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Elizabeth F. Grussenmeyer

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The Right to Display the American Flag in Common Interest Developments: Restrictions by Homeowners' Associations Not Tolerated

Elizabeth F. Grussenmeyer

Code Section Affected

Civil Code § 1353.5 (new).

SB 2032 (Monteith); 2002 STAT. Ch. 178.

I. INTRODUCTION

The terrorist attacks on September 11, 2001 brought out an immense sense of patriotism across the country.¹ Many Americans put up the United States flag to express loyalty to their country and sorrow for those Americans that lost their lives.² However, some people living in common interest developments³ (CIDs) were shocked to find out that they could not display the American flag without incurring penalties from their homeowners' associations.⁴

Lynnette Goldner, a resident of a CID community in Los Angeles, put an American flag on her condo balcony after hearing that her neighbor's brother, Captain Charles Burlingame, was the pilot of the plane that crashed into the Pentagon.⁵ Ms. Goldner wanted to openly display support for her neighbor.⁶ She was incredibly shocked and angered when early the next morning a board member from her homeowners' association told her that the flag needed to come down.⁷ Her association forbids hanging objects from balconies.⁸ She told the board member that if he did not like the placement of her flag he could sue her,

1. See Richard Morin, *Poll: National Pride, Confidence Soar*, WASH. POST, Oct. 25, 2001, at A7 (acknowledging a new state of mind in the American people).

2. See *Capital Can't Meet Flag Demand*, WASH. POST, Nov. 20, 2001, at A21 (stating that the "Capital [ran] out of the flags lawmakers give their constituents.").

3. See CAL. CIV. CODE § 1351(c)(1)-(4) (West Supp. 2003) (explaining that a CID includes community apartments, condominiums, planned developments, and stock cooperatives); see generally 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 307 (9th ed. 1987) (clarifying that CIDs are real property developments that integrate both separate interests and common features).

4. See Stephen Glassman & Donie Vanitzian, *Common Interest Living: Displaying Flag in Complex Prompts Fines*, L.A. TIMES, Sept. 23, 2001, at K6 (answering questions from homeowners about the legality of such actions, the author states "if your board says you cannot fly the flag, the law supports them.").

5. Letter from Lynnette R. Goldner to Dick Monteith, Senator (n.d.) (on file with the *McGeorge Law Review*).

6. *Id.*

7. *Id.*

8. *Id.*

but she was not taking it down.⁹ Ms. Goldner kept the flag up until her neighbor buried Captain Burlingame.¹⁰

As a result of complaints received from people belonging to homeowners' associations, Senator Monteith introduced Chapter 178, which preserves the right to display the American Flag in CIDs.¹¹ Chapter 178 prohibits homeowners from entering into agreements restricting their right to display the flag.¹² It also ensures that a prevailing party in an action to enforce the law will be awarded reasonable attorney's fees and costs.¹³

II. LEGAL BACKGROUND

A. *The Legal Right to Display the American Flag*

Existing law prohibits regulations or agreements restricting a person's legal right to display a flag of the United States on private property.¹⁴ However, reasonable restrictions may be imposed as to the appropriate time, place, and manner of display when needed for public health, safety, or order.¹⁵ Current law also forbids any restrictions imposed purely for aesthetic reasons.¹⁶ This prohibition is limited to only those who have a legal right to display the flag.¹⁷ Since "the legal right . . . to display the flag is not absolute and [may] be limited by contract, homeowners' associations have successfully written and enforced restrictions on the display of the American flag."¹⁸

B. *Constitutional Protection*

The Federal courts are split on whether judicial enforcement of such covenants constitutes state action and, therefore, brings private conduct within the scope of the Fourteenth Amendment.¹⁹ If the Fourteenth Amendment's Due

9. *Id.*

10. *Id.*

11. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 2032, at 2 (May 7, 2002).

12. *Id.* at 4.

13. CAL. CIV. CODE § 1353.5(c) (enacted by Chapter 178).

14. *See* CAL. GOV'T CODE § 434.5(b)(1) (West Supp. 2003) (noting an exception for advertising displays).

15. *Id.* § 434.5(c).

16. *Id.*

17. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 2032, at 4 (May 7, 2002); *see* CAL. GOV'T CODE § 434.5(a)(1) (stating that a legal right means the freedom of use and enjoyment generally exercised by landowners and occupiers).

18. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 2032, at 4 (May 7, 2002).

