

SIGNS AND HOLIDAY DISPLAYS - **How the Fair Housing Laws, CCIOA and First Amendment** **Relate to Associations' Rules and Actions**

There are two forms of expression that can create conflict within an Association, Holiday displays and political signs. As we approach the end of the year, there are annual issues that Associations face with holiday decorations that can raise tension between owners and even their Boards. With the recent election, political signs have been a hot topic. There has already been a situation with a non-holiday sign displaying a political slogan that recently hit the news. The issue becomes even more volatile concerning religious expression, because communities are becoming more and more diverse culturally. As Americans, we all value our freedom of expression and especially our freedom of speech. This article will discuss several common issues associated with political signs and Holiday displays. From freedom of speech to fair housing, this can be a difficult topic for both Associations and owners. However, if Associations and their managing agents are educated, cautious and consistent, they can minimize the fall out from political signs, Holiday displays and restrictions concerning these forms of expression.

Before looking at what Associations have to comply with concerning religious expression, it is important to first address whether residents have constitutional rights under the First Amendment to celebrate the holidays. The Freedom of Speech is not absolute in the United States. For example, someone cannot yell, "fire" in a crowded theater and expect to be able to use the First Amendment as a defense to the wrongful death suit of the person injured in the stampede for the exit. This is an often litigated area in the courts that often comes up regarding religious displays on government property. The legal standards for interpreting what is appropriate to be displayed on government property is ever evolving with the ever changing complexion of the Supreme Court. Books have been written on the topic, but one truth has emerged as this topic has been analyzed: there is no absolute right to freedom of speech.

Homeowner's Associations are not governments. While this sounds obvious, there was a recent case in New Jersey where a homeowner lost the argument he made to the court, that his full service Association was essentially a government actor or a quasi-governmental entity. The New Jersey court disagreed, which is a helpful precedent for Associations. In Colorado, Associations typically are non-profit organizations. Because Colorado Associations are not government actors, residents do not have a right to Free Speech concerning holiday displays and signs, in general. Yet, this does not end the discussion by any means. As many of you know from reading our recent articles on fair housing and Associations, the federal and state fair housing laws pertain to Colorado Associations. the Fair Housing Act Amended of 1988 (FHAA) applies to Associations.

So, how does the FHAA apply to Associations and holiday decorations and displays? Do Associations have to be concerned with decorations and displays? The answer is the FHAA applies in many ways and Associations absolutely need to be concerned with decorations and displays. While Associations are not government actors, the FHAA still controls how Associations must handle holiday signs and displays. The reason for this is because Religion is a protected class under the FHAA. For Associations, religious expression is something to be concerned about. Religious expression raises the issues of: (a) how can Associations and their Boards celebrate the holidays?; (b) how can homeowners celebrate the holidays, given the governing documents?; and (c) what does an Association have to allow in the common areas during the holidays?

The FHAA requires that all Associations provide equal treatment for all religious groups. Some Americans contend that this country was founded on Judeo-Christian beliefs and that Christmas is the country's main holiday for this time of year. So, why not celebrate it fully and anyone with different religious beliefs will just have to get over it? This sentiment simply does not comport the FHAA's stance on religion. Taking this point of view could be the first step in an Association buying itself a lawsuit. As communities across the country become more religiously and

culturally diverse, residents may celebrate a variety of religious holidays this time of year. Some of these holidays are unfamiliar to many. Further, religion may not be the only concern. Many African American residents celebrate Kwanzaa this time of year, which is a cultural holiday. Accordingly, race discrimination can be an issue this time of year. In short, Associations, like all housing providers, have to ensure that no preference is given to any religion or race. According to Mark S. Alper, Director of Compliance Services, National Center for Housing Management, failure of any housing provider to adhere to this concept can lead to fair housing lawsuits or civil rights complaints.

Does this mean that Associations and their members cannot celebrate the holidays? Certainly not. However, as discussed below, Associations have to treat everyone the same with respect to religious expression and not endorse a religion, yet not prohibit owners and residents from their own religious expression. On one hand, Associations simply cannot celebrate the holidays or take any action that endorses a particular religion. On the other hand, Associations cannot prohibit residents from celebrating their particular religion. These requirements leave many understandably confused about how to comply with the FHAA. To solve this confusion, we provide the following 5 helpful rules to avoid fair housing issues regarding holiday displays in common areas. The rules are based on the FHAA, reported court cases dealing with FHAA religious discrimination cases, and input from the Department of Housing and Urban Development. (HUD).

