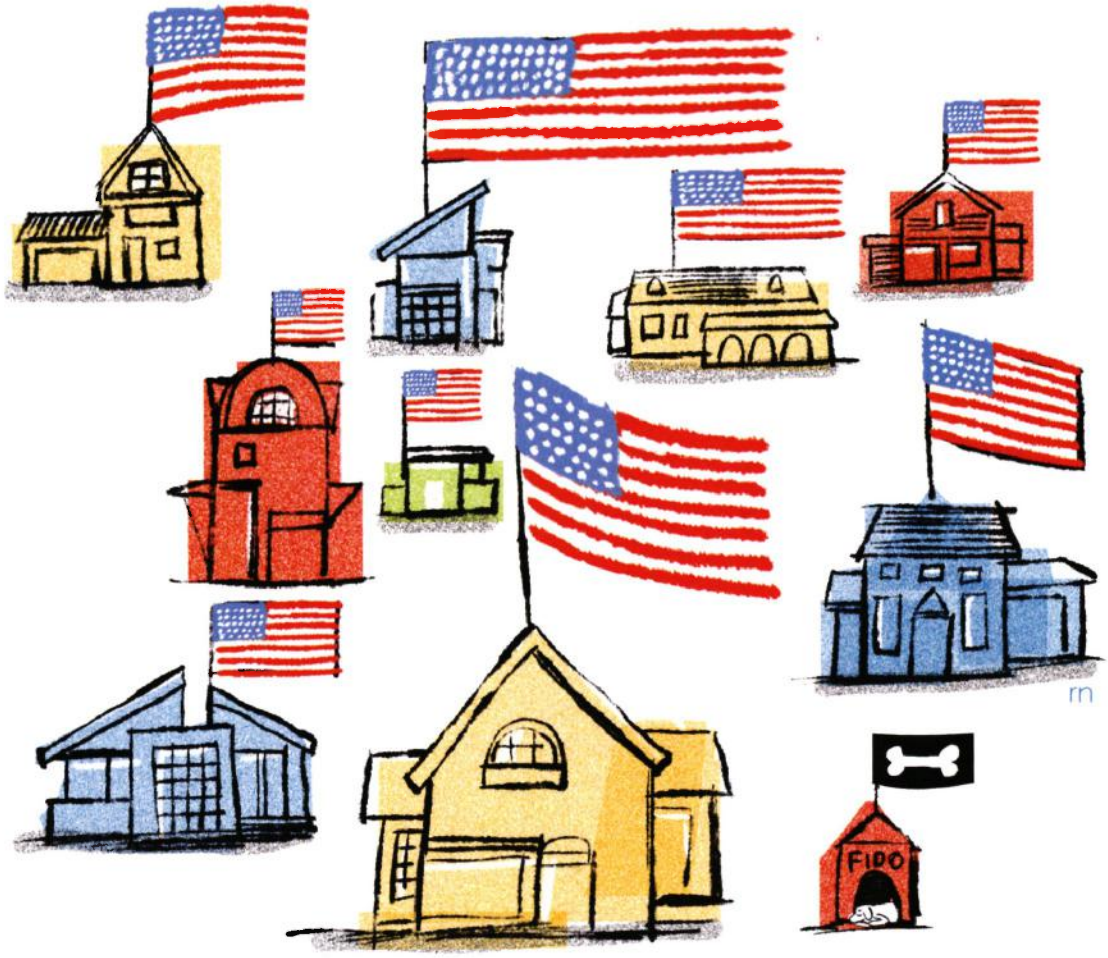

STARS AND STRIPES AND SLEEPLESS NIGHTS

By Edward Hoffman Jr., ESQ. | Illustration by Robert Neubecker

Flag disputes in community associations can quickly fly in the wrong direction. Pledge your allegiance to federal and state laws, your attorney's advice, and common sense.

IT'S HARD TO FATHOM how much litigation has ensued over the seemingly simple issue of the ability of a community association resident to fly an American flag, but there are disputes involving the size of the flag, the size of the pole, the location of the flag, the location of the pole, a flag being flown with no pole, multiple flags being flown instead of one, and innumerable others.

Federal law—the Freedom to Display the American Flag Act of 2005—states that community associations "may not adopt or enforce any policy, or enter into any agreement, that would restrict or prevent a member of the association from displaying the flag of the United States on residential property." The law allows associations to place reasonable restrictions pertaining to the time, place, or manner of displaying the American flag necessary to protect a substantial interest of the association. Many states also have their own statutes regarding flags.

