

01-111

**PROPERTY AND CONVEYANCES: PROPERTY OWNERS' ASSOCIATION ACT.**

**Act does not address question whether developer of retirement community, which controls homeowners' association of development, may establish budget for association that is not based on fact. Developer must provide to potential buyers disclosure statement reflecting financial status of association. Developer may retain control of association and bill homeowners for association expenses, provided developer retains ownership of majority of lots constituting development.**

The Honorable Robert G. Marshall  
Member, House of Delegates  
April 17, 2002

**Issue Presented**

You ask whether a retirement community developer, which controls the community's homeowners' association, may establish a budget for the association that is not based on fact. You next ask whether the developer is required to provide to potential buyers a disclosure statement reflecting the financial status of the association. Finally, you ask whether such developer may retain control of the association and bill the homeowners for association expenses.

**Response**

It is my opinion that the developer you describe is required to provide to potential buyers a disclosure statement reflecting the financial status of the association, and that the developer may retain control of the association and bill the homeowners for association expenses, provided the developer retains ownership of a majority of the lots constituting the development.

**Facts**

You advise that a constituent living in a retirement community has been advised that the home-owners' association is carrying a significant deficit, which accumulated in 1999 and 2000 allegedly from the building of community facilities and the care of common grounds. You relate that, when the constituent was in the process of purchasing her home, she reviewed a 1998 balanced budget sheet for the association based on the construction of 1,800 homes. To date, however, approximately 500 homes have been built. Neither your constituent, nor others who have begun residing in the community, have seen disclosure statements for the association actually showing deficits for the years 1999 and 2000.

**Applicable Authorities and Discussion**

At its 1989 Session, the General Assembly established the Virginia Property Owners' Association Act in Chapter 26 of Title 55 of the *Code of Virginia*<sup>1</sup> (the "Act") to govern the operation of property owners' associations. The 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.<sup>2</sup> Additionally, the Act places upon the associations certain reporting and accounting requirements.<sup>3</sup> Section 55-510.1(A) of the Act provides that meetings of the board of directors of such associations "shall be open to all members of record" of the association. "Minutes shall be recorded and shall be available as provided in [§ 55-510(B)]."<sup>4</sup> Section 55-510(B) provides:

[A]ll books and records kept by or on behalf of the association ... shall be available for examination and copying by a member in good standing or his authorized agent so long as the request is for a proper purpose related to his membership in the association. This right of examination shall exist without reference to the duration of membership and may be exercised ... upon five days' written notice reasonably identifying the purpose for the request and the specific books and records of the association requested.

Turning to your question whether a developer may establish a budget for the association that is not based on fact, I must first note the following: Article V, § 15 of the Constitution of Virginia provides that the Attorney General of Virginia "shall perform such duties ... as may be prescribed by law." The constitutional provision declaring that the Attorney General shall perform such duties as may be prescribed by law is implemented by those sections of the Virginia Code that define the various duties of the Office.<sup>5</sup> Section 2.2-505 articulates the authority of the Attorney General of Virginia to render official legal opinions. Generally, it is recognized that official opinions of the Attorney General must be confined to matters of *law*.<sup>6</sup> The duty to issue opinions is one of the most significant responsibilities of the Attorney General.<sup>7</sup> The requirements of this responsibility have been acknowledged consistently by constitutional commentators.<sup>8</sup>

The fact that Virginia's Attorney General was originally a member of the judicial department, and the Commonwealth's continuing insistence upon keeping the office popularly elected and independent of the Governor, would indicate that a Virginia Attorney General properly sees his opinion-giving function as a quasijudicial one *to be exercised to advance the best interests of the law and the public at large rather than to ease the job of state offices and agencies*.<sup>9</sup>

As a result, there are instances in which the Attorney General must decline to render an official opinion so as not to interfere with matters of appropriate legislative or judicial consideration, or of purely local concern.<sup>10</sup> Consequently, the Attorney General historically has been required to limit responses to requests for official opinions to matters that require an interpretation of federal or state law, rule or regulation.<sup>11</sup>

Since I find no provision in the Act addressing the specific question whether a retirement community's developer, which controls the community's homeowners' association, may establish a budget for the association that is not based on fact, I cannot interpret a provision of the Act that does not respond to this specific

question. Accordingly, I regret to advise that I am unable to render an opinion regarding the question.

Turning to your next question, § 55-512(A) of the Act requires that the association make available to an owner "within fourteen days after receipt of a written request ..., an association disclosure packet." The packet, once received by the owner from the association, "shall be delivered" to the prospective purchaser.<sup>12</sup> The information in the packet must be "current as of a date specified on the association disclosure packet."<sup>13</sup> Section 55-512(A) further requires:

An association disclosure packet shall contain the following:

....

2. A statement of any expenditure of funds approved by the association or the board of directors which shall require an assessment in addition to the regular assessment during the current year or the immediately succeeding fiscal year;

3. A statement, including the amount of all assessments and any other mandatory fees or charges currently imposed by the association and associated with the purchase, disposition and maintenance of the lot and to the right of use of common areas, and the status of the account;

....

