



The Special Assessment July 2022 Edition



Dealing with Tricky Tree Issues

By Michael Sottolano and Lauren Ritter

Disputes can arise between owners and their association regarding who is responsible for maintenance or removal when once healthy trees in the community begin to show signs of death or disease, especially when the trees are located near homes or other structures. Whether the association or owner is responsible (and could be held liable for damages which result if the tree, or a part thereof, falls and causes injury or damage) will often depend on whose property the tree is located on and what the association's governing documents provide.

Case Law

In 2007, the Supreme Court of Virginia issued an opinion in *Fancher v. Fagella*¹, now considered a landmark case that changed the rule of law concerning encroaching vegetation that had previously been in place for over sixty years. The *Fancher* case concerned the roots and overhanging branches of a sweet gum tree that were allegedly causing structural damage to an adjacent townhome. In *Fancher*, the Court upheld the long-established right of an adjoining landowner to exercise self-help to protect his property from encroachments and adopted a new standard for determining when it may be reasonable to impose an actual duty on a landowner to protect his neighbor's lot from damage caused by intruding roots and branches. The Court indicated that while it may be unreasonable to impose a duty "upon the owner of historically forested or agricultural land" that an actual duty may exist on the owners of adjoining residential lots to protect neighboring property from damage caused by encroaching vegetation. Building off this principle, a landowner may also have the right, depending on the extent of damage caused by encroaching vegetation, to seek money damages or pursue an injunction against the owner of the neighboring property to compel that owner to correct the "nuisance" vegetation.

¹ *Fancher v. Fagella*, 274 Va. 549 (2007).

Dealing with Trees on an Owner's Property

Homeowners are *generally* responsible for maintaining the trees located on their property; however, the association's governing documents (especially for townhouse communities) may prescribe that the association is responsible for maintenance of trees and other landscaping features on the owner's property or that the association is responsible for removal of diseased, dying or fallen trees in the community. Therefore, if a tree located on an owner's property appears damaged, diseased, dying or has fallen and is in need of removal, it's a good idea to check the association's governing documents to confirm which party the governing documents provide is responsible for addressing the matter.

If pursuant to the association's governing documents the owner is responsible for keeping his property in good order and repair, including maintenance and care of the trees and/or landscaping features thereon then, unless some other more specific provision of the association's governing documents expressly provides otherwise, the owner would be responsible for removal of fallen trees, limbs, branches, etc. on his property. Whether the association could require an owner to remove a dying, dead, diseased or otherwise unstable tree that has yet to fall from the property would depend on the terms of the association's governing documents and any applicable maintenance rules or guidelines (additionally, whether the association may prevent owners from removing an otherwise healthy tree from their property would depend on the terms of the association's governing documents and any applicable rules or guidelines). The association and owners, however, should keep in mind that a landowner who is negligent in maintaining a tree on his property (e.g., the tree is dying, diseased or damaged and owner takes no action to remove or treat the tree or otherwise mitigate the risks that it may pose) and that tree causes damage to a neighboring property, the landowner who failed to take appropriate action, consistent with the court's ruling in the *Fancher* case discussed above, may be responsible for the costs of repairing any damage caused by the tree.

When considering removal of a tree from the owner's property, there are also a few questions that should be addressed before the tree is actually removed: (1) does removal of the tree require approval from the association?; (2) is the owner required to install a replacement tree?; and (3) are there zoning provisions or proffers that are affected by the removal of the tree?

Some association's governing documents require owners to submit an exterior modification application before a tree is removed or require homeowners to plant a new tree when one is removed (*note*--sometimes, even if the governing documents would normally require association approval for removal or new installation of trees, there may be an exception provided for in the governing documents for situations where the tree is *dead, dying, or diseased*). The requirement to replant can also come from the association's proffers or the local zoning ordinance, which may require the development to have a certain number of trees planted on each lot or throughout the community.

