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Important LEGISLATIVE UPDATE

A breakdown of Supreme Court case:
SANJAY SAINANI v. BELMONT GLEN HOA and what it could mean for Virginia's Homeowners Associations and Condominium Associations going forward.

Associations' Enforcement Power Takes Another Hit

by ROBERT J. SEGAN

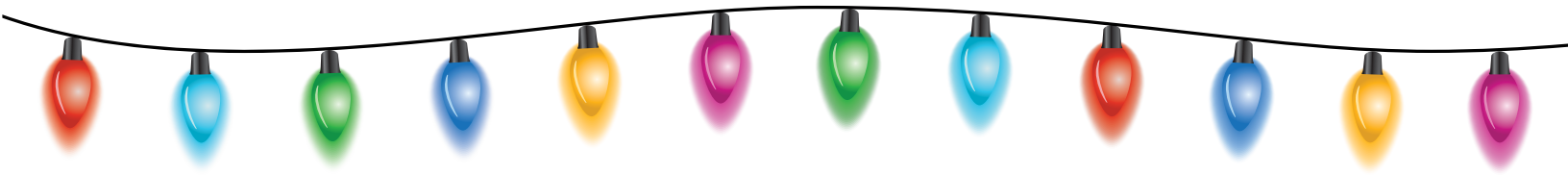
CLICK HERE to link to Court Case

On August 26, 2019, the Virginia Supreme Court dealt a significant blow to community associations seeking to enforce violations of their covenants and rules that apply to the lots and houses. In a case that concerned seasonal and holiday lights put up by two Loudoun County owners, the Court cited old doctrines favoring the free use of property and strict construction of covenants to overturn the association's efforts to collect fines and attorney's fees from the owners.

The Association had passed somewhat detailed regulations limiting temporary lights put up for religious and seasonal occasions. The regulations allowed lighting for certain federal and religious holidays, but they limited the number of days for their display and the hours they could be lit.

The homeowners, Mr. and Ms. Sainani, had placed and maintained lights in violation of the regulation's limits and were fined. They challenged the fine in the Loudoun County Circuit Court, which upheld the Association's position and required the Sainanis to pay the fine and the Association's legal bill of more than $39,000. They appealed that ruling to the Virginia Supreme Court.

The Association contended that it had the right to enact and enforce those regulations based upon two provisions in its



Covenants: one prohibiting nuisance or offensive activities and another banning modifications or alterations of any property until approved by the Association's Architectural Review Board (ARB). The ARB's mandate under the Covenants was to preserve and enhance property values and to maintain visual harmony. The Sainanis challenged the ruling on the grounds that the Board did not have the authority under the Covenants to enact the temporary lighting regulations.

The Court used this opportunity to strongly affirm the doctrine that it would very strictly construe grants of authority to limit the use of property by owners. "Underlying this principle of strict construction," the Court said, "is the common-law premise that the 'absolute right' to property 'consists in the free use, enjoyment, and disposal of all one's acquisitions, without any control or diminution, save only by the laws of the land." Therefore, the Court said, "restrictive covenants are not favored, and the burden is on the party who would enforce such covenants to establish that the activity objected to is within their terms."

The Court then carefully looked at the words of the Covenants, giving them a very narrow interpretation. The Association's claim that the Sainanis' lighting violated the nuisance covenant failed to convince the Court because of two subsections of the Covenants' "nuisance" section. One stated "No exterior lighting on a Lot shall be directed outside the boundaries of the Lot" and another said "Exterior lighting which results in an adverse visual impact to adjacent Lots, whether by location, wattage or other features, is prohibited." The Court found that the Association's seasonal and holiday lighting regulations were not reasonably related to the objects of either of those restrictions because the regulations were not tailored to limit impact outside the boundaries of the lot or the impact adjacent lots. The Association's attempt to apply more general nuisance principles was also rejected by the Court.

Regarding the "ARB approval" theory, the Court looked at the words of the covenant which said that nothing could be "installed, constructed, erected, placed, altered and/or externally improved on any Lot" without approval of the ARB. The Association argued that the word "placed" showed the intent to allow the ARB to regulate seasonal and holiday lights. But the Court concluded that "placed," in this context, had to be interpreted based upon the words surrounding it.

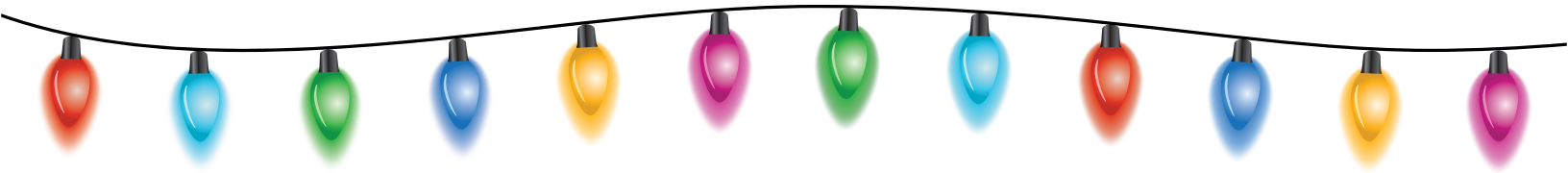
Quoting a book on legal interpretation co-authored by the late Justice Scalia, the Court said "When …any words are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar … its most general quality — the least common denominator, so to speak — relevant to the context." The Court reasoned that the other verbs - "made, installed, constructed, erected" - suggested that "modifications or alterations are akin to fixtures attached to the realty, and a temporary string of lights placed on one's front door or back-deck railing is not a fixture."

