CHADWICK WASHINGTON MORIARTY ELMORE & BUNN P.C.

WINTER 2012

VISIT US AT WWW.CHADWICKWASHINGTON.COM

THE QUARTERLY ASSESSMENT

INSIDE THIS ISSUE:

WE ARE MOVING!

Chadwick, Washington, Moriarty, Elmore & Bunn P.C. is pleased to announce it will be moving its Fairfax office in January of 2013. The firm's new address in Fairfax will be:

3201 Jermantown Road,
Suite 600
Fairfax, VA 22030

Please visit our website if you'd like to learn more about this and other upcoming news and events:

www.chadwickwashington.com

Revision of Condominium Project Approval Guidelines Released by FHA

By Michael A. Sottolano

The Federal Housing Administration ("FHA") released a long-awaited revision of its condominium project approval guidelines on September 13, 2012. The revisions to the FHA condominium guidelines are contained in Mortgagee Letter 2012-18 and expire on August 31, 2014. The FHA states it is making temporary adjustments to its condominium standards in response to market conditions.

The FHA appears to have been responsive to several key concerns of community associations, including delinquency rates, fidelity insurance coverage, the condominium project certification statement, and limitations on commercial space. Please contact our firm for a complete summary of the FHA policy changes and information on how these changes may affect your association.

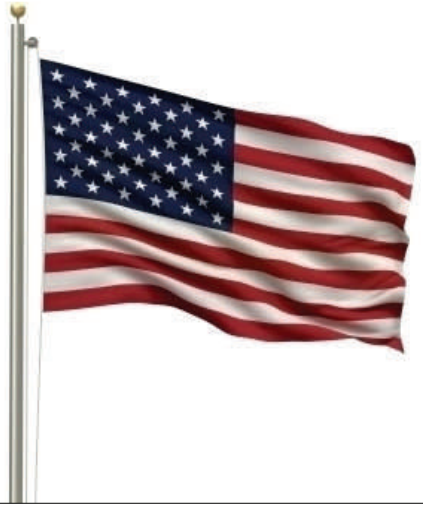
Our firm has successfully submitted recertification applications and obtained recertification approval on behalf of our clients and would gladly work with your association to secure FHA recertification approval of your condominium. Please contact us if you would like assistance in submitting an FHA recertification application, or if you have questions concerning the application process.

Can the First Amendment Co-Exist with Restrictive Covenants? Old Glory and 21st Century Restrictions

By Stephen H. Moriarty

Roughly once a year we see a news story telling the tale of a beleaguered homeowner, perhaps a war veteran, who is the target of a community association's wrath. His offense? Flying Old Glory. How is that possible in America?

Simply put, it's not. Mindful that the media rarely lets the facts (or the law, in the case described below) get in the way of a good story, let us consider a real case and real statutes.



It has been just over a decade since the case of *Wyndham Foundation v. Oulton* was decided in Virginia in 2001. Wyndham ("the Association") is a large, high-end neighborhood consisting of approximately 1500 homes, ranging from modestly sized condominiums and townhomes to sumptuous estates, like the one in which the owner in question lived. The owner, in fact, had purchased three lots and filled the middle one with a home. The two adjacent lots were nicely landscaped to complement the house. Thus, the stage was set for the dispute.

The owner, a Vietnam veteran, erected two flagpoles on one of the adjoining lots. The poles were made of PVC-like pipe material, roughly 20' in height apiece. From these he flew various patriotic flags, including the colors of the various services of the U.S. Military. The problem was that the Association had a design guideline, authorized by the restrictive covenants, that barred flagpoles except those mounted on the front of the home: each house was entitled to one such flagpole, and any flag of the owner's choosing could be flown from it. (The Association declined to limit any flags based upon content, mindful of the First Amendment.)

(Continued on page 2)

(Continued from page 1)

Attempts to resolve the matter failed and suit was filed by the Association. While trial was pending the owner removed the two pipe flagpoles and installed a single, 25' metal pole of a permanent nature, at the base of which was placed a stone and brass monument to his fallen comrades.

Public rallies were held, the local newspaper inveighed against the Association's position (as it was incorrectly understood) and television newscasters regularly ridiculed the Association.