Rule 1: Do Not Show a Preference for a Particular Religion's Holiday

Associations often want to celebrate the holidays. Associations often pay for and coordinate the lighting of the community in December and other holiday decorations. If the Association celebrates one particular religious holiday, this could violate the FHAA. Further, just because the Association argues that a majority of its members are part of the religion the Association has chosen to celebrate (e.g. Christmas or Hanukkah), this does not insulate the Association from being liable for

religious discrimination. Many communities decorate the common areas, club houses and sponsor holiday parties. To avoid a fair housing issues, Associations must not endorse a particular religion. When an Association tries to celebrate all religious holidays, this is also risky because its likely the Association will accidentally leave one religion out. So, how does the Association stay clear of this problem? The answer is set forth clearly in Rule 2.

Rule 2: Use Non-Religious Decorations and Displays

If the Association decorates or hangs lights, etc., it is wise to use non-religious secular words in the process. Words such as, "Happy Holidays" do not violate the FHAA. Associations should use non-religious symbols such as crosses, menorahs, star of David, etc. in celebrating the holidays. According to many fair housing experts, a lighted tree or several lighted trees is alright, as long as the Association refers to it as a, "holiday tree."

With respect to rules 1 and 2, many complain that following these rules results in watering down Christmas, which is a historical holiday in this country. Again, the FHAA does not support this mindset. However, in a 1995 memo, HUD, who enforces the FHAA, has taken the position that certain terms and symbols, while tied to a particular religious holiday, have become so secularized that they are no longer viewed as religious. Thus, their use at the holidays does not violate the HFAA. Terms like, "Merry Christmas" and images of Santa are not viewed by HUD to be religious. The U.S. Supreme Court even held that Christmas trees are secular in nature. To be safe, we still recommend that Associations stick with the words, "Happy Holidays" when referring to the December celebration.

Rule 3: Hold Non-Religious Secular Holiday Events

For those Associations that sponsor holiday parties, charity events, etc., it is critical to not endorse a particular religion in the process. The safest way to do this is to use the word, "Holiday" in all these events. (e.g. "Holiday Party", "Holiday Fund

Raising Event", etc.) One Association in the metro area recently advertised and coordinate a caroling event for its residents. By itself, this is not a problem. Associations can celebrate. However, for this particular Association, it is important to advocate the singing of secular holiday songs, such as, "Winter Wonderland, Jingle Bells, Frosty the Snowman, etc." as opposed to well known Christian Christmas hymns. Because Associations do coordinate these type events, they have to stay neutral. This can only be achieved by relying on purely secular messages.

Rule 4: Use Non-Religious Language in All Communications Pertaining to the Holidays

Associations must also stay neutral in their holiday newsletters, emails and other correspondence to the community. Some boards send Christmas cards. In order to fully comply with the FHAA, Boards should (1) send "Happy Holidays" cards and (2) make sure they send them to every single owner, if they decide to send such cards. Again, the message has to remain secular in nature. In newsletters and emails, Associations are wise to refrain from referring to particular religious holidays and better served to wish everyone a happy holiday season.

Rule 5: Give All Residents Access to Common Rooms and Clubhouses and Allow Residents to Hang Religious Decorations

If an Association allows owners access to common rooms, clubhouses or other shared spaces, then at the holidays, it is imperative for the Association to give equal access to everyone concerning religious expression. This does not mean the Association cannot enforce its own rules, provided the rules do not discriminate against a protected class. For instance, a first-come-first-serve rule can be enforced. The key is not to deny anyone outright. If you allow one group to throw a Christmas party, another to throw a Hanukkah party, but then do not allow another to have a Kwanzaa party, you will violate the FHAA, unless you are enforcing a first-come-first-serve policy. If your community rules do not allow access to common rooms or

clubhouses, then you are free to enforce such rule as long as you allow no exceptions. Nothing in the FHAA forces an Association to provide access to a religious group to use common facilities, if there is a rule against such access. The rule concerns equal access. While many Associations have rules pertaining to decorations and holiday displays, the FHAA requires all housing providers to allow religious expression.

