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Admitted only in DC and ME

December 11, 2010

Atty. Leslie S. Brown
Rees Broome, PC
8133 Leesburg Pike, Ninth Floor
Vienna, VA 22182-7261

Re: *Your Client: Belmont Community Association*
My Client: Asim Aziz

Dear Atty. Brown:

Thank you for your letter of December 7, 2010. Unfortunately, the letter displays several misunderstandings of law and fact. In this letter, I hope to sharpen the understandings of the Belmont Community Association, and I shall make an offer at the end.

By the way, I do understand that you are an attorney for the Association, and do not cast a vote. I write to you to discuss the law on the display of the American flag as it pertains to this matter.

The Right to Display the American Flag Act Creates a Right

You wrote: "The right to display the American flag is not a matter of right."

That phrasing would come as a surprise to the Congress and the President of the United States, because it contradicts the first words of Public Law 109-243, which I quote here, as they appear at 120 Stat.572 (July 24, 2006):

Public Law 109-243
109th Congress

An Act

To ensure that the right of an individual to display the flag of the United States
on residential property not be abridged.

Without jumping too quickly to a conclusion, it is not a great leap of logic to take the position that if the Congress and the President of the United States call it a right, it is a right. So I take that position. It is a right.

What I suspect was meant in your letter was that the "right of an individual to display the flag of the United States on residential property" is not an absolute right. It is a right limited by

the Association's prerogative to establish (quoting federal law): "any *reasonable* restriction pertaining to the time, place, or manner of displaying the flag of the United States necessary to protect a *substantial interest* of the condominium association, cooperative association, or residential real estate management association." (*Emphasis added.*)

The Virginia Statute Restricts the Association Even More

In furtherance of the purposes of the federal Freedom to Display the American Flag Act, the Commonwealth of Virginia enacted additional considerations not addressed in your letters. See § 55-513.1.C.:

In any action brought by the association under § 55-513 for violation of a flag restriction, the association shall bear the burden of proof that the restrictions as to the size, place, duration, and manner of placement or display of such flag are necessary to protect a substantial interest of the association.

You have written that "[t]he Association has a legitimate interest in maintaining the aesthetic appearance of the community." Unfortunately, that rationale is inadequate to sustain the burden placed on the Association by Virginia law. There is a big difference between a "legitimate interest" and a "substantial interest" as required by the statute.

Our position is that there cannot be a substantial interest in generally banning free-standing flagpoles at Belmont, such as the one my client seeks to erect, when five (5) such flagpoles exist already. Could it be the position of the Association that five (5) is enough?

In addition, nowhere can I find support for the proposition that banning free-standing flagpoles at homes is necessary to protect "the aesthetic appearance of the community." In any enforcement proceeding, the Association will bear the burden of explaining to the satisfaction of a Court why its five (5) flagpoles and flags are aesthetic, while the flagpole and flag proposed by Mr. Aziz is not aesthetic.

My client's proposed flagpole and flag are substantially the same, in construction and color, as those already in place within the community. The only difference of which I am aware to distinguish the flagpole and flag proposed by Mr. Aziz, and the multiple flagpoles erected by the Association, is that the flagpole proposed by Mr. Aziz is smaller than the flagpoles erected by the Association. If it is the position of the Association that its taller flagpoles are aesthetic, and his shorter flagpole will not be aesthetic, he stands ready to erect a taller flagpole, to match the height of the Association's multiple flagpoles.

A Stand-Alone Flagpole Will Permit Aziz to Fly the Flag at Half-Staff

The Flag Code, at 4 U.S.C. § 7(m), sets out detailed instructions on flying the flag at half-staff on Memorial Day and as a mark of respect to the memory of certain recently deceased public officials. The section provides that the President shall order the flag flown at half-staff for stipulated periods "upon the death of principal figures of the United States Government and the Governor of a state, territory, or possession." After the death of other officials or foreign dignitaries, the flag may be flown at half-staff according to Presidential instructions or in

accordance with recognized custom not inconsistent with law. In addition, the Governor of a state, territory, or possession, or the Mayor of the District of Columbia, may direct that the national flag be flown at half-staff, in the event of the death of a present or former official of the respective government or in the event of the death of a member of the Armed Forces from that jurisdiction.

Presidents also have ordered the flag to be flown at half-staff on the death of leading citizens, not covered by law, as a mark of official tribute to their service to the United States. Martin Luther King, Jr. is among those who have been so honored.

The problem with the Association's Design Guidelines that permit only flagpoles that are no greater than five (5) feet in length and that are attached to the front of a residence *at an incline*, is that the Design Guidelines have the effect of prohibiting the flying of a standard 3 x 5' flag at half-staff.

