

OCTOBER 2007

Property Owners' Right to Display the American Flag

By Leslie S. Brown

The display of the American flag on one's property is tantamount to freedom of expression and the demonstration of patriotism in the United States. However, all homeowners should be aware of federal legislation enacted within the last two years regarding this right, and also amendments to applicable Virginia statutes made in 2007 regarding this right. This memo will describe the applicable legislation and explain how it interplays with community associations' rights to govern and regulate the community. The main idea homeowners and managers should take away from this memo is that the federal and Virginia statutes afford all homeowners the right to display the American flag, but those rights are subject to the reasonable rules and regulations enacted by your community regarding the time, place and manner of display.

In mid-July 2006, Congress adopted the Freedom to Display the American Flag Act. The statute states in relevant part:

"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 . . .

Nothing in this Act shall be considered to permit any display or use that is inconsistent with . . . (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 residential real estate management association."

This legislation means that community associations may not enact rules and regulations that outright bar owners from displaying the American flag on their property, but may lawfully enact rules regarding the time, place and manner of display.

The 2007 amendments to the flag display provisions of the Virginia Property Owners Association Act and the Virginia Condominium Act generally follow the federal law. Section 55-513.1 of the Property Owners Association Act and Section 55-79.75.2 of the Condominium Act state in relevant part:

"Unless specifically prohibited by the association's rules and regulations or architectural guidelines

2 Rees Broome, PC

[condominium instruments] . . . the association shall not prohibit any lot owner from displaying the flag of the United States. . .

The association may restrict the display of such flag in the common areas [common elements] and may establish reasonable restrictions as to the time, size, place, duration, and manner of placement or display.

In any action brought by the association . . . the owner shall be entitled to assert as an affirmative defense that the required disclosure of any limitations pertaining to the display of flags or any flagpole or similar structure necessary to display such flags was not contained in the disclosure packet [or public offering statement] . . .”

When the state provisions are read in conjunction with the federal statute, again, associations may not outright prohibit the display of the American flag, but can adopt reasonable rules and regulations concerning the time and manner of display.

Under Virginia law, if the resale disclosure packet or public offering statement (in the case of newly developed condominiums) do not contain the associations’ rules on flag display, the owner has a right to assert such defense in the event an enforcement action is brought against the owner for the illegal display of the flag. Accordingly, managers should specifically be mindful of the Association’s flag rules and make sure they are enclosed in the Association’s resale disclosure packet. If the flag display rules are contained in design or architectural guidelines, the resale disclosure packet must contain a full copy of those guidelines with the flag provisions. The Association will not be able to enforce a covenants violation regarding the manner of display of an owner’s flag if such rules were not contained in the owner’s packet at

the time of settlement, unless the owner had actual knowledge that the contents of the disclosure packet were in error.

Likewise, under Maryland law, homeowners and tenants cannot be prohibited from displaying one removable American flag upon the portions of the dwelling where they reside; however, the Board of Directors of the community may adopt rules and regulations regarding the manner, place and display of the flag and the installation of flag poles, so long as an open meeting on the proposed rules and regulations has been held with proper advance notice of such meeting provided to the membership.¹

Regulations and restrictions that would be deemed reasonable under applicable law would be rules governing the use, placement and height of flag poles on lots, times at which the flag may be displayed, and, perhaps, the maximum size of the flag allowed to be displayed. All owners and managers should also be aware that Title 4 of the United States Code has additional provisions on the customs for how the American flag is to be displayed and some communities incorporate those rules into their existing guidelines and regulations. For example, the U.S. Code

¹ / The District of Columbia currently does not have any laws in place regarding an Association’s right to regulate the display of the American Flag within communities. Thus, any such regulations would fall under the association’s right to generally enact reasonable rules and regulations for the property, as permitted in the governing documents and per the federal statute. Communities should keep in mind, however, that Section 1-141 of the D.C. Code codifies the customs for properly displaying the U.S. flag contained in Title 4 of the federal code, such as displaying the flag only from sunrise to sunset on buildings and stationary flagstaves in the open, not displaying during inclement weather, displaying on federal and state holidays, etc.

provisions state that the flag should generally only be displayed from sunrise to sunset (unless illuminated at night) and should not be displayed

during inclement weather. The flag should be hoisted briskly and lowered ceremoniously.