6. A copy of the association's current budget or a summary thereof prepared by the association, and a copy of its statement of income and expenses or statement of its financial condition for the last fiscal year for which such statement is available.

The use of the word "shall" in this statute strongly implies that its terms are intended to be mandatory, rather than permissive or directive.<sup>14</sup> Designed as a disclosure law created to provide consumers complete information with which they may consider a decision to purchase, the Act contemplates such decisions before the transaction closes.<sup>15</sup> Once the purchase transaction is complete, the Act does not provide any remedies. Failure to provide the required disclosure statements as required by the Act is a ground for the purchaser to void the contract of purchase. The right to cancel the contract is waived after the transaction is closed. Therefore, the developer you describe is required to provide to potential buyers a disclosure statement reflecting the financial status of the association.

Finally, § 55-509.2 provides that, "once the majority of the members of the board of directors are owners of improved lots in the association," and the developer "no longer holds a majority of the votes in the association" all records held or controlled by the developer must be provided to the association. When the language of an enactment is plain and unambiguous, as in this case, its plain meaning must be applied.<sup>16</sup> Accordingly, the words must be taken as written and the history of the particular enactment, extrinsic facts, or general rules of construction of enactments that have doubtful meaning do not apply.<sup>17</sup> Consequently, in response to your final inquiry, a developer may retain control of the association and bill the homeowners for association expenses, provided the

developer retains ownership of a majority of the lots constituting the development.<sup>18</sup>

## Conclusion

It is my opinion that the developer you describe is required to provide to potential buyers a disclosure statement reflecting the financial status of the association, and that the developer may retain control of the association and bill the homeowners for association expenses, provided the developer retains ownership of a majority of the lots constituting the development.

<sup>1</sup>1989 Va. Acts ch. 679, at 1575 (consisting of §§ 55-508 to 55-516). Sections 55-508 to 55-516.2 currently comprise the Virginia Property Owners' Association Act.

<sup>2</sup>See Va. Code Ann. §§ 55-510 to 55-516 (Michie Repl. Vol. 1995 & Supp. 2001); 1997 Op. Va. Att'y Gen. 164, 165.

<sup>3</sup>See, e.g., Va. Code Ann. § 55-510(A) (Michie Supp. 2001) (keeping of financial records by association); § 55-512 (Michie Supp. 2001) (making financial disclosure packet available to prospective buyers); § 55-516.1 (Michie Repl. Vol. 1995) (filing of annual report accompanied by fixed fee); see also

1997 Op. Va. Att'y Gen., *supra*, at 165.

<sup>4</sup>Section 55-510.1(A) (Michie Supp. 2001).

<sup>5</sup>See Va. Code Ann. tit. 2.2, ch. 5, §§ 2.2-500 to 2.2-518 (LexisNexis Repl. Vol. 2001) ("Department of Law").

<sup>6</sup>See 2 A.E. Dick Howard, Commentaries on the Constitution of Virginia 668 (1974).

<sup>7</sup>See *id.* at 668.

<sup>8</sup>See *id.* at 668 n.42.

<sup>9</sup>*Id.* at 669 (emphasis added).

<sup>10</sup>See Op. Va. Att'y Gen.: 2000 at 106, 108-09; 1999 at 90, 93; 1997 at 105, 107; 1987-1988 at 489, 490; 1977-1978 at 31, 33.

<sup>11</sup>Op. Va. Att'y Gen.: 1999, *supra*, at 93; 1997, *supra*, at 107; 1991 at 237, 238; 1989 at 293, 298; 1986-1987 at 347, 348; 1977-1978, *supra*, at 33; 1976-1977 at 17, 17.

<sup>12</sup>"The disclosure packet, once received by the seller from the association, shall be delivered by the seller to the purchaser. The association shall have no obligation to deliver the disclosure packet to the purchaser of the lot." Va. Code Ann. § 55-512(A)(14) (Michie Supp. 2001).

<sup>13</sup>Section 55-512(A).

<sup>14</sup> See *Andrews v. Shepherd*, 201 Va. 412, 414, 111 S.E.2d 279, 281-82 (1959); see also *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965); Op. Va. Att'y Gen.: 1998 at 56, 58; 1996 at 178, 178; 1991 at 238, 240; 1989 at 250, 251-52; 1985-1986 at 133, 134.

<sup>15</sup> See 2 H. & S. Docs., *Report of the Efficiency and Effectiveness of the Property Owners' Association Act*, H. Doc. No. 22, at 4-5 (2000).

<sup>16</sup> *City of Winchester v. American Woodmark*, 250 Va. 451, 457, 464 S.E.2d 148, 152 (1995); *Southern Ry. Co. v. City of Richmond*, 175 Va. 308, 312, 8 S.E.2d 271, 272 (1940).

<sup>17</sup> *Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985).

<sup>18</sup> See Va. Code Ann. § 55-509 (Michie Supp. 2001) (defining "lot").

[Back to April 2002 Index](#)