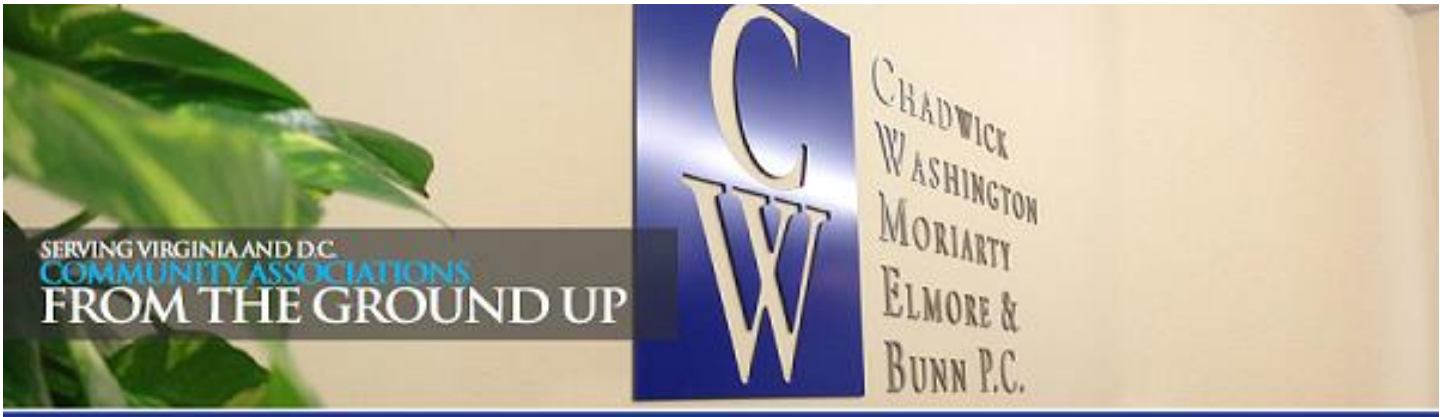
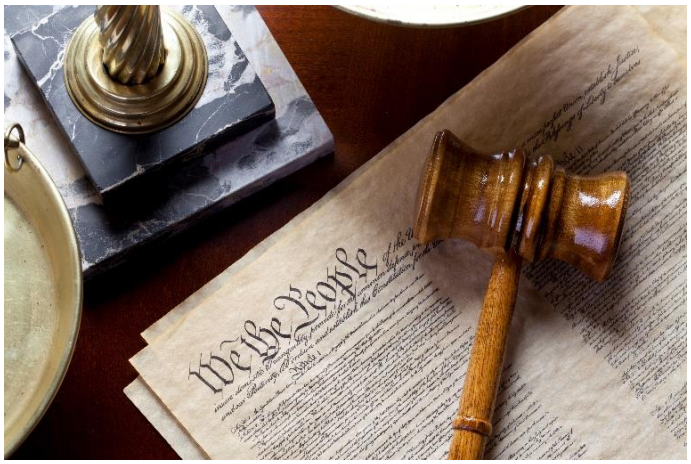


The Special Assessment
December 2022 Edition



But My Constitutional Rights?!

By Tiago D. Bezerra

Among the criticisms often levied at community associations is a claim that boards of directors cannot infringe on residents' Constitutional rights. With *Bill of Rights Day* being celebrated on December 15th, marking the anniversary of the ratification of the first ten amendments to the United States Constitution in 1791, now is a timely opportunity to consider the legitimacy of this argument with respect to board rulemaking authority in common interest communities.

Thinking back to our high school U.S. history classes, we remember that the Constitution was originally drafted only to set up the structure of the United States Government and did not recognize any "rights" of U.S. citizens and residents. That is, until the Bill of Rights was formally ratified by three-fourths of the states on December 15, 1791 – it's those rights that residents are likely referring to when claiming infringement by a board of directors. The rights set forth in the Bill of Rights, however, are written to protect "us" from the federal government. In fact, the Bill of Rights as originally drafted did not even limit what state governments could impose against state residents – the rights enumerated in those first ten amendments to the Constitution were not extended to restrict state government action until the 14th Amendment was ratified in July 1868.