According to 4 U.S.C. § 7(m)(1), "The term "half-staff" means the position of the flag when it is one-half the distance between the top and bottom of the staff."

When the total flagpole length is only five (5) feet, it is impossible to fly a standard 3 x 5' American flag at half-staff, for two reasons:

First, a flag that is three feet tall cannot properly fit into the available two and a half feet.

Second, lowering the flag to half-staff on a five-foot slanted pole inevitably results in a violation of 4 U.S.C. §8(b): "The flag should never touch anything beneath it . . .".

As a result of what I'll call the "half-staff problem," our position is that the restriction fails federal and state requirements that restrictions must be reasonable.

As the lawyer for the Association, Ms. Brown, it is my fervent hope that you will convey to the Covenants Committee this requirement of the Flag Code:

The flag should . . . be . . . always aloft and free.

4 U.S.C. § 8(c)

Are Property Values Seriously in Question?

According to the Association's Homeowner's Manual, Chapter 1, page 1: "By monitoring the design and use of all exterior portions of the community, the Association is able to maintain aesthetic standards that in turn sustain property values." Discussing his introduction of the federal "Freedom to Display the American Flag Act," Rep. Bartlett said:

We think that this is a commonsense accommodation of the rights of the associations to maintain the value of their properties and the rights of Americans to fly the flag. Mr. Speaker, it is hard for me to understand how

a flag outside my condo could depreciate the value of my condo. I would just think that Americans flying flags should increase the value . . .

Statement of Rep. Bartlett 152 Cong. Rec. H4574-02, 2006 WL 1749721, June 27, 2006.

Is it the Association's position that Mr. Aziz's proposed flagpole and flag will reduce property values? If this matter winds up in Court as an enforcement matter, and it need not, I am confident that the Association will find it most difficult to make that case to the Court and an interested public.

While I recognize that your role, Ms. Brown, is "to address the legal authority," and not to make decisions, I am hopeful that as a counselor, you will caution the Association about the potential that a firestorm may erupt should an enforcement action be brought. I hope no firestorm will break out, and, to that end, I urge you to continue reading until the very last part of this letter when I offer suggestions that may ease the minds of those who sit on the Covenants Committee.

***Bridgeville Community Association v. Tripodo* is Still a Problem for Belmont**

You have admirably distinguished *Bridgeville Community Association v. Tripodo*, and I applaud you, but to no avail. The distinction pointed out between that case and the present circumstance is correct: unclear rules, as opposed to a five foot pole rule. What has been overlooked, however, is that the *Bridgeville* case was brought to your attention because each element of the following is true here:

Plaintiff's Complaint and subsequent pleadings emphasize that the fines and request for injunction are based on the pole. However, the flag and the instrument necessary for flying it are intertwined in the display of the flag, and the Covenants require association pre-approval for both. Thus, Plaintiff attempts to enforce restrictions that prevent the display of the American flag.

Slip Opinion at 4. Footnote omitted.

The position of Mr. Aziz is that the blanket restriction against free-standing flagpoles is not "necessary to protect a substantial interest of the association."

This is a Pure and Simple Application for a Flagpole and Flag

You have written that my client intends to utilize "the flagpole, assuming it is approved by the Covenants Committee, to support [his] antennae..." I do not know how the idea arose that my client intends to support antennas on the flagpole.

That was never the case. It is not the case. If someone told you that this was the case, that person is a liar.

What is presently before the Association is a pure and simple application for a flagpole, a flag, and, of course, a rope halyard to properly raise and lower the flag in accordance with 4 U.S.C. § 6(b): “The flag should be hoisted briskly and lowered ceremoniously.”

My client has no intention of hanging any antennas off of the flagpole, or of supporting any antennas from the flagpole.

I emphasize, in clear declarative form, that there will be nothing supported by, or hanging off, that flagpole but a flag (and the halyard to raise or lower it). **Nothing.**

Suggestions

As you, or the Covenants Committee, have misunderstood the situation, my client will willingly, happily, accept a condition that:

“No antenna of any size or kind may be erected on the flagpole, or hang from it.”

Furthermore, my client would willingly accept a condition that:

“Upon request by the Association, the flagpole must be removed if the Applicant ceases to have a substantial ownership and use interest, direct or beneficial, in his present land.”¹

* * *

Thank you for the courtesy of your replies. I hope this matter can be resolved amicably, and without the tumult that accompanies an enforcement action.

Sincerely,

A handwritten signature in black ink, appearing to read 'Fred Hopengarten', written in a cursive style.

Fred Hopengarten, Esq.

C: Asim Aziz
Debbie Dickens, Covenants Administrator

¹ This wording allows him to transfer the property to a marital trust, a child, and so forth, without triggering the condition.