

**Guidance for Complying with the
Freedom to Display the American Flag Act of 2005**
Brought to you by CAI's College of Community Association Lawyers

On July 24, 2006, President Bush signed into law HR 42 – the Freedom to Display the American Flag Act of 2005 (Act). The Act went into effect immediately and permits owners in community associations to fly the American flag under prescribed circumstances. In particular, the Act allows the display of the American flag even though a community may have restrictive covenants prohibiting such display. Below are specifics you need to know about the new law and steps your association should take to comply with the Act.

**Community Associations Prohibited from Outright Ban
On the Display of the American Flag**

The provision of the Act addressing the right of unit owners to display the American flag provides:

Sec. 3. Right to Display the Flag of the United States

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.

Step 1. Consult with your association legal counsel to determine whether your association falls under the definition of a “condominium association,” “cooperative association,” or “residential real estate management association.”

Key Points:

► The Act incorporates the definition of a “**condominium association**” found in 15 U.S.C. 3603(4) which provides:

Condominium Association means the organization, whose membership consists exclusively of all the unit owners in the condominium project, which is, or will be responsible for the operation, administration, and management of the condominium project.

► The Act incorporates the definition of a “**cooperative association**” found in 15 U.S.C. 3603(9) which provides:

Cooperative Association means an organization that owns the record interest in the residential cooperative property; or a leasehold of the

residential property of a cooperative project and that is responsible for the operation of the cooperative project.

► The Act incorporates the definition of a “**residential real estate management association**” found in 26 U.S.C. 528(3) which provides:

Residential Real Estate Management Association means any organization meeting the requirements of subparagraph (A) of paragraph (1) with respect to a subdivision, development, or similar area substantially all of the lots or buildings of which may only be used by individuals for residences.

Paragraph (1) and subparagraph (A) provides:

(1) Homeowners association

The term “homeowners association” means an organization which is a condominium management association, a residential real estate management association, or a timeshare association if –

(A) such organization is organized and operated to provide for the acquisition, construction, management, maintenance, and care of association property.

Step 2. Consult with your association legal counsel to determine whether a law exists in your state that regulates flying the American flag in community associations. In the event there is a state law, your legal counsel will be able to tell you whether your association is required to comply with the state or federal law.

Key Points:

► Shortly after September 11, 2001, the issue of homeowners being permitted to fly American flags in community associations received nationwide attention. In response, CAI instituted *Operation Old Glory*, which recommended that community associations place a 180-day moratorium on enforcement of prohibitions on flying American flags. Since that time, many state legislatures have passed laws that regulate flying the American flag and other types of flags in associations. The provisions in these laws vary and some are more restrictive than the federal Act.

► It is essential that you contact your association legal counsel to determine whether your state has such a law and whether the state law or new federal law control how the American flag may be flown in your association. Do not assume that the federal law preempts your state law. Be sure to consult with legal counsel on this issue.

Step 3. Once you have determined that your community association must comply with the Act, work with your legal counsel to review existing rules to determine

whether your association bans unit owners from flying the American flag on an owner's unit, lot or in any area where the owner has exclusive use or possession.

- If your association has a rule that bans the display of the American flag, obtain advice from your association legal counsel on rescinding or amending the rule.
- See the guidance below on obtaining input from members of your community association when amending existing or creating new rules regulating the display of the American flag.

Key Points:

- ▶ A "member" of an association is defined as the owner of property in the community association. As a result, community associations may prohibit tenants from displaying the American flag. However, CAI's College of Community Association Lawyers (CCAL) recommends that community associations comply with the spirit of the Act and treat tenants the same as owners.
- ▶ Community associations may not *prohibit* flying the American flag on the owner's unit, lot or in any exclusive use or possession area. However, community associations are permitted to regulate how the flag may be displayed as explained below.

Community Associations Permitted to Regulate Time, Place and Manner of Display

Community associations are not permitted to *ban* owners from displaying the American flag on the owner's unit, lot or in any area where the owner has exclusive use or possession. However, the following provisions of the Act do permit community associations to place *reasonable* regulations on the manner in which the American Flag is displayed.

Sec. 4. Limitations

Nothing 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 Code, 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, 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.

Step 4. Review your association's existing rules to determine whether your association regulates the proper display of the American Flag. If so, compare the rules with the attached Federal Flag Code.

