



LAW OFFICES

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CURRENT NEWS FOR COMMUNITY ASSOCIATIONS



Waving the Flag

By C. John Christensen, Esq.

The Boards of Directors of community associations are occasionally faced with a lot owner, in a homeowners association, or a unit owner, in a condominium association, requesting to display a flag whose size, or whose flagpole mount, are in apparent violation of the community documents. Alternatively, Boards may be faced with a lot owner or unit owner who unilaterally displays an apparently violating flag, or installs a flagpole mount, without requesting permission from the Board of Directors or Architectural Control Committee of the association. At that point, the Board of Directors will typically conduct research to determine whether the lot owner or unit owner has the authority to display the flag in question, or install the questionable mount, in order to determine Association response. Hence, the following discussion will address the various statutes and policy considerations to guide a Board of Directors in this scenario. Let us begin with homeowners associations.

Section 720.304(2), Florida Statutes, of the Homeowners Association Act, currently provides the following regarding display of flags: "(2) Any homeowner may display one portable, removable United States flag or official flag of the State of Florida **in a respectful manner**, and on Armed Forces Day, Memorial Day, Flag Day, Independence Day, and Veterans Day may display in a respectful manner portable, removable official flags, not larger than 4-1/2 feet by 6 feet, which represents the United States Army, Navy, Air Force, Marine Corps, or Coast Guard, **regardless of any Declaration rules or requirements dealing with flags or decorations.**"

As you can see, this Statute provides no guidance as to either the size of the flag, or the flagpole mount such as a limitation on flagpole height. (Although Section 720.3075(3), Florida Statutes, does provide that the U. S. flag "must be displayed in a respectful manner, consistent with Title 36 U.S.C. Chapter 10", the Federal statute referenced does not address flag or flagpole size.) In this regard, it is somewhat clear from the legislative history of this statutory provision that the Legislature intended to state that specific standards for size, placement, and safety of flags contained in a homeowner association's documents were no longer valid.

For example, prior to the statute quoted above becoming part of the Homeowner's Association Act last year, the Act had contained a fairly extensive protocol for the display of the flag, specifically authorizing a Homeowners Association to establish flag size, placement and safety standards, which was replaced by the broader

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TIDBITS Did You Know

By the year 2011, 20% of the population, more than 77 million people, will be "seniors" 65 or older. Research shows that more seniors are choosing to stay in their homes rather than in assisted care living facility. What kinds of things can you do to handle issues related to aging populations in your community association?

- Get emergency contact and family information from new residents, and update it periodically for current residents.
- Keep records regarding medical conditions and medication to assist medical emergency personnel.
- Review governing documents to ensure a right of access to homes for emergencies.
- Update governing documents to reflect changes in lifestyle and needs of older persons, to accommodate caregivers, to provide handicap accessibility, and so on.

cont. on page 2

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COMMUNITY ASSOCIATION LEADERSHIP LOBBY WEBSITE.
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WAVING THE FLAG *cont.*

and unfortunately more vague language quoted above. Additionally, during the 2002 Legislative session, State Representative Harper attempted to amend the above-quoted Statute to limit flagpole height to fifteen feet (15'). However, Representative Harper's amendment failed, and the broader and more vague statutory provision then passed the Florida House of Representatives by a vote of 108 to 4, with even Representative Harper supporting the proposed Statute (without his amendment). Therefore, although it may seem nonsensical to assume that the current Homeowners' Association Act might permit a 100-foot high flagpole, and a flag the size of one that you may see on the lots of car dealerships; until the Courts address the situation, this matter is somewhat of a "no-man's land".

Hence, when faced with the display of a United States (or other authorized) flag, or installation of a flagpole mount, in apparent violation of the Homeowner Association's documents, the Board will need to make a business decision as to how aggressive it wishes to be and whether it wishes to run the risk of being a "test case". It seems clear that the Legislature took a hands-off approach regarding individual community flag restrictions and preferred the above-quoted statute to specifically supersede these restrictions. The bottom line is that if a potentially violative flag or flagpole is being proposed to be installed on lot property, which flag or flagpole can be characterized as an "industry norm", and such flag and/or flagpole can be installed without undue safety concerns, most Boards would be well advised to simply permit such installation, unless there is some overriding reason not to do so. (That is, while a 20-foot flagpole might be considered an "industry norm", and therefore acceptable notwithstanding documentary restrictions to the contrary, a 100-foot flagpole would seem excessive, and more likely of toppling and causing damage to the community, to thereby justify Board disapproval of same).

Finally, as the above-quoted statute provides, a recent amendment to this statute will not only allow the flag of Florida to be displayed in the same manner as the United States flag (e.g. on any day of the year, and even including oversized flags upon large flagpoles), but the identified flags of the United States Military may be displayed on the identified National holidays (however, in regard to the flags of the Military, the flag size is limited to 4-1/2 feet by 6 feet).