Another development came with the Virginia General Assembly's passage of §55-513.1, which required property owners' associations to notify contract purchasers of any restrictions on the display of flags. The owner moved to dismiss the case for failure to comply with the new law, but that was denied since the law post-dated, by several years, the Owner's purchase of his lots.

The parties engaged in approximately twenty deposition dates and ten pre-trial motions.

Trial commenced, appropriately enough, on June 6, 2001, the anniversary of D-Day. As anticipated, the owner contended that the Association was seeking to prevent him from flying the flag of the United States of America and, as a consequence, his rights under the First Amendment to the Constitution were being violated. The Association insisted that it was merely enforcing the prohibition against free-standing flagpoles that did not conform to its covenants and that the owner was entitled to display any flag of his choosing, but only by way of the same type of flagpole that everyone else in the community was required to use.

After two days of testimony the trial court held that the Association was entitled to require the removal of non-conforming flagpoles as well as a permanent injunction against similar installations in the future. The trial court also awarded the Association its legal fees and costs. The owner's appeals to the Supreme Courts of both Virginia and the United States were unsuccessful. The Association was also awarded judgment for substantially all of its attorneys' fees and costs in the matter. After multiple Show Cause hearings pertaining to enforcement of the Court Order, the flagpole was eventually taken down.

Quite often, however, such cases never see the inside of a courtroom. An association may fear the media scrutiny that such covenant enforcement will bring (regardless of whether it is really trying to ban Old Glory), the risk of losing the case, or perhaps just the headache of enduring such an experience. It therefore may be helpful to know the actual standards that apply so that boards may discern whether they stand on the legal high ground and, if so, how best to enforce their covenants.

First and foremost, the Freedom to Display the American Flag Act of 2005 is a federal law prohibiting common interest communities from adopting any rule that would restrict or prevent an association member from displaying the Flag of the United States on such member's property or area which such member has exclusive use. The Act, however, does permit an association to adopt reasonable restrictions pertaining to the time, place, and manner of displaying the flag as may be necessary to protect a substantial interest of the association.

Both the Virginia Property Owners Association Act and the Virginia Condominium Act refer to and follow the federal law but expressly state that an association can restrict the display of the U.S. flag in common areas. These acts also require the disclosure in any resale certificate (for a condominium) or resale disclosure packet (for a homeowners' association) of any association restriction on the display of the U.S. flag. Section 14-128 of the Maryland Code also follows the federal law and permits reasonable restrictions on the placement of flags; however, Maryland law additionally requires that certain meeting requirements be met prior to the enactment of such restrictions.

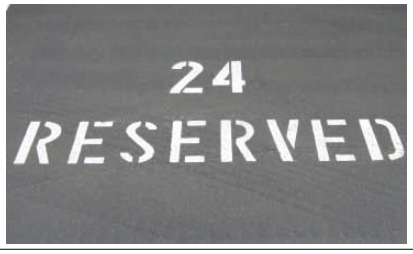
If your association is considering adopting rules restricting the display and/or placement of flags, we recommend that you confer with legal counsel prior to adopting such restrictions.

HOW "COMMON" IS COMMON?

Manchester Oaks HOA v. Batt, et al. (Supreme Court of Virginia, September 14, 2012)

By Jerry M. Wright

On September 14, 2012, the Virginia Supreme Court handed down an opinion that determined just how "common" is common area within a townhome community known as Manchester Oaks Homeowners Association, located in Fairfax County. The case, Manchester Oaks Homeowners Association, Inc. v. Patrick K. Batt, et al., 2012 WL 4039849, Va., September 14, 2012 (No. 111949), has set a standard in Virginia law as to the scope of owners' rights in and to the common areas -- and the extent to which an association may limit those rights.