- **Seek guidance from your association legal counsel to determine whether your association's existing rules should be amended to comply with the Act.**
- **See guidance below on obtaining input from members of your community association when amending existing or creating new rules regulating the display of the American flag.**

Key Points:

- ▶ The Federal Flag Code is referenced in the Act as Chapter 1 of Title 4 of the United States Code. Attached you will find the Federal Flag Code. We recommend that you pay particular attention to the provisions that are highlighted in yellow.
- ▶ Consult with your association legal counsel to determine whether you should: (1) include specific provisions of the Federal Flag Code in your rules, (2) incorporate the Federal Flag Code by reference, or (3) reference the Federal Flag Code at all in your rules.
- ▶ Contact your local Post of the American Legion for guidance on customs for flying and disposing of the American flag.

Step 5. Before amending existing rules or creating new rules regulating the display of the American flag, obtain input from the members of your community association – and use that input – when developing *reasonable* rules that protect a substantial interest of your community association. Make sure to consult with your association legal counsel to determine what a “substantial interest” means.

Key Points:

- ▶ Use a newsletter, website, town hall meeting or other form of communication with members of your association, inform them about the Act and solicit their input on what types of rules regulating the display of the American flag they believe would be reasonable and appropriate for their association. You may want to include a checklist of options and also give members an opportunity to provide you with any other input they have that was not included in the checklist.

Important Note: Going through this process will be extremely helpful in ensuring that rules developed by your community association are reasonable *and* protect a substantial interest of your community association, as required by the Act. Again, it's very important to consult with your association legal counsel to determine what a “substantial interest” of your community association means.

► Once you have worked with your association legal counsel to prepare draft amendments to existing rules or a draft of new rules, you may want to provide a copy of the draft to members of your association to solicit their final input. Remember, the creation of acceptable rules for members makes those rules much more likely to be followed and more easily enforceable. Be sure to take this input from members into consideration before implementing new rules.

► *Reinventing the Rules – A Step-by-Step Guide for Being Reasonable*, a CAI publication written by Lucia Anna Trigiani, Esq., offers the following checklist for renovating old rules. This checklist can also be utilized in part when drafting new rules.

Renovating Old Rules Checklist

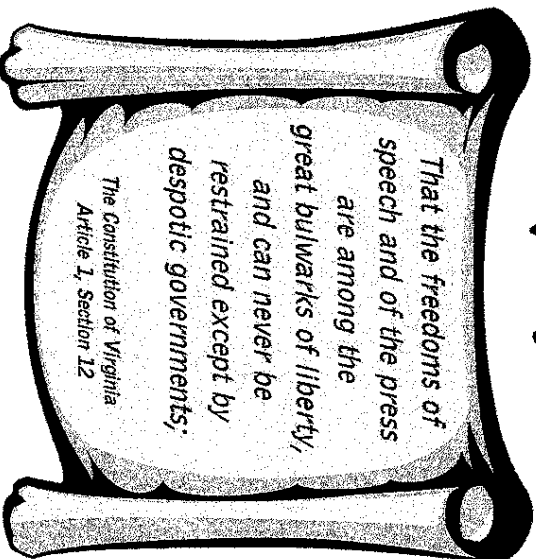
Yes	No	
☐	☐	Does the rule make sense?
☐	☐	Is this the least restrictive way to approach the issue?
☐	☐	Is the rule still needed?
☐	☐	Does it address a current problem?
☐	☐	Is it acceptable to residents?
☐	☐	Is compliance relatively easy? Is it possible?
☐	☐	Does the rule create new problems?
☐	☐	Is the rule getting the results you want?
☐	☐	Is the rule enforceable?
☐	☐	Is the rule legal?

If the answer to all of these questions is yes, keep your rule. If the answer is no to one or more, maybe it's time to consider an amendment. If the answer is no to a majority of questions on the checklist, it might be time to consider rescinding the rule altogether.

Step 6. Once you have gone through the process of soliciting input from the members of your association regarding the amendment of existing or creation of new rules, use your normal processes for formally adopting rules and disseminating the final rules to the members.

To learn more about CAI's College of Community Association Lawyers visit CAI's website at: www.caionline.org/ccal/index.cfm

Why Do Virginia's Property Owners Associations Deny a Right...



...that Our State and Federal Constitutions Protect?

