



HENRY McMASTER
ATTORNEY GENERAL

November 14, 2006

The Honorable David L. Thomas
Senator, District No. 8
23 Wade Hampton Boulevard
Greenville, South Carolina 29609

Dear Senator Thomas:

We received your letter recently submitted to Attorney General Henry McMaster requesting an opinion as to whether "a homeowners' association can prohibit a residential homeowner from flying the American flag on his/her property?" Attached to your letter, you included a copy of an email relating to your opinion request. In this email, Michael Cook described a situation in which the Summit Community Association, in Northeast Columbia, Richland County, South Carolina mailed letters to residents informing them they may not fly an American flag without applying for and gaining approval to make a modification to their home. Mr. Cook indicated he made such a request, but was denied and then was told he must attend a Covenants Committee meeting and make a request to it to fly an American flag. Mr. Cook stated in his email he believes such covenants are in violation of federal law.

Law/Analysis

Our courts recognize the following with respect to restrictive covenants: "As voluntary contracts, restrictive covenants will be enforced unless they are indefinite or contravene public policy." *Siau v. Kassel*, 369 S.C. 631, ___, 632 S.E.2d 888, 893 (Ct. App. 2006). Therefore, we start with the presumption that the covenants to which Mr. Cook refers are valid and enforceable. However, as Mr. Cook pointed out in his email, the United States Congress recently enacted the following provision in 2006:

A condominium association, cooperative association, or residential real estate management association may not adopt or enforce any policy, or enter into any agreement, that would restrict or prevent a member of the association from displaying the flag of the United States on residential property within the association with respect to

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which such member has a separate ownership interest or a right to exclusive possession or use.

Freedom to Display the American Flag Act of 2005, Pub. L. No. 109-243, 120 Stat. 572.

At first glance, this provision appears to be very broad in precluding enforcement of covenants restricting or preventing association members from displaying the United States flag on their property. However, this law also contains a provision stating certain limitations on the above provision.

Nothing in this Act shall be considered to permit any display or use that is inconsistent with - -

(1) any provisions of chapter 1 of title 4, United States Code, or any rule or custom pertaining to the otherwise applicable provision of law); or

(2) 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 a residential real estate management association.

Freedom to Display the American Flag Act of 2005, Pub. L. No. 109-243, 120 Stat. 572. The provisions contained in chapter 1 of title 4 of the United States Code provide guidance on the time and occasions for display, the position and manner of display, and various guidelines for showing respect to the United States flag. 4 U.S.C. §§ 6-8. As for the restrictions contained in the covenants referred to by Mr. Cook, we are not privy to such restrictions in order to evaluate their necessity to the interest of the homeowners' association. Furthermore, were we privy to such covenants, we are in not position to evaluate and determine whether they are "necessary to protect a substantial interest" of the homeowners' association. Such a determination is factual in nature and thus, is beyond the scope of an opinion of this Office. Op. S.C. Atty. Gen., July 5, 2006. Only a court, not this Office, may determine whether a particular restriction is appropriate under this provision. Op. S.C. Atty. Gen., March 10, 2004.

However, we also note the impact of State law on a homeowner's ability to fly a United States flag. Prior to the enactment of the federal statute, the South Carolina Legislature enacted section 27-1-60 of the South Carolina Code (Supp. 2006), which provides:

(A) Regardless of any restrictive covenant, declaration, rule, contractual provision, or other requirement concerning flags or decorations found in a deed, contract, lease, rental agreement, or

homeowners' association document, any homeowner or tenant may display one portable, removable United States flag in a respectful manner, consistent with 36 U.S.C. Sections 171-178, as amended, on the premises of the property of which he is entitled to use.

(B)(1) No homeowners' association document may preclude the display of one portable, removable United States flag by homeowners. However, the flag must be displayed in a respectful manner, consistent with 36 U.S.C. Sections 171-178, as amended.

(2) No restrictive covenant in a deed may preclude the display of one portable, removable United States flag on the property. However, the flag must be displayed in a respectful manner, consistent with 36 U.S.C. Sections 171-178, as amended.

(3) No rental agreement, lease, or contract may preclude the display of one portable, removable United States flag on the premises of any tenant. However, the flag must be displayed in a respectful manner, consistent with 36 U.S.C. Sections 171-178, as amended.

(C) For purposes of this section:

(1) "homeowner" means a person who holds title to real property, in fee simple or otherwise including, but not limited to, an owner of real property subject to a homeowners' association, an owner of an interest in a vacation time sharing plan, and a co-owner under a horizontal property regime;

(2) "homeowners' association" has the same meaning as provided in Section 12-43-230;

(3) "homeowners' association document" includes, but is not limited to, declarations of covenants, articles of incorporation, bylaws, or any similar document concerning the rights of property owners to use their property; and

(4) "tenant" means any tenant under a rental agreement executed pursuant to Chapter 40, Title 27, any tenant under a rental agreement executed pursuant to Chapter 47, Title 27, any tenant under a vacation time sharing plan, any tenant under a horizontal property regime, and any person who

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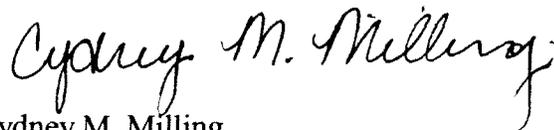
leases commercial or residential real property under a contractual agreement.

This provision is considerably less broad than the federal statute cited above, but it guarantees a homeowner the ability to display one portable, removable United States flag despite a restrictive covenant providing otherwise, presuming such display is in compliance with federal law.

Conclusion

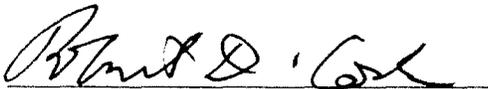
Federal law prohibits the enforcement of any restrictive covenant restricting or prohibiting a member of a homeowners' association from displaying the United States flag on their property. However, this provision allows for certain limitations on the display and use of the flag and even allows for the certain restrictions to protect the interest of the homeowners' association. In addition, State law guarantees homeowners the right to display one flag, but also contains certain restrictions. Thus, in light of State law, a homeowner has the right to display a United States flag on his property so long as it is portable, removable and is in compliance with federal restrictions regarding the display of the flag. In addition, the homeowner may have broader authority with regard to his or her display of the United States flag under federal law, presuming such display does not violate other federal guidelines concerning the display of the United States flag or other such reasonable restrictions as imposed by the homeowners' association necessary to protect the homeowners' associations' interests.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General