As to a condominium association, the analysis above would apply equally, since **Section 718.113(4), Florida Statutes, contains language essentially identical to the language quoted above from the Homeowners' Association Act.** (The only difference between these statutes is that the Condominium Act does not address the display of the flag of the State of Florida.) The "twist" in regard to condominium associations is that a unit owner often desires to display a flag, or install a flag mount, upon the **common elements** of the condominium (unlike a homeowners' association, in which the lot owners are typically installing flags and flag mounts upon lot property.) In this regard, the common elements (including the limited common elements) are legally "owned" by **all** of the unit owners in common, and prohibitions often exist against unit owner alteration of the common elements unless some sort of membership approval is obtained. Nevertheless, given the patriotic overtones involved in the display of the flag, unless the installation is completely inappropriate due to size or location, most Boards of Directors would be advised to allow unit owner display of statutorily authorized flags, and installation of flag mounts, upon the common elements, pursuant to the authority of 718.113(4), Florida Statutes, which could be cited to supersede any documentary limitations.

In fact, even the Division of Florida Land Sales, Condominiums and Mobile Homes is reticent to become involved in this potentially controversial issue, as evidenced by the Hurlingham Condominium Association, Inc. Petition

TIDBITS *cont.*

- Become familiar with local service agencies, and other support services, for residents who might need the information on short notice.
- Create and publish an emergency response plan to deal with resident problems, and for weather, fire, etc.

For Further Information on this topic see: *Boomer Shock: Preparing Communities for the Retirement Generation*, by Ellen Hirsch de Haan, Esq.,* published by Community Associations Press. It can be purchased from Community Associations Institute, by calling 703-5•8-8600, on the CAI website, www.caionline.org/bookstore.cfm (CAI Item #5788) or on Amazon.com.❖

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for Declaratory Statement, DS 96369. In this Declaratory Statement, the Division declines to answer a Petition asking whether a unit owner has the right, under 718.113(4), Florida Statutes, to "permanently erect a flagpole in a concrete base, which flagpole is approximately 18 to 20 feet high", apparently upon the common elements. The Division, citing a rarely invoked principle that Division Declaratory Statements are only meant to apply when the Petitioner is asking a question unique to his particular circumstances, declines to wade into the politically-charged issue of flag display and flag mounting. Hence, if the Division is unwilling to address this potentially controversial topic, and unwilling to establish limits upon an owner's right to display a flag or install a flagpole mount, perhaps Boards of Directors of condominium associations should likewise avoid disapproving a flag display or a flagpole mount which arguably satisfies 718.113(4), of the Florida Statutes.❖

LET US INTRODUCE... ATTORNEY DANIELLE BREWER



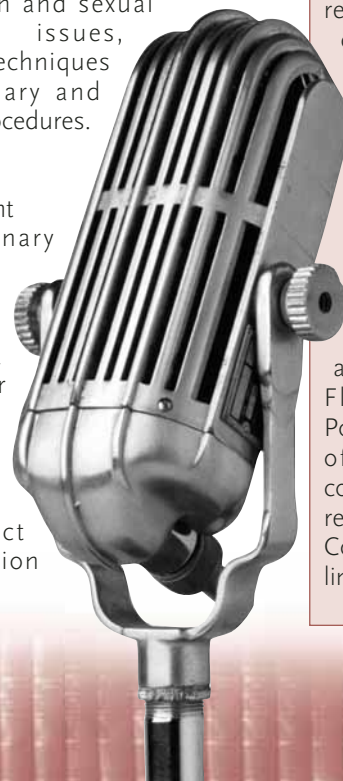
Many of you are quite familiar with the Association Attorney designated as the primary contact for your community and perhaps the collection/foreclosure paralegals. However, there are a number of other individuals at Becker & Poliakoff with whom you may not be familiar, but they can provide valuable services to Association clientele. The Community Update will spotlight various attorneys from time to time to help Association Boards of Directors get to know our other attorneys who provide valuable services that may greatly improve their community operations and protect them against liability. The first in our series is Danielle Brewer.

“She practices extensively in the Federal Courts”

Danielle Brewer is a litigator in Becker & Poliakoff, P.A.'s West Palm Beach office. She practices extensively in the Federal Courts handling employment, discrimination, fair housing and commercial matters in addition to Association disputes and enforcement matters. Danielle is Chair of the Labor and Employment Section, and former Chair of the Individual Employee Rights Committee of the Federal Bar

Association, a very prestigious organization. Employment related claims can significantly impact a community association, especially since many types of claims are not covered by standard insurance policies. Many Associations don't even have written employee policies, job descriptions or employee manuals or procedures for properly handling problems, making claims much more difficult to defend in court.

Danielle recently completed a full-scale Employment Law Training Program for a Country Club Community Association in Palm Beach County which taught the employer (the community association board) and employees how to identify employment law problems and implement procedures to protect the Association against adverse claims. The training included advice regarding the Fair Labor Standards Act (primarily wage and hour claims which can affect Associations with only one employee such as a manager, janitor, maintenance supervisor, valet, etc.); Americans With Disabilities Act (ADA) compliance; COBRA requirements, employment discrimination and sexual harassment issues, interviewing techniques and disciplinary and termination procedures. If you believe that training, the development of disciplinary procedures, creation of a employment manual, or a review of your existing practices is needed in your Association, please contact your Association Attorney. ❖



Upcoming CALL SURVEY RESULTS

Having endured the worst hurricane season in a century, Floridians living in condominiums and homeowners' associations say concerns over insurance cost and availability trump all other financial issues – even the perennially thorny condo issues of common area maintenance, financial reserve levels and unexpected special assessments.