Therefore the Court rejected the "ARB approval" theory, because the general restrictive covenant, read in conjunction with the other restrictive covenants on modifications and alterations and exterior lighting, was limited by the specific language of the exterior lighting covenant. The latter restrictive covenant was held to be inapplicable because it merely prohibited "directing exterior lighting outside the boundaries of the lot and causing any 'adverse visual impact to adjacent Lots, whether by location, wattage or other features' not the dates or the time of day that residents may display exterior lighting …."

"Enforce restrictive covenants where the intention of the parties is clear and the restrictions are reasonable"

The Court recognized that Virginia courts should "enforce restrictive covenants where the intention of the parties is clear and the restrictions are reasonable" and "if it is apparent from a reading of the whole instrument that the restrictions carry a certain meaning by definite and necessary implication." This is the test that community associations are going to have to pass in the future when drafting and enforcing restrictions on lots and houses.

The Court then endorsed these statement from a legal treatise that may sound chilling to association boards: "design-control powers are not necessary to the effective functioning of the community," and "powers to control the design of individual properties within the community do not necessarily further public interests or fulfill reasonable expectations of the property owners…"



The Court acknowledged that while express design-control powers granted by statute or by the Declaration are generally enforceable, the scope of implied powers is limited to governing or protecting common property and preventing 'nuisance-like activities' on individually owned property. The rationale for not giving an expansive interpretation to an association's power to make rules restricting use of individually owned property is based in the traditional expectations of property owners that they are free to use their property for that which is not prohibited and does not unreasonably interfere with the neighbors' use and enjoyment of their property.

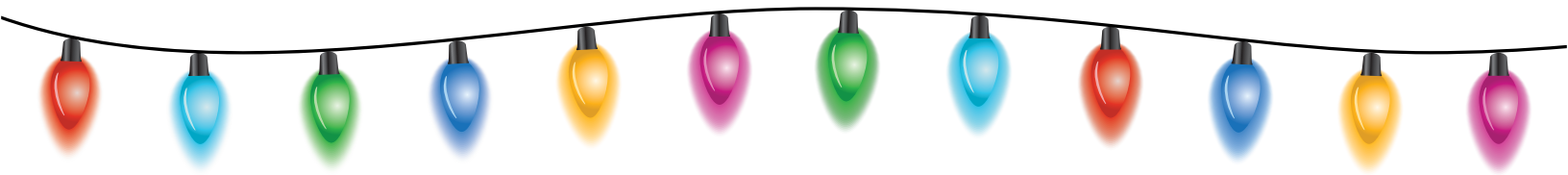
The Court also warned that discretionary design-control powers that are not expressly authorized by statute or by the declaration "create two kinds of risks for property owners: property owners (1) may not be able to develop in accordance with their expectations because they cannot predict how the controls will be applied and (2) may be subject to arbitrary or discriminatory treatment because there are no standards against which the appropriateness of the power's exercise can be measured."

> **"Unfettered design-control powers could depress property values and operate as unreasonable restraints on alienation"**

Continuing its recitation from the legal treatise, the Court stated "[i]f allowed, completely unfettered design-control powers could depress property values and operate as unreasonable restraints on alienation."

The Court's opinion did not discuss the fact that, in planned communities, owners expect that their property, as well as their neighbor's property, will be restricted so as to encourage harmony. These restrictions are part of the property rights of all members of a planned community. The General Assembly has mandated that owners in these communities be given extensive disclosures before their purchase contract becomes final to make sure they are given every opportunity to understand this principle.

The Court's opinion also failed to acknowledge that developers, realtors and appraisers generally agree that covenants restricting the use of property in planned communities and promoting harmony actually enhance property values.



In short, the Court is favoring the free use of land in construing the covenants in the recorded governing documents against homeowners and condominium associations. And, make no mistake, this ruling applies to homeowners and condominium associations as both are governed by covenants that run with the land and address the lots, houses and units as well as the common area or common elements.

Before you Roll the Dice, Know the Risk

by **DONNA M. MASON**

The aftermath of the Sainani case will most certainly be playing out in the Courts for years to come. Although the issue at hand was regulating holiday lights, the Court was clear that there will be a higher standard needed for covenant enforcement. It is important that each community make a conscious well-informed decision how to proceed. To help with the process, here are a few questions to ask.

- **Have the Design Guidelines been reviewed by the association's counsel in light of the Sainani case?**
- **Can the association absorb financially the expense of the association's legal fees and the owner's legal fees if the association loses?**
- **If the owner files a countersuit in enforcement action or association loses, would association's insurance offer any coverage?**
- **Are owner violations noted in resale packages still valid? If not sure, has legal counsel reviewed?**
- **To limit the risk, has Board considered a Declaration Amendment to clearly provide the power to enforce design guidelines?**