



# SIGNS OF THE TIMES

By Pamela Babcock | Illustration by Robert Neubecker

Community associations are facing a perfect storm for free-speech battles as the presidential election nears. Ensure your sign restrictions are reasonable and uniformly enforced.

**THE SIGNS THAT RALLY** support for a favorite candidate or cause typically begin to dot yards a few months ahead of an election. They may grow like weeds without careful attention.

The issue can be contentious in any election season, but the upcoming Nov. 3 presidential vote and a host of issues facing the country are creating the perfect storm for heated exchanges and free-speech battles.

The U.S. has been reeling from the COVID-19 pandemic, record unemployment, and protests over the police killing of a black man in Minneapolis in May. Months ahead of the election, news and social media are already filled with headline-grabbing stories of neighbors refusing to remove their Trump 2020 or Black Lives Matter signs and boards claiming the owners are running afoul of community restrictions.

It's a sign of the times, so to speak. And the issue will only grow as the election nears.

"I have little doubt that we will witness a spate of community association disputes regarding yard signage this year as we approach Election Day," says James A. Gustino, a Winter Garden, Fla., attorney. "Emotions have been inflamed beyond anything I have personally experienced in 36 years of practicing law, and boards should be prepared to address the issue with professionalism and tact."



To head off acrimony between residents and the board, the risk of being plastered on the local news, and the potential for costly litigation, it pays to ensure you've developed reasonable sign

restrictions and that they are enforced uniformly. Some experts recommend involving residents in discussions when rules about signs are formulated or revised.

### THE FREE SPEECH ARGUMENT

One of the first responses many residents make when told a sign isn't allowed is to argue that it's a violation of their First Amendment rights to freedom of speech, even if the sign goes against the association's rules. But that's often not the case. Community associations have significant discretion because they aren't government entities and, as such, aren't bound by the same constitutional restrictions.

Since a community association is private and not an official form of "government," federal First Amendment freedom of speech protections typically don't apply to private association restrictions or covenants that may limit such rights, according to attorney Edward Hoffman Jr., co-founder and managing partner of Barrow Hoffman in Pennsylvania.

But what about the states? How do they apply freedom of speech protections to community associations?

Most do not consider a community association a "state actor" and will not interfere or overturn private association restrictions or covenants that may limit speech. "There are states that have actually found in favor of homeowners in matters concerning freedom of speech in a community association," Hoffman says. (Read Hoffman's article, "Stars and Stripes and Sleepless Nights," on p. 21 for advice on flag displays.)

In recent years, several states have enacted legislation granting greater rights to residents to display political signs. Gustino recommends checking the state's highest court rulings and specific "freedom of speech" verbiage in the state's constitution.

Although most federal and state courts don't protect political signs from association enforcement, the New Jersey Supreme Court issued a pair of decisions in 2012 and 2014 protecting political speech, and those opinions could influence other state courts considering similar legal issues.



### DECIDING ON RESTRICTIONS

Boards often restrict signs because clutter detracts from a community's appearance or they could become safety hazards, perhaps by blocking the view of traffic.

When it comes to developing sign rules, associations generally have complete control over common elements but should follow any state statutes and the language of the governing documents regarding private property, says James H. Slaughter, a partner with Law Firm Carolinas in Greensboro, N.C., and a fellow and past president of CAI's College of Community Association Lawyers (CCAL).

For example, North Carolina regulates the display of political signs related to elections and prohibits an association from restricting them based on various conditions, including the size of the sign, how many days before an election it can be put up, and how many days after an election it can remain before being removed.

"Beyond that, we generally tell associations they need to enforce the language of their governing documents or change the language," Slaughter says.

He adds that association documents typically fall into one of three categories: no regulation of signs, other than what a state or local government body might require; certain signs allowed (such as

security, for sale, for rent, or construction signs); or a prohibition on all signs on individual lots.

Most boards don't want to be in the business of "approving" language or sign content. "That almost always leads to inconsistency and capriciousness based on the particular board at the time," Slaughter says. He notes that one community's documents banned all signs but spelled out it would make an exception for "Thank You, Jesus" signs while prohibiting those "for other religious beliefs."

Because political views can become quite charged and potentially lead to costly litigation or unnecessary friction at the least, Gustino recommends clients permit political signs but enact reasonable time, place, and manner restrictions, such as they can be put up only 45 days prior to an election, must be removed three days after votes are cast, can't contain profanity, and must be limited in number so they don't create a sight obstruction or other safety concern. He advocates involving community members when crafting restrictions and posting approved rules prominently via email blasts, special notices on the community website, and on entry signs to encourage compliance.

To avoid potential problems, Valencia Lakes Homeowners Association, an active adult community in Wimauma, Fla., bans all signs. "That allows us to avoid the issue of being discriminatory in what types of signs to allow," explains Randy King, a director on the board. "Our attorney told us a total ban on all signage was more likely to be upheld and, as that is what is in our governing documents, we believe our position is defensible."

### ENFORCEMENT LANDMINES

Associations often get tripped up when they don't enforce restrictions uniformly or engage in selective enforcement, such as allowing a sign supporting one side of an issue or candidate while disallowing a sign advocating the opposing view.

It also can be a slippery slope when an association that typically bans signs turns a blind eye—even when the signs convey positive messages such as "Congratulations, Class of 2020 Graduate" or "Thank

You First Responders." It becomes much more difficult to stop other signs that are general or contain political statements, says Slaughter.