19. *Compare* Gerber v. Longboat Harbour N. Condo., Inc., 724 F. Supp. 884, 877 (M.D. Fla. 1989), *rev'd on other grounds*, 757 F. Supp. 1339 (M.D. Fla. 1991) (holding that judicial enforcement of restrictions on the display of the American flag would be state action), *with* Quail Creek Property Owners Ass'n., Inc. v. Hunter, 538 So. 2d 1288, 1289 (Fla. App. 1989) (declaring "that neither the recording of the protective covenant

Process or Equal Protection Clauses are triggered by state action, it makes the fundamental right of free speech within the First Amendment applicable to the states.²⁰ A state action prohibiting a person's ability to express himself through displaying an American flag would infringe on a person's fundamental right to free speech, which may violate the United States Constitution.²¹ This theory of judicial enforcement of private restrictions equaling state action is premised on the Supreme Court's decision in *Shelley v. Kraemer*²² in which the Court held that judicial enforcement of racially restrictive covenants constitutes state action.²³ The scope of *Shelley* is uncertain.²⁴ One interpretation is that any action to enforce a covenant represents state action.²⁵ The court in *Gerber v. Longboat Harbour North Condominium, Inc.* failed to see how one could make the distinction that courts act as the state when enforcing racially restrictive covenants and not when giving effect to other covenants within the same agreement.²⁶ The court stated that according to *Shelley* "[e]nforcement of private agreements by the judicial branch of government is state action for purposes of the Fourteenth Amendment."²⁷ However, other interpretations vary between whether *Shelley* prohibits the enforcement of covenants that substantially infringe on constitutionally protected fundamental rights or whether *Shelley* is strictly limited to racially restrictive covenants.²⁸

C. *The Davis-Stirling Common Interest Development Act*

The Davis-Stirling Common Interest Development Act (Act),²⁹ adopted in 1985, consolidated the laws governing all CIDs in California.³⁰ The Act applies whenever a separate interest is coupled with an interest in a common area or when a membership in the association is conveyed.³¹ The Act establishes

in the public records, nor the possible enforcement of the covenant in the courts of the state, constitutes sufficient 'state action' to render the parties' purely private contracts relating to the ownership of real property unconstitutional.").

20. *Gerber*, 724 F. Supp. at 886.

21. *Id.*

22. 334 U.S. 1 (1948).

23. *See id.* at 20 (defining state action as "exertions of state power in all forms.").

24. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. d (2000).

25. *Id.*

26. 724 F. Supp. at 886-87.

27. *Id.* at 887.

28. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. d (2000) (noting that few cases have held the Fourteenth Amendment to bar non-racially restrictive covenants).

29. CAL. CIV. CODE § 1350-1376 (West Supp. 2003).

30. 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 314 (9th ed. 1987).

31. *See* CAL. CIVIL CODE § 1352 (West Supp. 2003) (requiring a declaration, condominium plan (if any), and parcel map be recorded; *see* 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 314 (9th ed. Supp. 2002) (stating that the Act does not apply to a development without a common area); *see also* Mt. Olympus Property Owners Assn. v. Shpirt, 59 Cal. App. 4th 885, 895, 69 Cal. Rptr. 2d 521 (1997) (holding that

requirements for declarations and documents governing a CID.³² Existing law requires that an association manage a CID and follow certain procedures to enforce disciplinary action on a member for violating the rules set forth in the governing documents.³³ Restrictions are enforceable as equitable servitudes and have a presumption of validity, which can be rebutted by showing that any given restriction is unreasonable.³⁴

D. Enforceability of CID Restrictions

The California Supreme Court's decision in *Nahrstedt v. Lakeside Village Condominium Association*³⁵ made it more difficult for a homeowner to challenge CID restrictions.³⁶ A homeowner may challenge a restriction on the ground that it is unreasonable and therefore invalid.³⁷ Previously, California courts determined whether a restriction was unreasonable by looking at the particular circumstances of the challenging homeowner.³⁸ However, in *Nahrstedt*, the court held that "reasonableness or unreasonableness of a condominium use restriction . . . is to be determined *not* by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole."³⁹ The court emphasized the need for a restriction's presumption of validity, which is reflected in predictability for homeowners, judicial efficiency, and deterrence of costly lawsuits.⁴⁰ The court further stated that use restrictions are inherent in CIDs and that owners' expectations that restrictions will be enforced must be protected.⁴¹ Purchasers know of the association's discretionary power to enforce and enact new restrictions.⁴² Homeowners in CIDs take the risk that this power

the plaintiff's property was not coupled with common interest so membership in the homeowners association was completely voluntary with no power to charge assessments).

32. *Id.* § 1352-357.

33. *Id.* § 1363.

34. *Id.* § 1354 (West Supp. 2003).