Disputes about flags in community associations usually begin when there is some type of overreach—either by a resident or by the association, and sometimes by both. In most cases, after some back and forth, the association and the resident find an acceptable middle ground, an American flag stays up, and everyone goes their separate ways. But it's not always that easy.

In October 2019, after a rejection by the association and many months of legal wrangling, a Vietnam War veteran resident of the Equestra at Colts Neck Crossing active adult community in Howell, N.J., was finally granted permission to install a nonpermanent, staked flagpole to keep his American flag hanging in his garden bed.

The association only allowed flags attached to the home, but the resident contended that it was difficult for him to climb ladders to reach the flags, that the brackets on the pole connected to the home frequently break, and that the pole didn't allow him to fly the flag at half-staff.

While an amicable resolution was eventually achieved, it came at the expense of time, money, and energy of both parties, and it also resulted in local news media covering a dispute between a Vietnam War veteran and an association about an American flag.

Another fairly well-known legal battle that garnered national attention involves Air Force veteran Larry Murphree and the Tides Condominium at Sweetwater by Del Webb Master Homeowners' Association in Jacksonville, Fla. The battle over flying the American flag started in 2011, when Murphree placed a small flag in a flowerpot by his front door.

The association asked him to remove the flag, so Murphree sued. The association eventually settled, allowing him to keep the flag so long as it was in compliance with association rules and the law.

However, by 2013, the association revised its rules to prohibit anything but the actual plant from being allowed inside a flowerpot. The association subsequently began fining Murphree for the violation, so the owner sued once again. The case ultimately ended up in state court with each side making claims against the other, and the matter went to trial in February. As of the writing of this article, to the author's knowledge, no verdict has been handed down, likely due to the outbreak of COVID-19 delaying the judicial process.

These examples raise several questions. Why are community associations fighting over flags with veterans—of all people? What is reasonable? What battles should actually be fought? And why are people even fighting over these issues to begin with?

The American flag means a lot of things to a lot of people. It's not just an issue of American pride or patriotism, but it also is an emotional issue that simply cannot be explained. That's why people are willing to dig in their heels, and associations will similarly do so to enforce their covenants.

The end result is that these disputes will never go away in community associations. Perhaps the lesson to be learned is that sometimes seeking an early solution by way of alternative dispute resolution, such as through nonbinding mediation, may allow for a reasonable discussion to occur and for a third party with no vested interest to make reasonable recommendations for each party to consider.

And let's not forget common sense, which can be foreign to some. It can, and should, be used when issues like these develop.

But how should community associations handle other flags?

Old Glory, but modified. It's important to note that the federal law on American flags is only applicable to the flag as defined by the U.S. Flag Code: 13 horizontal stripes, alternating red and white, with 50 white stars on a blue field.

Despite any arguments to the contrary, Americans flags that have other embellishments such as the Marine Corps' Semper Fi logo, an Army star, or a "thin blue line" to support law enforcement are not protected by federal law. Community associations can prohibit these flags.

State flags. Many states also have passed their own statutes that prohibit associations from completely prohibiting the display of the American flag as well

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as state flags. In all my years of practicing law and representing associations in Pennsylvania and New Jersey, I have never received a question about someone being allowed to fly a state flag. My guess is that this is a bigger issue in Texas, South Carolina, and other states where there is immense pride in their flag.

Decorative flags. I've fielded plenty of inquiries relating to residents displaying other flags in the community, including but not limited to those representing colleges, professional sports teams, seasons, holidays, Bible verses, and charitable foundations or issues. I am not aware of any federal, state, or local laws that would prevent an association from prohibiting or restricting residents from flying or displaying these types of flags so long as the recorded, private covenants that run with the land specifically allow for it.

Where there is no specific covenant relating to flags, the association must ensure that some other language exists that would support a prohibition or restriction. This is typically in the form of an outright ban on displays or decorative items placed outside the home or unit or a restriction (such as size and location) that would encompass and include other flags by its nature.

If no language is present in the covenants, and the association decides to handle the issue through the rulemaking process rather than a covenant amendment, there is risk that such a rule may be unenforceable if challenged. Finally, if there is no prohibition or restriction present, and residents are happily displaying other flags in the community, an amendment project to prohibit or restrict these flags would likely fail before it even starts.

Military branch and support flags. Another recurrent issue involves flying military branch and prisoner-of-war or missing-in-action flags. There appears to be no federal protection for these in community associations, but various states, such as Illinois, Texas, and Florida, have included them in their statutes. The advice here is: Check with association counsel before making any decision on these flags. Your state may have a law that deals with them.