At issue in the Manchester Oaks case was whether, and to what extent, the Association could limit the use of common area parking spaces in the Manchester Oaks townhome community. The Association assigned the parking spaces preferentially, by designating two spaces for each "ungaraged" Lot, but no spaces for Lots containing garages. The Association's Declaration provided that *"[e]very Owner shall have a right and easement of enjoyment in and to the Common Area"*, which included the parking areas in the community. This "right and easement," however, was expressly subject to, among other things in the Declaration, the Association's right to (1) *"establish rules and regulations governing the parking lots within the Common Area"* and (2) *"designate a maximum of two parking spaces within the Common Area for the exclusive use of the Owner of each Lot."*

When Owners of "garaged" Lots challenged the preferential designation of parking spaces to "non-garaged" Lots, the Association amended its Declaration to create "Reserved Common Area," which

(Continued on page 3)

(Continued from page 2)

expressly included the right of the Association to designate two parking spaces for the exclusive use by each "non-garaged" Lot Owner on a non-uniform and preferential basis. This amendment, however, was ruled invalid by the trial court for a number of reasons, including (i) the absence of adequate notice of the meeting to vote on the amendment under the Declaration; (ii) the fact that the use of proxies was not expressly authorized in the Declaration; and, (iii) that the effect of the amendment was an improper forfeiture of the "garaged" Lot Owners' easement rights. The absence-of-notice basis for the trial court's ruling was not challenged by the Association on appeal to the Virginia Supreme Court. Because it was not challenged, the ruling of the trial court on this issue constituted a separate and individual finding that supported the trial court's ruling that the amendment was invalid. Thus, on that unchallenged ground alone, the Supreme Court affirmed the trial court's ruling that the amendment was invalid, and the Court did not rule on the other issues involving the challenge to the amendment.

Having agreed with the trial court that the purported amendment was invalid, the Supreme Court then turned to whether the original language of the Declaration authorized the Association to assign parking spaces only to the "non-garaged" Lot Owners, to the exclusion of the "garaged" Lot Owners. To answer this question, the Supreme Court analyzed the definitions of the terms "common area" and "in common" and concluded that equality was inherent within each definition. Thus, as it did in Sully Station II Community Ass'n, Inc v. Dye in 2000, the Virginia Supreme Court held that *"any assignment of parking spaces undertaken pursuant to... [the Declaration] must benefit all lot owners equally without regard to the type of lot owned."*

The Supreme Court also recognized that there are only 72 parking spaces for 57 lots in the community, and yet the Declaration allows the Association to assign a maximum of two spaces to each Lot. Obviously, it would have been impossible to assign two spaces to each Lot equally. Unfazed by this conundrum, the Supreme Court explained that a *"maximum of two includes one and none, both of which are permissibly equal assignments of parking in the common area in its current, 72-space configuration."* Furthermore, the Court suggested that the Association had express authority to annex additional property into the HOA, providing further support for the notion that the "maximum of two" language had meaning.

For those reasons, the Supreme Court held in favor of the aggrieved Owners of the "garaged" Lots and ruled that the Association must assign the parking spaces equally, irrespective of the type of Lot owned.

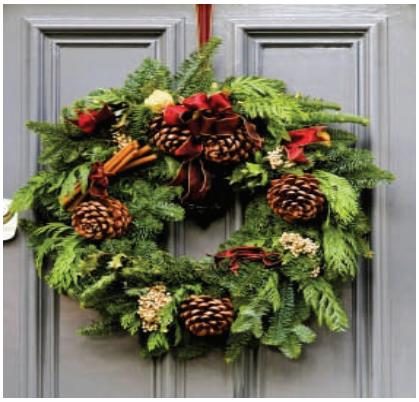
So what's the moral of the story?

First, make sure that your association strictly follows the procedures set forth in your association's governing documents when amending covenants or bylaws, including providing adequate notice for the meeting!

Second, remember, COMMON in effect means EQUAL ACCESS/USE, and when there is an easement right in favor of all members of the association to use the common area, common area parking spaces must be assigned on an equal, non-preferential basis unless your declaration expressly provides otherwise. If your association is not currently assigning common area parking spaces in your community on an equal, non-preferential basis, you should check your association's governing documents and perhaps review them with counsel. A change to your parking space assignment policy may be necessary.

Holiday Decorations - Maintaining Decorum During the Holiday Season

By Susan L. Truskey



With the holiday season upon us, most - if not all - community associations will inevitably experience a vast array of holiday decorations. Once again, boards of directors and managers will be faced with tough decisions regarding rulemaking and enforcement. The holidays can generate awkward and complex situations for associations because of the increased potential for complaints from disgruntled residents on both ends of the spectrum – from those who would like to outwardly express their religious or cultural observances to those who claim to be offended by such expressions. It can be difficult to strike a balance between architectural uniformity and individuality while still garnering a sense of community.