It follows that the Constitution and Bill of Rights applies only to government actors, not to actions of private organizations. But what about the Virginia Constitution, which also sets forth its own Bill of Rights that substantially mirrors those Rights established in the amendments to the U.S. Constitution? The Virginia Supreme Court has held that, at least regarding protections for speech, the Virginia Constitution is *coextensive* with the U.S. Constitution. In other words, the applicability of the Virginia Constitution is the same as the U.S. Constitution – it only applies to governmental actors.

So, at least in Virginia, residents who raise concerns about the "Constitutionality" of board-adopted rules can be told simply that the Constitution and its Bill of Rights do not apply to community associations because the association is not

acting by or on behalf of the government. Even so, governing boards must appreciate that this does not mean they have a blank check for rulemaking. While not limited by the Constitution, boards' rulemaking authority can be limited by the by statute or the recorded declaration or condominium instruments. So, while a board of directors could adopt rules restricting speech – prohibiting the display of signs on lots or units, for example – there may be a basis to challenge the rule if the recorded governing documents or applicable law narrow the scope of the board's rulemaking authority over signs.

When considering rules that could arguably abridge the types of rights residents believe to be guaranteed under the Constitution and Bill of Rights, boards should be mindful of the following:

- √ *Always, first confirm that there is authority for adoption and enforcement of the rule in the community's recorded declaration or condominium or applicable law – while the Constitution does not limit board authority, courts may certainly construe the scope of board rulemaking authority narrowly to that established by statute and in recorded governing documents.*
- √ *Determine whether the rule protects and serves association interests*.
- √ *If your rules permit some, but not all, of a type of conduct or activity (e.g., some but not all signs are permitted), consider the reason for the distinctions and whether the rules should instead be uniform (e.g., prohibit all signs).*
- √ *Be reasonable.*
- √ *When in doubt, consult with legal counsel.*

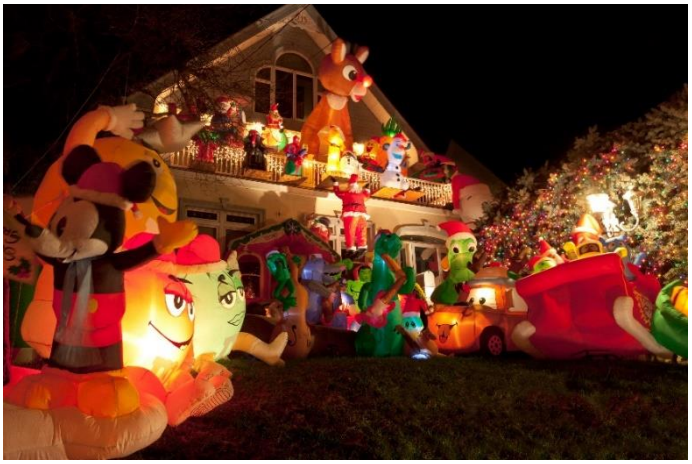
Community associations are private membership organizations rather than governmental actors and, thus, fall outside the protections against government infringement of rights. Even so, governing boards must appreciate that their authority continues to be limited – by statute, by the association's governing documents and by court decisions. To that end, boards should carefully consider their scope of authority when adopting rules, particularly those that restrict how residents can use their individual lots or units.

Regulating Holiday Displays

By Michael A. Sottolano

Regulating holiday displays can be a tricky topic and association boards of directors are well advised to keep certain things in mind when dealing with it. With the holiday season upon us now is a great time to brush up on some important principles when it comes to adopting and enforcing rules regulating the display of holiday lighting and decorations.

First, it's important to remember that associations can generally prohibit and regulate decoration of common areas and common elements. The ability, however, for an association to regulate changes to a unit or lot, even of temporary nature such as the short-term display of holiday lights and decorations, must be based in authority provided by the association's recorded restrictive covenants (which are, in the context of property or homeowners associations, the recorded declaration, deed of restrictions, CC&Rs, etc., and, in regards to condominiums, the recorded condominium instruments) or by a rule or regulation duly adopted pursuant to authority provided by the covenants or applicable law.