35. 8 Cal. 4th 361, 33 Cal. Rptr. 2d 63 (1994).

36. See Daniel R. Puterbaugh, *The Reasonable Pet: An Examination of the Enforcement of Restrictions in California Common Interest Developments After Nahrstedt v. Lakeside Village Condominium Ass'n, Inc.*, 36 SANTA CLARA L. REV. 793, 805 (maintaining that "[t]he new standard [in *Nahrstedt*] approaches preclusion of judicial review" of CID restrictions).

37. CAL. CIV. CODE § 1354 (West Supp. 2003).

38. See *Bernardo Villas Mgmt. Corp. v. Black*, 235 Cal. Rptr. 509, 190 Cal. Rptr. 3d 153 (1987), *overruled by Nahrstedt v. Lakeside Vill. Condo. Ass'n.*, 8 Cal. 4th 361, 386, 33 Cal. Rptr. 2d 361 (1994) (finding that a restriction against having a parked truck was unreasonable when applied to a clean noncommercial pick-up truck because it did not interfere with other owners' use and enjoyment of their property); see also *Portola Hills Cmty. Ass'n. v. James*, 5 Cal. Rptr. 2d 580, 4 Cal. App. 4th 289 (1992), *overruled by Nahrstedt*, 8 Cal. 4th at 386, 33 Cal. Rptr. 2d 361 (1994) (holding that a restriction prohibiting satellite dishes unreasonable when homeowners satellite dish was invisible to the public because it did not seem to promote any legitimate goals of the association).

39. 8 Cal. 4th at 386, 33 Cal. Rptr. 2d at 78.

40. *Nahrstedt*, 8 Cal. 4th at 388, 383, 33 Cal. Rptr. 2d at 66, 76.

41. *Id.* at 372, 377, 33 Cal. Rptr. 2d at 68, 72.

42. *Id.* at 374, 33 Cal. Rptr. 2d at 66, 76.

will be used to benefit the whole development at the expense of the individual.⁴³ Finally, the court reasoned that decisions by associations made in good faith, furthering a development purpose should be upheld.⁴⁴

E. Attorney's Fees

Existing law provides that a court may award attorney fees for a prevailing party when the party has enforced a right affecting a public interest.⁴⁵ A significant benefit must be conferred on a large class of people.⁴⁶ Private enforcement must also be a necessity and the financial burden great.⁴⁷ In the interest of justice, attorney's fees should not be paid out of the prevailing party's recovery.⁴⁸

III. CHAPTER 178

Chapter 178 provides that "no declaration or other governing document [of a CID] shall limit or prohibit, . . . the display of the [American] flag . . . on or in the owner's separate interest or . . . exclusive use common area" unless there is a need to protect public health and safety.⁴⁹ Display of the flag

means a flag . . . made of fabric, cloth, or paper displayed from a staff or pole or in a window, and does not mean a depiction or emblem of the flag . . . made of lights, paint, roofing, siding, paving materials, flora, or balloons, or any other similar building, landscaping, or decorative component.⁵⁰

"In any action to enforce this section [of the Civil Code], the prevailing party shall be awarded reasonable attorney's fees and costs."⁵¹

43. *Id.*

44. *Id.*

45. *See* CAL. CIV. PROC. CODE § 1021.5 (West 1980 & Supp 2003).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* § 1353.5(a) (enacted by Chapter 178); *see id.* § 1351(i) (West Supp. 2003) (defining "[e]xclusive use common area as an area designated for the exclusive use of one or more, but fewer than all, of the owners of the separate interests and which is or will be appurtenant to the separate interest or interests.").

50. *Id.* § 1353.5(b) (enacted by Chapter 178).

51. CAL. CIV. PROC. CODE § 1353.5(c) (enacted by Chapter 178).

IV. ANALYSIS OF THE NEW LAW

A. *The Purpose of Chapter 178*

The purpose of Chapter 178 is to ensure that homeowners throughout California are able to freely display the American flag.⁵² Specifically, the Legislature wanted to include homeowners in CIDs within the definition of those landowners and occupiers with the legal right to display the American flag.⁵³ After September 11th, there was a surge of complaints from homeowners in CIDs stating that their associations denied their right to display the flags.⁵⁴ The new law seeks to remedy the frustration felt by homeowners.⁵⁵ Many homeowners were fined or sued for refusing to take down their flag.⁵⁶ Veterans' organizations across the state strongly support Chapter 178 and argue that such restrictions on the freedom to fly the flag are outrageous.⁵⁷ These organizations emphasize the flag's importance as a "symbol of freedom and liberty."⁵⁸

B. *Freedom to Contract*

Associations have enforced agreements restricting the right to display the American flag on the grounds that the right may be limited by contract.⁵⁹ Placing limitations on the subject matter of CID restrictions becomes difficult when considering the freedom to contract.⁶⁰ When parties make a consensual agreement, it generally should be enforced.⁶¹ However, statutes and government regulations have often limited the subjects upon which people can legally create servitudes.⁶² Furthermore, agreements between homeowners and CIDs may not

52. See 2002 Cal. Legis. Serv. ch. 178, sec. 1, at 662 (explaining the intent of the Legislature in enacting section 1353.5 of the California Civil Code).

