Free Speech Rights Cast Aside

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My recent column regarding political yard signs (Associations may limit yard signs, October 21, 2004) generated a number of e-mails about free speech rights in association living and whether you check your constitutional rights at the gate when buying into a community regulated by an HOA.

Recently, a Florida appeals court addressed similar issues in a published opinion which started with the following sentence: "The rigors of living in compliance with the rules and regulation of a homeowners' association set the stage for this appeal."

Charlotte Shields purchased a home in the Andros Isle Subdivision in Palm Beach County. Dissatisfied with the builder, she displayed a sign in her front yard advertising the sale of her house and criticizing the builder. She placed other signs complaining about her home and its builder in the windows of her automobile.

The Association sent Ms. Shields a letter concerning the "for sale" sign, and the property manager also paid her a visit. The manager told Ms. Shields to reduce the size of her "for sale" sign to not greater than two square feet, which was the size permitted by the deed restrictions. Ms. Shields reduced the size of her sign as instructed, but apparently did not change the wording.

About a year later, notices were again sent to the owner, claiming that all of the signs violated the restrictions, and had to go. Ms. Shields did not comply. Litigation followed.

The trial judge ruled in favor of the association on all counts, finding that the yard sign violated the restrictions, as did the signs posted in the car windows.

On appeal, a three judge panel was called upon to review the trial court's ruling.

The appeals court began its discussion of the dispute by noting two conflicting policies found in the law applicable to judicial enforcement of restrictive covenants. First, the court noted that restrictions found in a declaration of covenants "are afforded a strong presumption of validity, and a reasonable unambiguous restriction will be enforced according to the intent of the parties." On the other hand, the court also noted that restrictive covenants "are not favored [in the law] and are to be strictly construed in favor of the free and unrestricted use of real property." Stated otherwise, when in doubt, the association loses.

The court then looked at the restrictions for the Andros Isle community under a judicial microscope. The first relevant clause stated that no sign could be displayed "to public view on any lot," except one "for sale" or "for rent" sign, of not more than two square feet. The court found that the reference to the "lot" was limited to the real property (the land and the home) and accordingly did not prohibit the signs in the car windows.

The second documentary clause in question stated that: "[n]o vehicles, except four-wheeled passenger automobiles... with no lettering or signage thereon, shall be placed, parked or stored upon any lot." Ms. Shields argued that the restriction against signs "thereon" automobiles did not prohibit signs "therein."

After quoting the dictionary, and considering the rules of grammar involving the use of prepositions, the appeals court sided with

the homeowner on the car signs. The court concluded that the language in the restriction was meant to curb the parking of commercial vehicles, not criticism against the builder.

The court did agree with the association that the yard sign violated the regulation. However, the court sent that issue back for trial, since Ms. Shields had argued "selective enforcement" by the association, citing 124 additional sign violations which the association had supposedly done nothing about.

Although "free speech" rights were not the center of the legal points in this case, the decision does show that courts will uphold an association's ability to restrict what might otherwise be considered constitutionally protected communications. The case also points out that unless the association has dotted the i's and crossed the t's, it may well find itself on the losing side of an effort to enforce its rules and regulations.

See *Shields v. Andros Isle Property Owners Association, Inc.*, 872 So. 2d 1003 (Fla. 4th DCA 2004).

Question: Our bylaws state that a board member can serve on the board for two consecutive two year terms, but then cannot run for the board again until a two year lapse has occurred. We are a small association with 32 homeowners. Of the 32, approximately 24 are seasonal residents. Question: Without changing the bylaws, since this is expensive, how can the board get around this since some of the board members were asked to continue past the four year limit by many of the homeowners? Would a vote at the annual meeting be acceptable? **P.A. (via e-mail)**

Answer: The association's governing documents are required by law to set forth the criteria and guidelines for serving on the board of directors. It is not common to see language that limits a board member's service to a specific number of terms, or to require an outgoing board member to wait a set period of time before he or she is eligible to serve on the board again. However, such a clause is not unlawful, and must be followed. You cannot "get around" the current language of the governing documents by some other means, you will need to properly amend the bylaws. The process is not particularly complicated or expensive.

Question: I live in a condominium which suffered hurricane damage to all of the roofs in our complex, along with soffit, screen, solar panel damage, several trees and damage to a carport. Is our association required (and in accordance with most associations insurance policies) to have a licensed contractor repair all of these damages or can our maintenance people repair all of this damage although none of them have contractors/roofing licenses? **L.L. (via e-mail)**

Answer: In your description of the damage, you have listed items ranging from minor in nature up to what appears to be extensive roof damage. Certainly a good portion of the damages that you have listed would be beyond the scope of the normal maintenance duties or skill level of on-site maintenance personnel. Furthermore, to properly avoid issues of liability, it would behoove the association to have damages repaired by a licensed contractor. As you have pointed out, it is also possible that your association's insurance policy will require the use of a licensed contractor.

An additional benefit of hiring a licensed contractor is that in the process of obtaining quotes from several contractors, you will benefit from their professional experience when they come to assess the damage at your condominium. In other words, they have the experience to properly evaluate the total damage, and may discover additional needed repairs that your maintenance crew would not discover. Finally, a licensed contractor will have the knowledge and experience to obtain all proper permits and inspections for the repair process.

Question: My homeowners association has only had one audit since the beginning of the development, which was around 1984. The members of the Association would feel much more secure if an audit was done on a regular basis. How should this be handled? Do the

owners pay for an audit? Does the audit requirement have to be included in the bylaws? **B.M. (via e-mail)**

Answer: Significant amendments to Chapter 720, the statute governing homeowners' associations, were adopted during the 2004 legislative session. The amendments to Section 720.303(7), Florida Statutes, effective October 1, 2004, require certain financial reporting by a homeowners' association depending on the total annual revenues of the association. An association with total annual revenues of $100,000.00 or more, but less than $200,000.00, must prepare "compiled" financial statements. An association with total annual revenues of at least $200,000.00, but less than $400,000.00, shall prepare "reviewed" financial statements. Finally, an association with total annual revenues of $400,000.00 or more must prepare audited financial statements.

An association with total annual revenues of less than $100,000.00 is only required to prepare a report of cash receipts and expenditures. An association in a community of fewer than 50 parcels, regardless of the annual revenues, may prepare a report of cash receipts and expenditures in lieu of financial statements required by the Statute, unless the governing documents provide otherwise.

Therefore, the first step in determining what type of financial reporting is required is to determine the association's annual revenues. If your association has total annual revenues of less than $400,000.00 or consists of fewer than 50 parcels, an audit would not be required.

However, the new law also permits 20% of the parcel owners to petition the Board for a level of financial reporting higher than that required by the Statute (for example, an audit). If a petition is presented, the association must hold a meeting of the members within thirty (30) days of receipt of the petition for purposes of voting on raising the level of reporting for that fiscal year. If approved by a majority of the total voting interests, the financial report approved by the members would be paid for using association funds.

The statute also allows the owners to waive the preparation of compiled, reviewed, or audited financial statements if approved by a majority of the voting interests present at a properly called meeting of the Association. If the required financial reporting is not waived, the Association must comply with the financial reporting requirements in the statute based on the total annual revenues.

It is not necessary to amend the bylaws to require an audit if your annual revenues exceed $400,000.00, as an audit will be required pursuant to the statute, unless waived. ⚖

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.

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