Although architectural guidelines are intended to preserve property values, if overdone, they can become so restrictive that a community is left appearing sterile and stark. Consider a potential purchaser visiting a community for the first time – what impression would he or she get of a community if Christmas decorations were still on display in June? What about a neighborhood with no Jack-O-Lanterns on Halloween? Both impressions may be equally negative and uninviting.

The key to achieving a harmonious balance is for boards to be reasonable in regulating holiday decorations, and achieving reasonableness depends on many factors. Some associations have broad authority under their documents to regulate holiday decorations while others may be significantly restricted. Because holidays are often a time of celebration, it is advisable for associations to communicate regulations (if any) regarding holiday decorations to the community well in advance. Providing residents with advance notice (and perhaps examples of or suggestions for permissible decorations) may help to decrease the number of unintended violations and lead to a more festive, welcoming community atmosphere.

It is also critical to tailor your association's rules to the residents in your community. Boards should evaluate their association's past

(Continued on page 4)

(Continued from page 3)

experiences with holiday decorations in determining whether greater regulation is necessary. For associations that have struggled to enforce vague covenants, adopting a policy resolution regarding decorations may prove helpful for both the residents and those responsible for enforcement. If a board is considering new rules and regulations for holiday decorations, it should do so with the following goals in mind: be reasonable, fair, consistent -- and as neutral as possible.

The first and most important step in the rulemaking process is to understand the governing documents and make sure that any policy resolutions, rules or architectural guidelines are consistent with the governing documents.

Second, be reasonable and, if possible, avoid banning decorations altogether as this may be perceived by residents as a deprivation of their ability to express themselves. Ideally, boards should develop neutral, nondenominational and generic guidelines, which set reasonable limitations on decorations as to duration, type and placement.

For example:

- Establish appropriate dates/times for holiday decorations *(e.g. from Thanksgiving to New Year's Day, light displays until 12:00am midnight).*

- Require "tasteful" decorations or decorations that are not a nuisance to others *(this is more subjective and may be harder to enforce).*

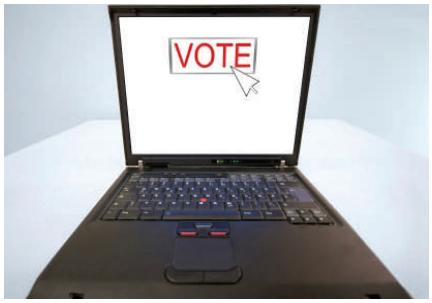
Lastly, live within the governing documents. If, for example, the documents prohibit objects being attached to a balcony railing, the board cannot be selective in its enforcement and should not make exceptions during the holidays. If, however, a community believes that its documents are overly restrictive, the association may wish to consider amending them to allow residents more freedom to decorate for the holidays.

Although the holiday season may present associations with awkward and complex situations, with proper planning and preparation, boards may be able to ensure that this coming holiday season is both festive and free of unintentional violations.

Electronic Voting - A Brave New World

By Bruce H. Easmunt

If your association has difficulty in obtaining a quorum of members at your annual meeting, it is not alone in that regard. Many associations have experienced a similar lack of participation among their members for annual or special meetings. In some situations, associations have gone for years without obtaining a quorum at their annual meetings.



The task of electing board members or conducting other association business requiring member approval can be frustrated, or sometimes made impossible, by the lack of a quorum. But electronic voting may be the solution to the problem. If properly implemented, electronic voting procedures may enable your association to obtain a quorum and may therefore facilitate the conduct of your association's business.

Maryland, DC and Virginia each require that certain steps and procedures be put in place prior to implementing electronic notice and voting.

In 2010, the Virginia legislature enacted § 55-79.71:1 of the Virginia Condominium Act and § 55-515.3 of the Virginia Property Owners Association Act. Each of these similarly worded statutory provisions authorizes condominium unit owners' associations and property owners' associations, respectively, to conduct association business (including voting) "using the most advanced technology available at that time if such use is a generally accepted business practice." The technology to be used must provide adequate security, reliability and verifiability in the transmission of any vote. Currently, several technologies meet these criteria, although web applications (typically offered through a third-party vendor) appear to offer higher levels of security and ease of implementation.