Many sets of restrictive covenants will prohibit a lot or unit from being used for certain activities or require approval by the board of directors (or a committee) before exterior changes may be made. In such situations the association *may* possess adequate authority to regulate holiday decorative displays. Consider, however, that *the specific language of the association's covenants is important!* As the Virginia Supreme Court made clear in its 2019 opinion in the case of Sainani v. Belmont Glen Homeowners Ass'n, Inc., 831 S.E.2d 662, 666 (2019). In the Sainani case, the owners had displayed on their lot lighting in celebration of various Hindu, Sindhi and Sikh religious holidays at times and in areas outside of those permitted by the rules regarding holiday decorations adopted by the association's board of directors. As a result, the board took corrective action against the owners, including levying violation charges and, ultimately, filing a lawsuit against them in the Loudoun County Circuit Court. While the Circuit Court in this instance agreed with the association that, because there was authority in the association's restrictive covenants to adopt architectural standards applicable to lots, the board had the ability to adopt rules regulating the display of holiday lighting and decorations and enforce violations of such rules against the owners. On appeal of this decision by the owners, however, the Virginia Supreme Court found what it considered to be more specific and controlling language in the association's covenants that limited the board's ability to regulate external lighting on a lot only to the extent that the lighting had an "adverse visual impact to adjacent lots". Based on this language, the Virginia Supreme Court determined that the holiday display rules adopted by the board in this instance were overbroad and sought to regulate issues involving the lighting display on the owners' lot that went beyond the authority provided by the association's restrictive covenants. As a result, the Virginia Supreme Court reversed the Circuit Court's decision (which had awarded to the association injunctive relief, violation charges, and attorneys' fees) and remanded the case back to the Circuit Court for further proceedings consistent with its opinion.

The Sainani decision relates to a specific set of facts and unique language in a community's restrictive covenants; however, it is a good reminder to all association board of directors that if it attempts to stretch its rulemaking authority regulating holiday displays on lots or units beyond that which is provided in the recorded covenants that a Virginia court is unlikely to be supportive of such efforts.

Boards should also consider, if adequate authority for the association to regulate holiday displays on lots or units exists, rather than prohibit decorating lots or units (a decision which may be unpopular in the community) or require that all displays be approved on a case-by-case basis (which is likely to be an administrative nightmare), that a better idea may be for the board to adopt *reasonable* rules and guidelines which permit the short-term installation of holiday decorations that adhere to certain parameters. When developing holiday decorating rules, be sensitive to reducing potential health and safety issues and generating reasonable rules that address the issues which are of concern to the community. In particular, some issues to consider when generating holiday decorating rules:

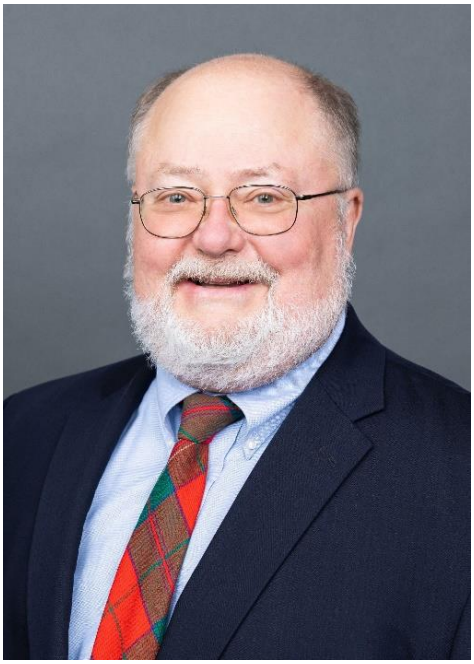
1. Allowing a *reasonable* time period, prior to and following the holiday, during which decorations may be installed and removed.

2. Addressing the hours during which holiday lights may be left on. An example of a possible *reasonable* time period for such activity would be from sundown (or earlier) until 10PM.

3. Adopting *reasonable* restrictions on size, style, material or number of decorations (depending on the size of lots/units and any other special considerations of the community).