The United States Supreme Court recognizes the display of a political sign on a homeowner's private property as protected speech.
City of Ladue et al. v. Gilleo

Virginia Law denies localities the authority to prohibit the display of political campaign signs on private property.
Code of Virginia, § 15.2 - 109

Yet despite these protections, Property Owners Associations (POAs) in Virginia can, and frequently do, completely PROHIBIT the display of a political sign on a homeowner's private property.

Not just restrict, PROHIBIT. Why?

While Holiday decorations are encouraged, civic participation in our democratic process is denied. Doesn't Election Day deserve as much respect and protection for those who are active and seek to use the rights we cherish most as Americans?

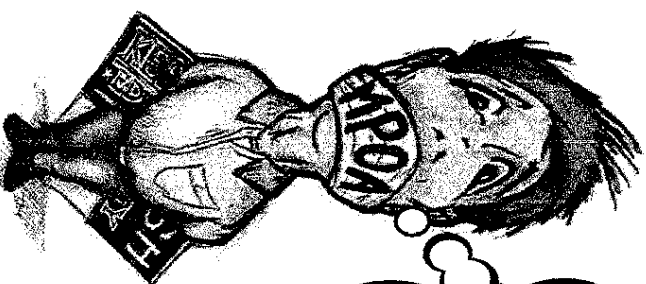
It is one thing for POAs to impose restrictions on the appearance and upkeep of a community. But when they prohibit a fundamental, Constitutional right, they go too far.

In the last three years, at least five states* have passed legislation to specifically restore and protect the right to display a political sign, with reasonable restrictions, to homeowners living in POAs. They join Maryland and others states that provide the same protections.

* AZ, CA, CO, NC, TX, WA

The Commonwealth of Virginia has a legitimate public purpose in seeking to protect the free speech rights of all Virginians.

House Bill 878 and Senate Bill 621 provide a reasonable solution between the extremes of complete prohibition and complete freedom. They protect the speech rights of homeowners in POAs, while still allowing reasonable restrictions on the duration, size and number of signs that can be displayed.



**PLEASE
REMOVE THIS
GAG!
SUPPORT
LEGISLATION
TO
GIVE ME BACK
MY SPEECH!**

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My Rights Aren't a Matter Of Address

Advertisement

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Virginians are proud of the commonwealth's role in the founding of the country and the formation of the ideals and rights that define us as Americans.

From George Mason's Virginia Declaration of Rights, to Thomas Jefferson's Statute for Religious Freedom to James Madison's role as the father of the Constitution, Virginians have been at the forefront of declaring and protecting individual rights.

Increasingly, however, these rights are being undermined or stripped by a form of government that the Founders did not foresee: the property owners association (POA).

The Constitution and Virginia law specifically recognize and protect the display of political yard signs on a homeowner's property, yet a POA can and often does strip people of this right to free speech.

In letters sent to people who had put up political signs in my community in Prince William County, the POA claimed that the "aesthetic preservation" of the neighborhood was at stake. Presumably all signs would have an effect on community aesthetics, yet some circumstances, such as selling a home or having a yard sale, require a sign. The POA regulates the size, number and length of time such signs can be displayed but generally allows them. So why should political signs be singled out for prohibition?

During holiday seasons, homeowners in my development are encouraged to decorate their homes with, say, Halloween scenes or Christmas decorations. Shouldn't Election Day be treated as an important holiday for democracy? In my community, putting the issue to a vote has been suggested, but I disagree with this approach. What the Constitution gives, neither my POA nor my neighbors should be able to take away. Moving into a POA-ruled neighborhood should not mean moving out of America.

Property owners associations in Virginia have the legal right to prohibit homeowners from displaying political signs in their own yards. Homeowners are bound by the contracts they must sign to live in POA-regulated neighborhoods, and they agree to sacrifice some rights at the gates to the community. But it should not be within the reach of a POA to establish covenants that deny homeowners a constitutional right. Limitations on the size, number and duration of sign displays might be reasonable, but prohibition is not.

Across the country, state legislatures have recognized this problem and have passed legislation to protect homeowners against overreaching POAs. In the past year at least five states passed laws to prohibit POAs from denying their members the right to display political signs on their own property, joining other states such as Maryland that already provide such protections.

To stop free-speech infringements by POAs, the Virginia General Assembly should follow the example of these states. Legislation has been introduced in both the House and Senate in Richmond, and a bill should be passed and signed into law. The efforts of our neighborhood's founding developers to create attractive, homogeneous enclaves should not trump the efforts of the Founders to declare and protect the rights we enjoy as Virginians and as Americans.

-- Chris Casey

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