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Cause-based flags. What about "Hate Has No Home Here" flags? During the 2016 election season, they popped up with increasing frequency as residents in associations attempted to assert their First Amendment right to freedom of speech.

Now, as the 2020 election approaches and as the U.S. deals with the COVID-19 pandemic and racial equality protests, "Hate Has No Home Here" flags have been joined by "Stay Home, Save Lives" and "Black Lives Matter" flags.

The freedom of speech argument doesn't necessarily apply in these situations. In very general terms, and as related solely to the discussion of the issues in this article, the First Amendment of the Constitution provides that the government (which now includes local and state governments) cannot make laws that abridge freedom of speech:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

The emphasis on "the government" in the First Amendment is an important one. There must be "state action" by a "state actor" in order to trigger application of First Amendment rights. In other words, the government must be seeking to curtail or otherwise limit someone's First Amendment rights for protections to apply.

Community associations are private entities and can enact restrictions or covenants that limit speech. Most states don't consider communities "state actors" and won't overturn private association covenants, but a few state courts have found in favor of homeowners in freedom of speech cases.

Pennsylvania isn't one of these states, at least according to two important cases.

In *Midlake on Big Boulder Lake Condominium Association* v. *Cappuccio,* the Pennsylvania Superior Court in 1996 upheld an association restriction that prohibited owners from posting any type of sign on or in a unit or a common element that would be visible from the outdoors.

The court held that the association was a private, not governmental, organization. As a result, the association was entitled to enforce its restrictions without violating the First Amendment. In reaching its decision, the court also found that the owners contractually agreed to abide by the restrictions in the covenants at the time they purchased the home, thereby relinquishing their freedom of speech.

In *Anelli* v. *Arrowhead Lakes Community Association, Inc.,* a restriction on "For Sale" signs was contained in the association covenants. Homeowners who could not sell their home posted a sign in front

of it. The Pennsylvania Commonwealth Court held in 1997 that the association restriction on "For Sale" signs was enforceable since the association is not a governmental entity and is permitted to restrict "speech."

Thus, at least in Pennsylvania, "Hate Has No Home Here" and other cause-based flags would not be afforded protection under the First Amendment. The association's private covenants, if applicable and restrictive, would be determinative.

Once again, though, contact the association counsel if this issue manifests. Your state may have differing protections that would alter the outcome.

Political flags. Community association residents have divergent political leanings and opinions on various issues, and many want to support their preferred political party and its candidates. They often do so by putting a sign or flag in the lawn or window of their home.

But since they live in a community association, can they be displayed if the association's covenants and restrictions say they can't? Can communities limit where they can be placed? In the state of New Jersey, the answer appears to be: It depends.

In *Committee for a Better Twin Rivers* v. *Twin Rivers Homeowners' Ass'n,* the New Jersey Supreme Court upheld in 2007 an association's ability to enforce sign restrictions, including "political" signs, as the contractual (association) restrictions still reasonably allowed for the placement of such signs in a window and in an identified area of the lawn.

Five years later, the New Jersey Supreme Court issued another opinion in *Mazdabrook Commons Homeowners' Ass'n* v. *Khan.* This time, the court ruled in favor of the homeowner.

In *Mazdabrook,* a homeowner was running for local political office and posted two of his campaign signs inside of a window and a glass door of his home. The distinction between this case and *Twin Rivers* was that the association's restrictions in *Mazdabrook* essentially banned almost all types of signs, except for one "For Sale" sign.

The court held that the sign restriction violated the New Jersey Constitution, which provides that "… [e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right." In coming to its decision, the court concluded that an owner's right to post a political sign outweighed the impact on the association's private property interests.

It appears that the distinction between the cases was that the *Twin Rivers* restrictions permitted political signs but restricted their location, while *Mazdabrook* did not permit political signs in any manner, stifling the homeowner's right to assert political speech in accord with the state constitution.

The same analysis likely would occur if, instead of a lawn or window sign, residents displayed a flag with their preferred candidate's name emblazoned across it. In my eyes, these flags are merely political campaign signs, and they may be permitted by vague covenants when other types of exterior signs or displays may otherwise be prohibited. (Read more about political signs in "Signs of the Times" on p. 17.)

Flag issues will always be present in community associations, so association boards and community managers must be educated on the topic and handle them correctly before they go the wrong way. The cogent advice of association counsel should be sought.

Remember, a little common sense goes a long way. Often, flag issues should, and can, be resolved before they end up in court or are plastered across social media and cable news networks. **CG**

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