If in doubt regarding your association's ability to regulate holiday displays in the community this holiday season, check with your association's legal counsel to confirm the extent of your board's rulemaking authority and that the desired regulations do not conflict with your association's unique set of recorded covenants or applicable law.

In Gratitude:



As you may already be aware, after 40+ years of practicing community association law, I have decided to retire, effective December 31, 2022.

Over these many years, I have been privileged to serve many of our firm's common interest community clients. It has been an honor to work with you and I have appreciated your confidence in me, and the long-standing relationships of trust established as a result.

Fortunately, I am leaving you in good hands as our firm is comprised of some of the best and ablest community association attorneys, not only in the Washington D.C. metro area, but in the nation. Did you know that our firm has six (6) nationally recognized attorneys who are members of Community Associations Institute's prestigious College of Community Association Lawyers? Accordingly, you can be sure that your community's legal issues will be handled by knowledgeable, experienced, and caring people as I "ride off into the sunset."

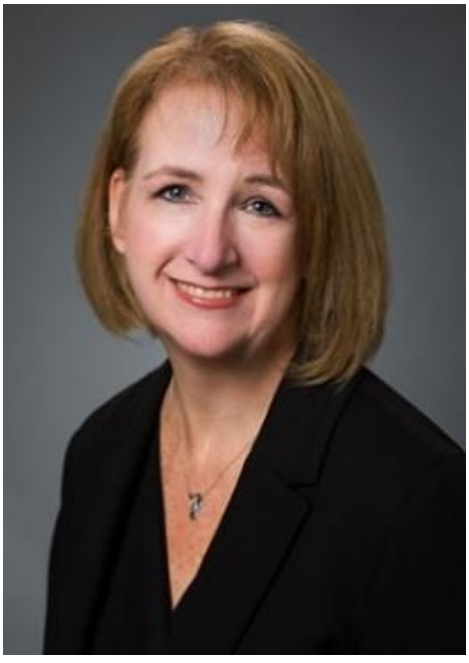
I will miss all of you, including my many friends and colleagues in the industry.

It has been my privilege and honor to serve you and with you on behalf of your Association and to have worked beside the many dedicated and hard-working industry colleagues in the profession. Thanks to all of you for making it the wonderful ride it has been. And thank you for the opportunity to serve and for your trust over the years. I wish you well in all things moving forward.

GODSPEED! AND REMEMBER TO MAKE IT A GREAT DAY!

BEST REGARDS,

KEN CHADWICK



Sara Ross Honored for Highest Level of Service to Practice of Community Association Law and Receives National Recognition as a CCAL Fellow

Sara Ross, Esq., a shareholder with CWMEB, has been granted fellowship in the College of Community Association Lawyers ("CCAL"). More than 4,000 lawyers practice community association law in the United States, yet fewer than 175 attorneys nationwide can distinguish themselves as CCAL fellows. Sara is the sixth Chadwick Washington attorney to be accepted into this elite group of community association practitioners from around the nation.

Sara earned this national recognition due to her outstanding leadership, commitment to the advancement of the legal principles and practical tools

necessary for community associations to thrive. She possesses high ethics, strong analytical and writing skills, a substantial depth of experience and the ability to teach others in the field.

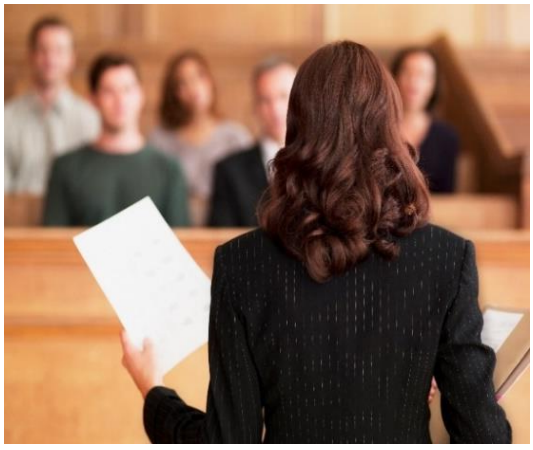
Sara is a graduate of the College of William and Mary and George Mason University School of Law. She is an active member of the Community Associations Institute ("CAI") at both the local, in the Washington Metropolitan Chapter of Community Associations Institute ("WMCCAI"), and national levels. She is currently serving on the CAI Business Partners Counsel and is a member of the WMCCAI Board of Directors. She has also spoken at numerous educational seminars, including the 2010 and 2012 CAI National Conference, the 2013, 2018, 2019 and 2020 WMCCAI Conference & Expo, the 2018 & 2019 CAI Virginia Leadership Retreat, and the 2015 and 2018 CAI Law Seminar.

