



ALAN WILSON
ATTORNEY GENERAL

June 24, 2016

The Honorable Bill Taylor, Member
South Carolina House of Representatives
P.O. Box 2646
Aiken, SC 29802

Dear Representative Taylor:

We received your opinion request regarding whether a homeowners' association can prohibit a residential homeowner from erecting a stand-alone flag pole on their property to fly the American flag. Specifically, you state:

[i]t has been brought to my attention that the Cedar Creek Homeowners' Association in Aiken County states that the Fourth Amended and Restated Declaration of Covenants, Conditions and Restrictions for Cedar Creek prohibits homeowners in Cedar Creek from having a standalone flagpole on their property from which they could fly the American flag.

Homeowners have made numerous efforts to persuade the appropriate officials in the Homeowners' Association that it is both proper and the law to have such a flagpole. One homeowner has even gone to great expense to have installed a collapsible and removable flag pole, which allows them not to have any flagpole at all on their property when they are not displaying the American flag. (In other words, the flagpole itself – not just the flag – is easily removable).

The homeowner received a letter from the Association's counsel threatening to file an action against them in court and face paying for the Association's legal fees if they did not take down their flagpole and enter into some agreement. The homeowners were dismayed that the Association threatened them with legal action and significant financial harm simply because they wish to fly the American flag on their property.

I have enclosed past opinions from your office as well as other documentation regarding the issue of flying the American flag on personal property. A specific opinion as it relates to the Cedar Creek Homeowners' Association would be appreciated.

LAW/ANALYSIS:

In a prior opinion, our Office determined that section 27-1-60¹ of the South Carolina Code “guarantees a homeowner the ability to display one portable, removable United States flag despite a restrictive covenant

¹ Section 27-1-60 of the South Carolina Code 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 leases

providing otherwise, presuming such display is in compliance with federal law.” Op. S.C. Atty. Gen., November 14, 2006 (2006 WL 3522442).

The federal law that we referred to was the Freedom to Display the American Flag Act of 2005, (“Flag Act”) Pub. L. No. 109-243, 120 Stat. 572. The Flag Act granted a right to display the American Flag when it stated:

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

Id.

However, the Flag Act also provided for certain limitations on this right, when it provided:

[n]othing in this Act shall be considered to permit any display or use that is inconsistent with - -

(1) any provision of chapter 1 of title 4, United States Code², or any rule or custom pertaining to the proper display or use of the flag of the United States (as established pursuant to such chapter or any 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

commercial or residential real property under a contractual agreement.

S.C. Code Ann. § 27-1-60 (1976 Code, as amended).

² As explained in our November 14, 2006 opinion,

[t]he 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.

Op. S.C. Atty. Gen., November 14, 2006, supra.

condominium association, cooperative association, or a residential real estate management association.

Id.

In summary, a homeowner can display one portable, removable United States flag despite a restrictive covenant providing otherwise if the homeowner properly displays and uses the flag in a respectful manner pursuant to federal law. A homeowners' association can regulate the "time, place, or manner" of display when "necessary to protect a substantial interest" of the homeowners' association. Thus, a homeowner does not have an unfettered right to display the American flag.³

You ask us for a specific opinion relating to the Cedar Creek Homeowners' Association. However, we are unable provide you with one. As we explained in our November 14, 2006 opinion:

[a]s for the restrictions contained in the covenants. . .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.

Op. S.C. Atty. Gen., November 14, 2006, supra.

CONCLUSION:

A homeowner can display one portable, removable United States flag despite a restrictive covenant providing otherwise if the homeowner properly displays and uses the flag in a respectful manner pursuant to federal law. A homeowners' association can regulate the "time, place, or manner" of display when "necessary to protect a substantial interest" of the homeowners' association. Thus, a homeowner does not have an unfettered right to display the American flag.

³ Rep. Roscoe Bartlett (R-Maryland), who introduced the Freedom to Display the American Flag Act of 2005, expressed his purpose for introducing the legislation in his testimony before the House:

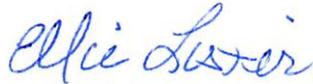
[t]his is a very simple bill. We believe that it is a reasonable compromise between the rights of an association, homeowner's association, condominium association, to maintain the value of their properties and the rights of the individual to fly his country's flag.

See Brian Craig, Construction and Constitutionality of the Freedom to Display the American Flag Act, 36 Real Est. L.J. 7 (2007) (quoting Statement of Rep. Bartlett 152 Cong. Rec. H4574-02, 2006 WL 1749721, June 27, 2006).

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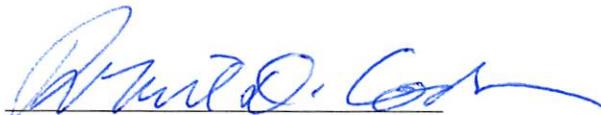
This Office can not provide you with a specific opinion relating to the Cedar Creek Homeowners' Association because we can not investigate the facts of a matter and are confined in our advisory opinions to questions of law. Therefore, we can not advise you as to whether or not Cedar Creek's covenants regarding the display of the American flag are necessary to protect a substantial interest of the homeowners' association. Only a court may make this determination.

Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General