Balancing Restrictions on Individual Homeowners Displays with Fair Housing Rights

While Associations themselves must be very neutral about initiating holiday celebration, Associations must conversely allow owners and residents to freely express their religious preferences. Associations are allowed to enforce their rules about decorations, signs, decorative lights, etc., provided they do so evenhandedly. But where the community rules make some allowance for signs, holiday decorations, etc., Associations must allow all owners and residents to express as they feel appropriate. Unless your covenants bar everyone from holiday expression (which is doubtful), your Association must allow religious expression.

When it comes to individual units, there is an important distinction to make in regard to holiday decorations. An Association cannot prohibit specific religious displays on an individual unit. Most Association governing documents do not on their face discriminate against specific displays. For instance, it is not often that you see a specific prohibition on Christmas trees. However, rules and regulations dealing with displays are more likely to have restrictions that may prohibit specific displays. It is important for the protection of the Association that specific religious prohibitions be removed from rules and regulations.

An Association can prohibit displays of lights and signs in an individual unit, with the exception of political signs. The key to the prohibition of lights and signs in an individual unit, is that there are not exceptions made for owners. The prohibition must be enforced across the board. For example, if you have a covenant that does not allow any decorative lights on decks or prescribes a certain size, the Association must

enforce such covenant or community rule equally. If one resident has a large Star of David decoration that violates this particular covenant, it would be a FHAA violation to enforce it against this resident, but not enforce the same covenant against a different resident whom has a large Nativity Scene decoration.

Other common restrictions allow owners to display lights or signs around the holidays, but only for a set period of time. Clearly, the intent of these type of time restrictions is to prevent displays related to the December holidays being up through the following summer up in July. Such a restriction is not discriminatory and has a legitimate basis. For example, a resident who wanted to leave up a lighted Cross on his deck well into the months beyond the allotted time frame, for religious expression, would not be entitled to do so. The legitimate, nondiscriminatory time restriction is a viable rule this resident must follow. Further, the resident could not make the argument that his First Amendment free speech rights authorize him to keep the lighted Cross up past the allowed time frame, because, as stated above, Associations are not government actors and the resident does not have such a First Amendment right. Rather, the FHAA applies and the FHAA allows Associations to enforce their rules, as long as they do so consistently and do not discriminate against a protected class.

Concerning political expression, there are CCIOA Restrictions based under C.R.S. § 38-33.3-106.5, which address limits on the size of signs that are political signs.

C.R.S. § 38-33.3-106.5 (c)(I) The display of a political sign by the owner or occupant of a unit on property within the boundaries of the unit or in a window of the unit; except that:

(A) An association may prohibit the display of political signs earlier than forty-five days before the day of an election and later than seven days after an election day; and

(B) An association may regulate the size and number of political signs in accordance with subparagraph (II) of this paragraph (c).

(II) The association shall permit at least one political sign per political office or ballot issue that is contested in a pending election. The maximum dimensions of each sign may be limited to the lesser of the following:

(A) The maximum size allowed by any applicable city, town, or county ordinance that regulates the size of political signs on residential property; or

(B) Thirty-six inches by forty-eight inches.

(III) As used in this paragraph (c), “political sign” means a sign that carries a message intended to influence the outcome of an election, including supporting or opposing the election of a candidate, the recall of a public official, or the passage of a ballot issue.

If a Holiday sign meets the definition of a political sign, then an association cannot restrict the display of the sign so long as it complies with the statutory definition of political sign. Given that the timing of this article is December 2008, there should not be any political signs related to the November election still displayed at homes within Associations.

If owners or their residents must approach architectural or design committees to have certain holiday decorations, then the Association must ensure that everyone is treated the same. A local federal fair housing case from Denver District Court, held that an Association violated the FHAA by treating the plaintiffs different because of their religion in reviewing their architectural application. If Associations make sure they are consistent, this problem will not occur.

Those who own homes in covenant controlled communities made a conscious choice to live in such communities that have rules and regulations. A large benefit of an Association is the enforcement of restrictive covenants designed to protect property values in the community. Thus, Associations have every right to have rules concerning political signs and holiday displays, as long as they do not violate CCIOA or the FHAA. Regarding political signs, following the rules prescribed by CCIOA will protect Associations. As to holiday decorations, Associations need to have solid fair housing training and follow the rules discussed above. As our world becomes more diverse, Associations must continue to strive hard to balance the requirement of not endorsing a particular political or religious expression, while allowing residents to express themselves as allowed by law.