February 5, 2008

The Honorable Raymond E. Cleary, III
Senator, District No. 34
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Cleary:

In a letter to this office you questioned the types of restrictions that a homeowners' association may place on homeowners generally. You particularly questioned a homeowners' association's powers with respect to the display of an American flag by a homeowner.

As to the construction of restrictions established by a homeowners' association, as stated in the dissenting opinion of Judge Anderson in the case of Cedar Cove Homeowners Association, Inc. v. DiPietro, 368 S.C. 254, 270-271, 628 S.E.2d 284, 292 (Ct.App.2006),

> [r]estrictive covenants often authorize the creation of a homeowners' association, usually in the form of a not-for-profit corporation, and grant it authority to manage common areas, make regulations, levy assessments, and other similar privileges. Homeowners' associations are contractually limited by the restrictive covenants establishing them. While homeowners' associations typically have the power to regulate the use of common areas, their regulations cannot prohibit a usage contrary to any regulations creating easements or rights of use of property of others.
>
> Covenants that restrict the free use of property must be strictly construed against limitations upon the property's free use...Where there is doubt, the doubt must be resolved in favor of the property's free use...As voluntary contracts, restrictive covenants will be enforced unless they are indefinite or contravene public policy.

See also: Seabrook Island Property Owners Assn. v. Pelzer, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct.App.1987) "[r]estrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract.

As similarly set forth in Arcadian Shores Single Family Homeowners Assn., Inc. v. Cromer, 373 S.C. 292, 299, 644 S.E.2d 778, 781-782 (Ct.App.2007),

> [t]he language in a restrictive covenant shall be construed according to the plain and ordinary meaning attributed to it at the time of execution. Seabrook, 358 S.C. at 661, 596 S.E.2d at 383. "A restriction on the use of property must be created in express terms or by plain and unmistakable implication and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of the property." Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) (citations omitted). The court may not limit a restriction, nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998) (citations and quotations omitted).

As to specific areas of concern regarding the powers and authority of homeowners' associations, prior opinions of this office have commented on such. A prior opinion of this office, a copy of which is enclosed, dated July 11, 2007 dealt with the question of a homeowners' association's ability to impose a transfer fee on the purchasers of homes located in the area covered by the homeowners' association. The opinion concluded that S.C. Code Ann. § 33-31-302(15), which deals with the general powers of nonprofit corporations,

> ...appears to allow a homeowners' association registered under the Nonprofit Corporations Act the ability to impose a fee on the transfer of membership by one homeowner to another, presuming such is not prohibited by the homeowners' association's articles of incorporation. Furthermore, we are of the opinion, that homeowner's associations are private organizations and their ability to collect particular fees and assessments is a private matter between the association and its members. Thus, we suggest you look to that agreement to determine whether transfer fees are authorized.

Another prior opinion of this office dated February 22, 2005 referenced that S.C. Code Ann. § 56-5-6310 states that the provisions of Chapter 5 of Title 56 of the Code which comprise the Uniform Act Regulating Traffic on the highways in this State

> ...shall be applicable to private roads if the owner, including any corporation or homeowners' association holding title to community roads and excluding those only holding easements over such roads, shall file a written consent stating that the

> undersigned is the owner of the private roads shown on an attached plat and consents to the application of the provisions of this chapter for purposes of highway safety on such private roads....

An opinion of this office dated August 30, 2001 commented that

> ...the ability of a property or homeowners' association to assess and collect fines and penalties for violations occurring on private property would probably depend on the nature of the homeowners' association's agreement and whether the violator was a member of the association or in a position contractually which would bind the violator to the terms of the agreement. Courts in other jurisdictions have addressed similar questions. In Florida, the State District Court of Appeals held that a homeowners' association had the authority to assess fines against a homeowner based on violations of covenants restricting parking...Similarly, the Court of Appeals of Wisconsin noted...that the property owners' "association's power to fine its members depends on the contract between the association and the members embodied in the bylaws and articles."

Consistent with such, homeowner's associations are private organizations. As referenced above, these associations' authority to collect fees and assessments and enforce restrictive covenants is a private matter between the association and its members. Therefore, consideration must be given to any agreement to determine whether such collections or restrictions are authorized.

As to your specific question regarding the display of an American flag, I am enclosing a copy of a prior opinion of this office dated November 14, 2006 which deals with such. That opinion concluded that

> [f]ederal 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.

If there are any further questions, please advise.

Sincerely,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Assistant Deputy Attorney General