CCAL was established in 1993 by CAI, providing a forum for the exchange of information among experienced legal professionals working for the advancement of community association governance. Its goals include promoting high standards of professional and ethical responsibility, improving and advancing community association law and practice, and facilitating the development of educational materials and programming pertaining to legal issues.

About Community Associations Institute

Since 1973, Community Associations Institute (CAI) has been the leading provider of resources and information for homeowners, volunteer board leaders, professional managers, and business professionals in the nearly 350,000 homeowner associations, condominiums, and housing cooperatives in the United States and millions of communities worldwide. With more than 41,000 members, CAI works in partnership with 36 legislative action committees and 64 affiliated chapters within the U.S., Canada, South Africa, and the United Arab Emirates as well as with housing leaders in several other countries, including Australia, Spain, Saudi Arabia, and the United Kingdom. A global nonprofit 501(c)(6) organization, CAI is the foremost authority in community association management, governance, education, and advocacy. Our mission is to inspire professionalism, effective leadership, and responsible citizenship—ideals reflected in community associations that are preferred places to call home.

Four Recent Jury Trial Victories for CWMEB Litigation Team



Congratulations to Chadwick Washington's litigation team! In the past year, CWMEB's **Janeen Koch** and **Henry Moore** tried four jury trials and secured favorable verdicts in each case. In three of the trials, Janeen and Henry defended their insurance defense clients from plaintiffs' claims of permanent traumatic brain injury ("TBI"). The first case was tried in federal court in October 2021, with the defendant admitting liability. While plaintiff's last settlement demand was $2 million (with the defendant offering $200,000), the verdict was just $10,000.

The second TBI case was tried in Rockbridge Circuit Court, with the jury returning a defense verdict. The third TBI case was tried in Chesterfield County in October 2022, with defendant again admitting liability. While the plaintiff asked the jury for $750,000, she was awarded just $65,000, another favorable outcome for the firm's litigation team.

***Note**: Lawyer case results like those noted above depend upon a variety of factors unique to each case. Case results do not guarantee or predict a similar result in any future case undertaken by the lawyer.*

Firm Happenings

Lesley Rigney was recently elected to another term on the Central Virginia Chapter of Community Associations Institute ("CVC-CAI") Board of Directors and received the Past Presidents Award for her continued commitment and dedication to the Central Virginia Chapter.

Michael Sottolano recently received an award from the CVC-CAI as part of the CVC-CAI Tradeshow Committee, who were recognized at the 2022 CVC-CAI Annual Meeting and Awards as Committee of the Year. He was also recently elected to a second term on the Board of Directors of the Southwest Virginia Chapter of Community Associations Institute ("SWVA-CAI").

Jerry Wright as outgoing Chair was recently recognized by the Virginia Legislative Action Committee ("VLAC") for his six years leading the VLAC**.**

Sara Ross was recently a panelist at the *Women in Community Association Law: A Dialogue* live webinar hosted by The College of Community Association Lawyers ("CCAL") on November 9, 2022.

Bruce Easmunt and **Tiago Bezerra**, along with Rebecca Shiland of the Portland, Maine law firm Jensen Baird, will be presenting their program entitled *Aiding & Abetting: Lawyer Liability for A Client's Breach of Fiduciary Duty* at the Community Associations Institute Law Seminar in New Orleans, Louisiana in January 2023.

Check out through the link below the article *Dealing with Tricky Tree Issues* written by **Michael Sottolano** and **Lauren Ritter** and recently published on the blog for the Southeastern Virginia Chapter of Community Associations Institute.

Read full article

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