COMMONWEALTH of VIRGINIA

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The Honorable Thomas K. Norment, Jr.
Member, Senate of Virginia
P.O. Box 6205
Williamsburg, Virginia 23188

The Honorable Christopher K. Peace
Member, House of Delegates
P.O. Box 819
Mechanicsville, Virginia 23111

Dear Senator Norment and Delegate Peace:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask whether a development[1] with a declaration recorded after January 1, 1959, is subject to the provisions of the Virginia Property Owners' Association Act.[2] You also ask whether a development with such a declaration may rely on § 55-508(A)(6) to amend its declaration to provide that the Act applies to the development pursuant to § 55-515.1(D).

Response

It is my opinion that a development with a declaration recorded after January 1, 1959, is subject to the provisions of the Virginia Property Owners' Association Act. It further is my opinion that a development with such declaration or its property owners' association may, pursuant to § 55-508(A)(6), amend its declaration by a two-thirds vote of the owners to apply the provisions of the Act to the development when the declaration is silent regarding amendment or the amendment is made in accordance with the declaration.

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[1]In your request, you use the terms "development" and "home subdivision" interchangeably. The Virginia Property Owners' Association Act defines "development" as "real property located within this Commonwealth subject to a declaration which contains both lots, at least some of which are residential or are occupied for recreation purposes, and common areas with respect to which any person, by virtue of ownership of a lot, is a member of an association and is obligated to pay assessments provided for in a declaration." VA. CODE ANN. § 55-509 (2003). The Act further deems the term "subdivision" "to correspond with the term 'development.'" § 55-508(A) (Supp. 2005). For the purposes of this opinion, I shall use the term "property owners' association," as defined by the Property Act, to refer to the governance structure of a development. *See* § 55-509 (defining "property owners' association" as "an incorporated or unincorporated entity upon which responsibilities are imposed and to which authority is granted in the declaration").

[2]*See* tit. 55, ch. 26, §§ 55-508 to 55-516.2 (2003 & Supp. 2005).

Background

You relate that representatives of some property owners' associations have expressed concern regarding whether they are subject to the Virginia Property Owners' Association Act (the "Property Act"). You seek clarification of the effect of amendments to the Property Act regarding which developments are subject to the Act. Specifically, you inquire about developments having declarations recorded after January 1, 1959, but prior to the enactment of the Subdivided Land Sales Act[3] and the Property Act.

Applicable Law and Discussion

The 1989 Session of the General Assembly established the Property Act in Chapter 26 of Title 55[4] to govern property owners' associations. The Property Act applies "to developments subject to a declaration, as defined [by the Act,] initially recorded after January 1, 1959."[5] The Property Act guarantees certain rights and protections to individual association members and grants associations the right to enforce rules and regulations and to impose and enforce liens for unpaid assessments.[6]

In the Property Act, the General Assembly defines the term "declaration," in part, as

> any instrument, however denominated, recorded among the land records of the county or city in which the development or any part thereof is located, that either (i) imposes on the association maintenance or operational responsibilities for the common area or (ii) creates the authority in the association to impose on lots, or on the owners or occupants of such lots, or on any other entity any mandatory payment of money in connection with the provision of maintenance and/or services for the benefit of some or all of the lots, the owners or occupants of the lots, or the common area. "Declaration" includes any amendment or supplement to the instruments described in this definition.[7]

When the language of a statutory provision is plain and unambiguous, its plain meaning must be applied.[8] The definition of the term "declaration" is clear and unambiguous. Therefore, the words must be taken as written.[9] Where ambiguity exists, however, it is a basic rule of statutory construction that when construing statues on the same subject matter, the statutes should be harmonized if possible.[10] You relate that amendments to the Property Act, enacted subsequent to the establishment of certain

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[3] *See* 1978 Va. Acts ch. 510, at 752, 752-61 (enacting Subdivided Land Sales Act; codified, as amended, at tit. 55, ch. 19, §§ 55-336 to 55-338, 55-341 to 55-344, 55-347, 55-349 (not set out)).

[4] 1989 Va. Acts ch. 679, at 1575, 1575-80 (consisting of §§ 55-508 to 55-516). Sections 55-508 to 55-516.2, as amended, currently comprise the Virginia Property Owners' Association Act.

[5] Section 55-508(A).

[6] *See* §§ 55-508 to 55-516.2; Op. Va. Att'y Gen.: 2002 at 266, 266-67; 1997 at 164, 165.

[7] Section 55-509; *see also* Dogwood Valley Citizens Ass'n v. Winkelman, 267 Va. 7, 12, 590 S.E.2d 358, 360 (2004) (construing provisions of Property Act).

[8] City of Winchester v. Am. Woodmark Corp., 250 Va. 451, 457, 464 S.E.2d 148, 152 (1995); S. Ry. Co. v. City of Richmond, 175 Va. 308, 312, 8 S.E.2d 271, 272 (1940).

[9] Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985).

[10] *See* 1985-1986 Op. Va. Att'y Gen. 108, 111.

developments, appear to create ambiguity. Therefore, you are concerned that these developments may not be subject to the Property Act.

The facts you provide show that a development for which a declaration was recorded after January 1, 1959, and prior to the enactment of the Subdivided Land Sales Act and the Property Act would conform to the Property Act's definition of "declaration" provided it meets the requirements of a property owners' association under the Property Act.[11] The determination whether a covered development with a declaration that does not provide for amendment may legally rely on §§ 55-508(A) and 55-515.1(D) to apply the Property Act to the development requires that the two statutes be harmonized.

The plain meaning of the applicability of the Property Act and the definition of the term "declaration" support the conclusion that a development with a declaration recorded after January 1, 1959, is subject to the provisions of the Property Act. In construing §§ 55-508(A) and 55-515.1(D) together, when the declaration of a development or its property owners' association does not provide for amendment, the declaration may be amended pursuant to §§ 55-515.1(D) and 55-508(A) to apply the Property Act to such development.[12]

Conclusion

Accordingly, it is my opinion that a development with a declaration recorded after January 1, 1959, is subject to the provisions of the Virginia Property Owners' Association Act. It further is my opinion that a development with such declaration or its property owners' association may, pursuant to § 55-508(A)(6), amend its declaration by a two-thirds vote of the owners to apply the provisions of the Act to the development when the declaration is silent regarding amendment or the amendment is made in accordance with the declaration.

Thank you for letting me be of service to you.

Sincerely,

Robert F. McDonnell

1:1133; 1:941/06-032

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[11] *See Dogwood Valley*, 267 Va. at 13, 590 S.E.2d at 361 ("'[I]t is clear that in order to qualify under the [Property Owners' Association Act] an association must posses both the power to collect a fixed assessment or to make variable assessments and a corresponding duty to maintain the common area. In addition, these conditions must be expressly stated in a recorded instrument in the land records of the jurisdiction where some portion of the development is located.'" (alteration in original) (quoting Anderson v. Lake Arrowhead Civic Ass'n, 253 Va. 264, 271-72, 483 S.E.2d 209, 213 (1997))).

[12] *See* 1997 Op. Va. Att'y Gen., *supra* note 6, at 166-67.