Associations utilizing electronic voting procedures should be aware that these statutes require that non-technology alternatives be made available to any members who do not wish to vote electronically. In practice, this requirement is typically not a concern as electronic voting can be utilized in conjunction with in-person and proxy voting, as opposed to replacing those methods.

Although the statutes previously discussed generally authorize the use of electronic voting, there are other provisions within the Virginia Condominium Act and the Virginia Property Owners Association Act that impose additional requirements and restrictions. In order to comply with these additional requirements and avoid potential conflicts, associations should adopt a resolution authorizing the utilization of (and establishing procedures for) the electronic voting process. Associations should also be mindful of any provisions within their respective governing documents that would preclude electronic voting or impose additional requirements or restrictions beyond those set forth in the statutes. Be especially wary of express provisions in those documents that utilize the term "shall" versus "may" in setting forth the method of casting votes.

Associations are encouraged to seek legal counsel prior to implementing any electronic voting procedures.

FIRM HAPPENINGS

Awards:

At this year's CVCCAI annual awards on November 2, 2012 **Chadwick, Washington, Moriarty, Elmore & Bunn, PC** was named Business Partner of the Year and **Jerry M. Wright, Jr.** received the Past President Award and Board Member recognition.

At this year's WMCCAI annual awards on November 3, 2012 **Ken Chadwick** was named Educator of the Year, **Allen Warren** received Board Member Recognition, and **Bruce Easmunt** was elected to the WMCCAI Board of Directors and awarded the 2012 WMCCAI Committee Chair of the Year award.

Brendan Bunn was elected to the Business Partner's Council of the Community Associations Institute. The Business Partner's Council will kick off its 2013 year with a retreat held prior the Community Association Law Seminar in January 2013.

Marie Johnson was promoted to senior associate attorney and named head supervising attorney for the collections department of Chadwick, Washington, Moriarty, Elmore & Bunn, PC.

Recent Events:

Wil Washington appeared on the Fairfax County Government's live TV program "Your Community, Your Call" on September 18, 2012 at 7 p.m. with CPA Howard Goldklang to discuss the basics of the community association budgeting process.

Wil Washington presented at a state approved continuing education seminar on Fair Housing at the Property Management Coalition Conference in Charlottesville on October 25, 2012.

Over 80 homeowners attended the firm's seminar at Smith Mountain Lake on Saturday, October 20, 2012, where **Steve Moriarty, Wil Washington, Brendan Bunn** and **Mike Sottolano** spoke on a variety of topics ranging from social media to meeting procedures. The event was hosted by the Association of Lake Area Communities.

Ken Chadwick was a guest panelist on an educational common interest community seminar entitled "A View from Richmond". The seminar was held on Tuesday, November 13, 2012 from 7 p.m. to 9 p.m. at the Fairfax County Government Center and was sponsored by Fairfax County's Consumer Affairs Branch and WMCCAI. The panelists discussed how regulations, legislation and recent case law impact Virginia homeowners and condominium association communities, board members, and managers.

Recent Publications:

Steve Moriarty and **Bruce Easmunt** authored articles in the October 2012 issue of Quorum magazine and **Susan L. Truskey** authored an article appearing in the November 2012 issue of Quorum magazine, printed by the Washington Metropolitan Chapter of CAI.

Jerry M. Wright, Jr. and **Mike Sottolano** authored an article in the Fall 2012 edition of Consensus Newsmagazine, printed by the Central Virginia Chapter of CAI.

Upcoming Events:

Andrew Elmore and **Wil Washington are** scheduled to speak at the Community Association Law Seminar in January 2013. Andrew will serve on the "Panel of Pundits" on a variety of community association law issues and Wil will discuss the significant cases that shaped community association law in 2012.

CHADWICK, WASHINGTON, MORIARTY, ELMORE & BUNN, P.C.

9990 FAIRFAX BOULEVARD, SUITE 200
FAIRFAX, VA 22030
(703) 352-1900
FAX (703) 352-5293

201 CONCOURSE BOULEVARD, SUITE 101
GLEN ALLEN, VA 23059
(804) 346-5400
FAX (804) 965-9919