"We've had associations that have language prohibiting all signs, but then the board feels this is a 'good sign' that warrants an exception," Slaughter notes. "If documents don't permit an exception, you are then choosing what language is good and what is bad, which almost always leads to problems as different owners will have different opinions."

Boards that decide to enforce rules they've been lax about in the past should explain to residents the reasoning, along with its legal authority to do so "well in advance of the effective date of enforcement," Gustino says.

Remind residents of sign rules prior

to election season or when they become effective. Boards considering adopting new sign rules or amending existing ones should invite feedback by publishing a draft of proposed changes and holding at least one meeting to gather community feedback and answer questions.

Fortunately, some communities seem to have avoided problems with political signs. Harbour Landings Estates Homeowners Association, a gated community with 59 lots in Cortez, Fla., bans all signs except for "For Sale" and alarm signs. Both are limited to one sign per lot, with size and height restrictions. Mike Bishop, secretary and chair of the community's architectural review board, says violators typically have been painters or repair companies doing work in the community.

## LEGISLATING SIGNS

The Arizona state legislature is considering a bill (SB 1412) that would further limit a community association's power over residents' political activity and outlines actions that owners can take to voice their views in opposition to community policies. The state, like a few others, currently prohibits associations from banning political signs for federal, state, and local elections but sets limits on how long they can be up, when they need to be taken down, and the like.

SB 1412 expands the definition of political activity and would allow owners to put up political signs for community association issues and elections and stop associations from banning political meetings and events from being held in common areas. The statute, tabled when the recent session was cut short due to the COVID-19 pandemic, is expected to be reintroduced in 2021.

CAI's Arizona Legislative Action Committee (LAC) opposes the bill, saying homeowners who object to community policies "would be allowed to place signs of opposition in their front lawns, go door-to-door to discuss concerns with neighbors, circulate petitions for actions in the community, and require community associations to allow political fundraisers in common areas." The LAC contends that SB 1412 "takes away the association's ability to self-govern" and would create problems for neighbors who buy homes that "want the peaceful enjoyment of a community where conflict is not promoted, and civility is encouraged."

Brian W. Morgan, managing partner with Maxwell & Morgan in Mesa, Ariz., co-chair of the Arizona LAC, and a fellow in CAI's College of Community Association Lawyers (CCAL), says he is not opposed to signs per se, but maintains that communities should be allowed to decide "what's best for their particular community instead of the government getting involved and mandating what's best, especially on a local level." —P.B.

He adds, however, that a new homeowner once put up a “No Trespassing” sign. “It was the nicest ‘No Trespassing’ sign I have ever seen—really, a brass plaque,” Bishop recalls. When made aware of the violation, the owner removed the sign without complaint.

## DRIVING NEW RIFTS

It’s no surprise that in these turbulent times, “Black Lives Matter,” “Hate Has No Home Here,” “Stay Home, Save Lives,” and other signage supporting causes have caused rifts.

In June, Briar Chapel Community Association in Chapel Hill, N.C., made headlines when some residents questioned the timing of enforcement of a yard-sign policy, saying the rules hadn’t been enforced until “Black Lives Matter” signs began appearing on lawns.

According to *WTVD*, the board notified residents that “yard art and garden flags are not allowed,” and that noncompliant signs would need to be removed by July 1. But resident Mia King and others noted to the local television station that there are signs, flags, and “little lawn animals” in yards, which technically aren’t supposed to be there and that had long been ignored.

The board later issued a mea culpa, noting that while “our intentions were procedural, we failed to appreciate the



direction the community would like to take” on sign rules. Carmichael, president of the CAI North Carolina chapter and a CCAL fellow, notes that she is legal counsel for the association and that her response is not in her capacity as chapter president.

Such signs are far more challenging to regulate since—unlike political signs—social justice causes are not “transitory events,” according to Gustino. In Florida, and in most states, such signs are subject to reasonable regulation by community associations. Nonetheless, “simply because community associations are empowered to enforce restrictions against those signs” doesn’t mean it’s wise to do so, Gustino

signs as they are of political signs.”

Brian W. Morgan, managing partner with Maxwell & Morgan in Mesa, Ariz., and co-chair of the CAI Arizona Legislative Action Committee, says he began seeing an uptick in calls about social justice signs around June. “Mostly, it’s managers saying, ‘Hey, they’re posting signs. We’re getting complaints. ... What should we do?’”

Morgan says most boards recognize the tension and anxiety many are feeling and are adopting a wait-and-see approach rather than taking aggressive action.

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relevance of current events ... and how our message would be received. We realize that our actions to address signage in the community have caused pain to some residents and for that we apologize.” The board is reviewing its covenants and, for now, the signs are allowed to stay.

In a statement to CAI, Hope Derby Carmichael, a partner with Jordan Price Wall Gray Jones & Carlton in Raleigh, N.C., says the Briar Chapel Hill board is “working on engaging with the community in the coming months regarding

says. He recommends boards survey homeowners for their opinions before embarking upon enforcement.

“Each community is unique, and the facts arising in one may vary greatly from the facts arising in another,” Gustino says. The degree of “toleration” for speech on such subjects will also likely vary between communities. “There is simply no ‘one-size-fits-all’ advice in these circumstances,” Gustino says, adding that when it comes to enforcement, he recommends clients “be at least as tolerant of social justice

complete and immediate enforcement of all signs, especially those related to social justice causes?” asks Morgan, a CCAL fellow.

He thinks not. Just as much of the world has been put on hold, Morgan says this just may be a good time for full enforcement to take a back seat. “We just need to let the world heal a little bit,” Morgan says. “We need to let everybody breathe a little sigh of relief.” **CG**

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