53. *Id.*

54. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 2032, at 3 (May 7, 2002).

55. See Nick Rappley, *Legislators Jump on Flag Bill Bandwagon*, TURLOCK J., May 2, 2002, at A2 (stating that one homeowner thought it was "ridiculous" to have rules against flying the American flag and that no one should be prevented from putting one up; legislators agreed with him).

56. *Id.*; see Glassman & Vanitzian, *supra* note 4 (printing numerous letters from homeowners that state that they were fined for displaying the flag).

57. See, e.g., Letter from Ron Melendez, Legislative Chairman, California Association of County Veterans Service Officers, Inc., to Dick Monteith, Senator (Apr. 29, 2002) (on file with the *McGeorge Law Review*).

58. Letter from Glenn E. Mays, Veterans Service Officer, Department of Veterans Affairs, to Dick Monteith, Senator (Apr. 23, 2002) (on file with the *McGeorge Law Review*).

59. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 2032, at 4 (May 7, 2002).

60. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (2000) (stating that the principle of freedom of contract applies to the creation of servitudes).

61. See *id.* (quoting the Restatement of Contracts to emphasize the strong public interest in acknowledging a person's ability to handle his own affairs).

62. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. c (2000) (illustrating the type of

be completely consensual.⁶³ Homeowners are usually not in the position to bargain over individual restrictions.⁶⁴ Purchasers often believe that there is no CID with the individual restrictions they desire because CID restrictions are usually “bundled” together.⁶⁵ Furthermore, many buyers are forced to consider purchasing in CIDs because of their affordability.⁶⁶ Additionally, many homeowners may not even be aware of all the restrictions.⁶⁷ The law does not require that they have actual notice of the restrictions as long as those restrictions are recorded.⁶⁸ Considering that contracts between homeowners and homeowners’ associations may not be completely consensual and the government’s ability to limit the legality or enforceability of servitudes, the freedom to contract argument articulated by some homeowners’ associations may not hold substantial weight.⁶⁹

C. Protecting Property Values

Homeowners’ associations enact rules restricting the display of the flag out of fear that it will lower property values.⁷⁰ The associations are especially concerned with extravagant displays such as a whole house painted like a flag or flags made of lights.⁷¹ However, the bill was amended to address these concerns.⁷² A display of the flag is strictly defined as “a fabric, cloth or paper flag placed on a pole or in a window.”⁷³ Federal law also sets out certain standards for respectful displays of the American flag.⁷⁴ The new law reduces associations’ abilities to enforce aesthetic restrictions dealing with lighting, size, and manner of the flag.⁷⁵ But homeowners’ associations may be able to justify some of these restrictions on public health and safety grounds.⁷⁶ For example, an

statutes or government regulation that have affected the validity of servitudes, such as anti-discrimination statutes, statutes preventing restrictions on flying flags or displaying for sale signs, and zoning ordinances).

63. Puterbaugh, *supra* note 36, at 806.

64. *Id.*

65. See Robert G. Natelson, *Consent, Coercion, and “Reasonableness” in Private Law: The Special Case of Property Owners Associations*, 51 OHIO ST. L.J. 41, 55 (explaining that each restriction is bundled with the real estate and other restrictions).

66. Puterbaugh, *supra* note 36, at 807.

67. Natelson, *supra* note 65, at 59.

68. CAL. CIV. CODE § 1354 (West Supp. 2003).

69. See *supra* notes 59-69 and accompanying text.

70. Glassman & Vanitzian, *supra* note 4.

71. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 2032, at 3 (May 7, 2002).

72. Interview with Andrew F. House, Legislative Director & Stacy M. Richmond, Legislative Assistant, Office of Senator Dick Monteith, in Sacramento, Cal. (July 30, 2002) [hereinafter House & Richmond Interview] (notes on file with the *McGeorge Law Review*).

73. CAL. CIV. CODE § 1353.5(b) (enacted by Chapter 178).

74. 4 U.S.C.A. § 1 (West 1997); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 2032, at 3 (May 7, 2002).

75. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 2032, at 4 (May 7, 2002).

76. *Id.*

association may be able to regulate the size or placement of a flag if it blocks a motorist's visibility.⁷⁷ Furthermore, supporters of the bill point out that the display of the American flag is beautiful and associations should not be apprehensive about lowering property values.⁷⁸

D. *The Ability of Homeowners to Enforce their Rights*

Most of the time CIDs are managed by large corporations that have a significant amount of resources and knowledge of the law while the homeowners may be less knowledgeable about the law and have fewer resources.⁷⁹ To ensure that homeowners would not be afraid to enforce their legal rights because of high attorney costs, Chapter 178 requires that the prevailing party be awarded attorney's fees.⁸⁰ However, there is concern over the lack of flexibility courts would face when dealing with different circumstances such as when an association has a legitimate safety concern about the placement of a flag.⁸¹ The new law might unfairly penalize the losing party for taking a reasonable dispute to court.⁸² The Legislature attempted to clarify this provision by stating that its intent is to provide "a homeowner who is unlawfully prohibited from flying a flag of the United States . . . [with] those costs and attorneys' fees incurred in enforcing his or her right to do so."⁸³ Perhaps this statement will give the courts some flexibility in awarding costs and attorney's fees in order to effectuate the purpose of protecting those homeowners' rights that have clearly been violated.⁸⁴

E. *Flag Restrictions in Other States*

Californians are not alone in their struggles with homeowners' associations.⁸⁵ Across the country, people living in CIDs are restricted from displaying the flag.⁸⁶ In response, both Arizona and Florida have passed analogous legislation

77. *See id.* at 5 (offering the example to show that a legitimate dispute between an association and a homeowner may occur making an award of attorney's fees an unfair penalty).

78. House & Richmond Interview, *supra* note 72.

79. Puterbaugh, *supra* note 36, at 806.

80. House & Richmond Interview, *supra* note 72.

81. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 2032, at 5 (May 7, 2002).

82. *See id.* (pointing out that the losing party could easily be the homeowner).

83. 2002 Cal. Legis. Serv. ch. 178, sec. 1, at 662.

84. *See* House & Richmond Interview, *supra* note 72 (emphasizing that the function in granting attorney's fees is to allow homeowners with limited resources to assert their rights).

85. *See, e.g., Las Vegas Homeowners Association Bans Flagpole*, ASSOCIATED PRESS (Mar. 30, 2002) (discussing how a Las Vegas homeowner was told by his homeowners association that he could not place a flagpole in his backyard).

86. *See* Maria Puente, *Pledging Allegiance to the Flag*, USA TODAY, at http://www.usatoday.com/life/2002-07-23-us-flag_x.htm (July 23, 2002) (copy on file with the *McGeorge Law Review*) (illustrating similar situations in Arizona, Connecticut, Florida, Ohio, Pennsylvania, and South Carolina).

prohibiting such restrictions.⁸⁷ A few other states are also considering enacting similar new laws.⁸⁸ If this response spreads across the nation, it may symbolize a “subtle shift in the . . . power struggle between homeowners’ associations and their . . . members over community standards versus individual rights.”⁸⁹

V. CONCLUSION

CID residents will be able to fly their flags more freely as a result of Chapter 178.⁹⁰ Homeowners’ associations no longer have the protection of the Davis-Stirling Act to enforce restrictions on the display of the American flag.⁹¹ According to Senator Dick Monteith, “the ownership of property in a common interest development does not supercede the right to display the American flag.”⁹² Although homeowners’ associations will not be able to actively restrict the display of the American flag through contract, Chapter 178 has not disrupted the presumed validity of restrictions in CIDs.⁹³ According to the California Legislature, the interest in protecting property values is not as substantial as protecting the right to freely display the American flag, especially during a time when Americans are feeling a need to express their patriotism.⁹⁴ With the tremendous support Chapter 178 has received from citizens and legislators across party lines, it may pave the way for other states to pass similar legislation.⁹⁵

87. *Id.*

88. *Id.*

89. *Id.*

90. *See supra* notes 52-58 and accompanying text (stating the purpose behind Chapter 178)

91. Press Release, Monteith’s American Flag Bill Received Unanimous Support in Committee: Legislation Would Enhance Display Rights Among Homeowners (May 8, 2002) [hereinafter Monteith’s American Flag Bill] (on file with the *McGeorge Law Review*).

92. *Id.*

93. *See supra* Parts II.D, III.

94. *See supra* Parts I, IV.C.

95. Monteith’s American Flag Bill, *supra* note 91.