Dealing with Trees on Common Areas/Elements

The association may generally engage in tree removal, root removal, and branch trimming of any vegetation that grows on the common area or common elements. Additionally, if a tree on a neighboring property to the common area/elements is hanging over the boundary line of the properties (or the roots are extending from the neighboring property into the common area/elements) and posing the possibility of damage to the common area/elements, the association has the right to cut back the encroaching portions of the tree to the boundary line of the properties. Keep in mind, however, that while the owner of a property which neighbors the common area/elements would have the same right as the association to cut back the encroaching portions of the tree, most association governing documents will prohibit an owner from making changes to the common areas/elements, such as the cutting back or removal of trees, without association approval.

What to do if an owner removes trees from the common areas or common elements without permission? Check the association's governing documents for the remedies that are available to the association, which may include: (1) the association replaces the tree and assesses the cost to owner; (2) the owner replaces the tree at the owner's expense (voluntarily or through injunctive relief); (3) the association levies violation charges against the owner; and/or (4) the association suspends the voting rights and/or other privileges of membership of the owner, etc.

TIP: If the Board suspects or becomes aware of an owner removing trees from the common area/elements (or the owner's property if approval by the association is required for removal) without permission, take photographs immediately. Pictures of how the property appeared before and after the removal can be helpful in establishing damages if the matter needs to be litigated (keep in mind, the relief *likely* to be requested by the association in these types of lawsuits will be that the owner replant a tree of similar species, size and maturity as that which the owner removed; a picture of what was removed can go a long way towards demonstrating to the court what needs to be installed).

Untangling tricky tree issues can be challenging! Remember, your association's legal counsel is here to help and can provide valuable advice if you're stumped.

Revisiting Flag Restrictions

By Tiago D. Bezerra

On June 14, 1777, the Continental Congress adopted a resolution establishing the general design of the flag of the United States of America. In fall 1949, over one hundred seventy years later, June 14th was designated as *Flag Day*, a day of national observation for all Americans. In recognition of Flag Day, we revisit how current federal and state statutes restrict the extent to which community associations can regulate the display of American flags in common interest communities.



Although predated by restrictions in the Virginia Property Owners' Association Act ("POA Act"), the Freedom to Display the American Flag Act of 2005 became federal law in 2006 after passing the House of Representatives and the Senate without objection and signed by President George W. Bush. Since then, the principles established in the federal law have been further enshrined in the POA Act – Section 55.1-1820 – and the Virginia Condominium Act ("Condo Act") – Section 55.1-1951 – with some key additional restrictions.

The general rule under these statutes is clear – no association may prohibit any owner from displaying the American flag on their individually owned property (or an owner's exclusive-use area), even if a covenant contained in a declaration or the condominium instruments prohibits such display. All three statutes, however, clearly reserve to associations: (1) the ability to restrict the display of the flag on the association's common areas or common elements; and (2) the ability to establish *reasonable* restrictions (i.e., rules) pertaining to the *time, place, duration, and manner of display* of the flag. Common examples of American flag display rules we have encountered include prohibiting flagpoles, requiring flags to be kept in good condition, and requiring prior approval for the location where the flag will be displayed.

What is tricky about association rulemaking authority in this area is that the laws require the rule to be (i) *reasonable* and (ii) *necessary to protect a substantial association interest*. Further complicating this ambiguous scope of association authority is that the POA Act and Condo Act make clear that if a flag rule is challenged, the burden is on the *association* to prove that the rule protects a *substantial association interest*. While "preserving property values" and "maintaining harmonious appearance" are certainly the most significant interests associations commonly are created to protect, we are not aware of any reported case in Virginia where a court has opined that flag rules are necessary to protect these interests. As a result, and without clear guidance from a Virginia court on what it considers to be a substantial association interest worth protecting in the context of this issue, associations could be left in uncharted territory regarding whether a court may ultimately deem a particular rule reasonable and enforceable.