Respondents to the **CALL 2004 Community Living Survey** also say that quality-of-life concerns that include the environment and overdevelopment equal more traditional concerns, such as access to quality healthcare and education, as major issues influencing property values and their financial well-being.

What's more, survey responses from community association residents challenge some commonly-held beliefs about Florida's "snowbird" seasonal resident phenomenon, with barely 11% of respondents saying they live three months or less per year in Florida and two-thirds saying they live year-round.

These key findings are among the many results of the first-ever survey of Floridians living in condominium and homeowner associations, conducted by Florida's Community Association Leadership Lobby (CALL), an advocacy group established in 2003 by Florida-based law firm Becker & Poliakoff to advance the shared interests of the state's common-ownership community associations. The full survey results will be published in an upcoming Community Update or can be seen on line at www.callbp.com. ❖

CASENOTES

A Duty Not Delegated...

Is A duty Retained

Denise Robert-Blier v. Statewide Enterprises Inc.
2005 Fla. App. Lexis 16 (Fla. 4th DCA 2005)

Increasingly, Community Associations are employing security companies to meet all or a portion of its security needs. In so doing it is critical for the Association to indicate with specificity what security functions are being provided by the independent contractor and what obligations, if any, are being retained by the Association.

Recently, in the case of *Denise Robert-Blier v. Statewide Enterprises Inc.* 2005 Fla. App. Lexis 16 (Fla. 4th DCA 2005), the Fourth District Court of Appeals affirmed the proposition that an independent contractor is only responsible for those security functions that it has assumed as conditioned by the contractual arrangement between the parties. In *Blier*, a third party invitee sued the security company after being forced into her car, driven off premises, and raped. The plaintiff sued the contractor for failing to provide more security than the association hired it to provide. Plaintiffs also sued the Association, but that matter was settled before trial.

In affirming a trial verdict for the defendant, the appellate court reasoned that the contractor was engaged to provide only very limited services, which were tantamount to merely providing an appearance of security. Pursuant to the terms of the oral agreement, the security company agreed to provide one unarmed guard to patrol a community of several buildings and adjoining parking areas, to escort residents to their homes upon request, and to observe and report suspicious incidents. No other services were expected or intended by this agreement.

The court opined that the defendant owned no duty to the defendant guest because no such duty was undertaken. The Fourth District Court of Appeals relying upon a 2003 Florida Supreme Court decision in *Clay Electric Cooperative, Inc. v. Johnson* 873 So.2d 1182, 1185 (Fla. 2003) determined that a duty may arise from the general facts of a case when one undertakes to provide a service to others and "thereby assumes a duty to act carefully and not to put others at an undue risk of harm." In *Blier*, there was no evidence that the contractor ever undertook by any affirmative act to assume the association's duty to protect its residents or its guests. The court held that the security company's "mere act of providing a security guard" did not impose any duty to protect the guests of the Association from criminal assault. ❖

Water, Water, Everywhere!

Sherry vs. Regency Insurance Company
29 Fla. L. Weekly D 1707 (July 23, 2004)
(Fla. 2nd DCA 2004)

In the case of *Sherry vs. Regency Insurance Company* 29 Fla. L. Weekly D 1707 (July 23, 2004) (Fla. 2nd DCA 2004), a unit owner challenged summary judgment findings that a court had entered against her for damages caused when a washing machine hose in her condominium burst, flooding her unit and the condominium unit located below her. At the time of the flooding, both Sherry and her downstairs neighbors, the Reginos, were on extended trips out of town. Sherry admitted that she did not turn the water off in her unit before she left town. The Reginos' insurance company did pay the policy limits on the Reginos' claim. However, the Reginos filed the action against Sherry to recover those damages that exceeded their insurance coverage. The Reginos argued that Sherry was liable for the damage to their unit under one or more of four different legal theories: strict liability, negligence for leaving the water on while away from home, negligence for failing to properly maintain the washing machine hose and trespass by permitting water to enter the Reginos' condominium. The trial court found Sherry was liable for the damages because, between the two parties, she should have to bear the risk of damage, not the Reginos. Sherry appealed the trial court's decision.

The appellate court found that the trial court should not have decided the case as if there were no disputed facts, because some did exist. For example, issues of fact existed as to whether Sherry was negligent for failing to turn the water off before her trip or for failing to properly maintain the washing machine hose. The appellate court sent the case back to the trial court to determine these issues. **However, the appellate court clarified that strict liability (liability that exists regardless of whether any negligence existed) did not apply to damages resulting from water in household pipes.** Also, absent strict liability, intention or negligence, Sherry could not be liable for trespass as a result of the bursting water hose. Depending on the facts, however, she potentially could be liable for negligence. This case was remanded for further proceedings. ❖