

Associations can Restrict Sovereignty

FORT MYERS NEWS-PRESS, OCTOBER 23, 2003



By **Joe Adams**

jadams@becker-poliakoff.com

TEL (941) 433-7707

FAX (941) 433-5933

Community living is a lifestyle of trade-offs. It was perhaps said best by a court some thirty years ago: "Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less. The individual ought not be permitted to disrupt the integrity of the common scheme through his desire for change, however laudable that change might be."

As Americans, we are engrained with a strong sense of "individual rights" and "freedom of choice." Among those inalienable rights are freedom of speech and freedom of worship.

A nagging question is whether, once you move into a community association setting, you check your constitutional rights at the gate. The courts have been far from consistent in addressing this issue.

Over twenty years ago, the Florida Supreme Court held that condominium age restrictions, which prohibited occupancy by children (prior to the 1988 fair housing laws) did not violate constitutional rights of privacy or procreation. In a later case, a Florida appellate court ruled that a homeowners' association's ban against "for sale" signs in front yards did not violate free speech, since the actions of the HOA were not "state action," which is necessary to invoke the protections of the Constitution.

In contrast to the sign ruling, one Florida-based federal court has ruled that the actions of an association can constitute "state action," and found the association's prohibition against flying the U.S. flag to be unconstitutional. (This

case arose before the amendment to the condominium statute conferring the right to fly the flag, and was actually the catalyst for the amendment to the law).

Can an association ban political signs in yards? Can an association prohibit door-to-door solicitation by religious groups? Can an association regulate exterior decorations celebrating religious holidays? These questions remain largely unanswered.

However, last week, a Florida appeals court did address one dispute involving these weighty questions. A group of unit owners in a condominium had requested the right to use the association's auditorium for the conduct of religious services. The board of directors had enacted a rule that prohibited any type of organized religious services being conducted on the common elements.

The unit owners who disagreed with this decision sued the association, claiming that the "right of assembly" contained in the condominium statute, gave them the right to assemble for religious purposes.

The appeals court disagreed, finding that the right of assembly in the statute applied only to civic and governmental types of gatherings, such as inviting candidates for public office to speak. The court went on to hold that even if the "right of assembly" in the law applied to religious organizations, the board's rule was reasonable, since it applied equally to all religious groups, not just the group in question.

According to recently published statistics, it is estimated that by the year 2010, some forty percent of Floridians will reside in communities governed by

a mandatory membership association. As more people flock to this life-style, these issues are sure to remain in the focus of public opinion. Until somebody comes up with a better idea, it looks like these tough questions will continue to be slugged out, on a case-by-case basis, in the courts.

Now on to reader mail.

QUESTION: Our homeowner's association has recently instituted a "curfew rule." Security guards have been instructed not to allow any visitors to enter the community after 11:00 p.m. if they are under age eighteen. Our rules also state that children must be off the streets by 11:00 p.m., or they will be escorted home and their parents notified. Is our community entitled to determine curfew hours in this manner? K.M. (via e-mail)

ANSWER: There are two different concepts which come into play. The first is the general authority of the HOA to make rules and regulations. Assuming

there has been a problem with marauding children, it is my sense that the rule would probably be upheld as reasonable.

The trickier question involves potential discrimination. Assuming that your community is not a "55 and over" community, the association needs to tread very carefully to avoid running afoul of fair housing laws, which prohibit discrimination against families with children. Any time an across-the-board rule is directed at children, your association may be looking for trouble. Your board would be well advised to have the association's retained legal counsel review the specific rules and provide a written opinion as to their enforceability.

The defense of discrimination suits can be a nightmare. Not to mention the fact that you will be dealing with governmental agencies (with unlimited resources), many insurance policies exclude discrimination claims, and it is one of the few areas in community association governance where board members face realistic exposure to personal liability. ⚠

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.