We recommend that governing boards review any flag rules currently in place in light of these laws preserving the right of owners to display American flags and, if necessary or appropriate, consider revising. Specifically, boards should consider the following:

- ✓ *Review your covenants to identify whether any flag restrictions exist.*
- ✓ *Review and confirm that any flag rules only restrict the time, place, duration, and manner of display of American flags on an owner's property or limited common elements.*
- ✓ *Determine whether the association interests are protected by the rules.*
- ✓ *If your rules distinguish between flags, consider the reason for the distinctions and whether rules should be uniform with respect to all flags.*
- ✓ *When in doubt, consult with legal counsel!*

Finally, if your community has flag rules in place, it is critical that the rules are properly disclosed in resale certificates and disclosure packets. Unlike some other rules that may continue to apply even if not disclosed during resale, pursuant to the POA Act and Condo Act, failure to disclose flag rules can provide owners with an absolute defense in a case seeking to enforce violation of a flag rule. For example, if your community prohibits installation of standalone flagpoles but that prohibition is not disclosed in the resale document issued for a new owner, that owner may rely on such failure to disclose to install a flagpole.

Like our country's flag, which has changed twenty-seven times in our Nation's history, association flag rules should be revisited from time to time to ensure compliance with laws and the changing times. National days of observance such as Flag Day provide great opportunities to remind us to review the association's governing documents, condominium instruments and/or rules and regulations to ensure community interests are being properly preserved.

Chadwick Washington Zoom Webinar Series



Chadwick, Washington, Moriarty, Elmore & Bunn, P.C., is pleased to host and invites you to attend one or more of its educational Webinar Series for 2022 highlighting topics relating to community association law and governance. Each Webinar is one hour, with two topics presented by CWMEB attorneys followed by Q&A Sessions in separate Zoom breakout rooms staffed by CWMEB attorneys. The waiting room for the Webinars will open about 15 minutes before the sessions begin at 7:00 p.m., with the Q&A Breakout Rooms opening at approximately 7:40 p.m.

Topics this season include Amending Governing Documents; EV Charging Stations and Solar Panels; Understanding the Fiduciary Duty; Association Insurance Coverages; Emotional Support Animals; Drafting Rules and Regulations; Key Provisions in Vendor Contracts; a Virginia legislative update (June sessions); and many more.

The firm's next educational Zoom Webinar will be held on **Monday, July 25, 2022, at 7:00 p.m.** and will include presentations regarding **Emotional Support Animals** as well as **Solar Panels & Electric Vehicle Charging Stations**. If you are interested in registering you may do so directly [here](#).

We look forward to seeing all of our clients and guests during our 2022 Webinar Series and encourage you to register early for those topics and presentations you don't want to miss. The schedule listing the dates, times and topics for the 2022 Webinar Series is posted [here](#). Clients, managers and guests can also register for the Webinar(s) of choice directly [here](#). Additionally, more information can be found on the Seminar Series page of our website at www.chadwickwashington.com.

Firm Happenings



Jerry Wright was recently selected to serve on The Common Interest Community Board's Senate Bill 693 Committee to "...review the feasibility of allowing audio and video recordings to be submitted with a notice of final adverse decision as a record pertinent to the decision in accordance with § 54.1-2354.4 of the Code of Virginia."

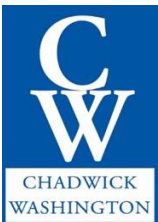


Later this month **Tiago Bezerra** and **Lauren Ritter** will be presenting a program entitled *Striving for Architectural Compliance* at the 12th Annual Virginia Leadership Retreat in Hot Springs, Virginia, which is held by the Virginia chapters of the Community Associations Institute.



Recently published in the July 2022 edition of *Quorum* and accessible through the link below is an article by **Sara Ross** which provides valuable information regarding how Association Boards of Directors should evaluate and consider Fair Housing Accommodation Requests from residents (especially when granting one resident's request may negatively impact or disturb another resident).

[Read full article](#)



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