COMMONWEALTH of VIRGINIA

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The Honorable R. Lee Ware, Jr.
Post Office Box 689
Powhatan, Virginia 23139

Dear Delegate Ware:

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

Issue Presented

A restrictive covenant of the Brandermill planned community provides that property in a residential area may be used only for residential purposes. You ask whether this covenant is legally enforceable.

Background

Brandermill is a planned community in Chesterfield County. A restrictive covenant in its declaration requires that property in a residential area be used exclusively for "residential purposes," except that an office that does not generate customer or client traffic (a "home office") is deemed a residential use:

> All lots in said Residential Areas shall be used for residential purposes exclusively. The use of a portion of a dwelling on a lot as an office by the owner or tenant thereof shall be considered a residential use if such use does not create customer or client traffic to and from the lot.[1]

Applicable Law and Discussion

The Virginia Property Owners' Association Act (the "Act")[2] governs the operation and management of a property owner's association (a "POA") in Virginia. A POA has no inherent power; it

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[1] Brandermill Declaration of Rights, Restrictions, Affirmative Obligations and Conditions: Multiple Family Covenants, Part II (Restrictions), Paragraph 2(a) (August 30, 1974).

[2] VA. CODE ANN. §§ 55-508 through 55-516.2 (2012 & Supp. 2016).

has only those powers delegated to it by the General Assembly under the Act.[3] The primary document for any POA is the declaration.[4] A declaration may include restrictions on the uses of property.[5] The Act also specifically provides that a POA may prohibit any lot owner from operating a home-based business within his personal residence if the prohibition is contained in a recorded declaration.[6] Thus, since the restrictive covenant in question is in the declaration, all nonresidential uses in residential areas are barred, with the qualification that a home office not creating customer or client traffic to and from the lot is deemed a residential use.

It is well settled in Virginia that restrictive covenants are not favored.[7] Furthermore, the Supreme Court of Virginia has stated that restrictive covenants "are to be strictly construed."[8]

But although restrictive covenants are disfavored, they are permissible. The Supreme Court of Virginia has held that "courts of equity will enforce restrictive covenants where the intention of the parties is clear and the restrictions are reasonable."[9] A Virginia circuit court has held that members of a property owners association must abide by the association's governing documents.[10] A prior opinion of this Office concluded that a homeowners association may limit the use of housing units through a restrictive covenant.[11]

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[3] *See* Skeen v. Indian Acres Club of Thornburg, Inc., 27 Va. Cir. 167, 170 (Spotsylvania Cty. 1992) (citing Unit Owners Ass'n v. Gillman, 223 Va. 752, 763 (1982)).

[4] *See* § 55-513.2 (Supp. 2016). The Act defines the term "declaration" 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. 'Declaration' shall not include a declaration of a condominium, real estate cooperative, time-share project or campground." Section 55-509 (Supp. 2016).

[5] While the Act does not explicitly say that restrictive covenants may be included in a declaration, that concept is embedded in the fabric of the Act: perhaps it so obvious that the General Assembly did not see the need for it to be stated. *See* § 55-508 (2012) ("*'Covenants,' 'deed restrictions,'* or *'other recorded instruments'* for the management, regulation and control of a development shall be deemed to correspond with the term 'declaration.'"). *See also* § 55-509.5(A)(9) (Supp. 2016) (The disclosure packet of a homeowners association shall include "[a] statement that any . . . uses made of the lot . . . are not in violation of the declaration . . . ."). The Supreme Court of Virginia has repeatedly, without question, treated restrictive covenants contained in declarations as enforceable. *See, e.g.*, Tvardek v. Powhatan Village Homeowners Ass'n, 291 Va. 269, 276 (2016); Lovelace v. Orange Cty. Bd. of Zoning Appeals, 276 Va. 155, 159 (2008).

[6] "*Except to the extent the declaration provides otherwise*, no association shall prohibit any lot owner from operating a home-based business within his personal residence." Section 55-513.2 (emphasis added).

[7] Scott v. Walker, 274 Va. 209, 212-13 (2007) (quoting Schwarzschild v. Welborne, 186 Va. 1052, 1058 (1947)).

[8] Deitrick v. Leadbetter, 175 Va. 170, 175 (1940) (citing Whitehurst v. Burgess, 130 Va. 572, 576 (1921)).

[9] Fein v. Payandeh, 284 Va. 599, 606 (2012) (quoting *Scott*, 274 Va. at 212-13).

[10] Farran v. Olde Belhaven Towne Owners Ass'n, 80 Va. Cir. 508, 511 (Fairfax City 2010).

[11] 2011 Op. Va. Att'y Gen. 163, 164 (opining that the restrictive covenant in question placed a limit on the number of housing units a single owner could own and offer for rent).

In my view, the restrictive covenant identified in your request is reasonable, as it comports with the authority specifically granted to a POA under the Virginia Code to restrict uses to residential purposes, and it provides a reasonable exception by deeming an office that does not create customer or client traffic to and from the lot to be a residential use. Further, even when strictly construed, the covenant is non-ambiguous.[12] "Residential" is a clear and unambiguous term of common usage.[13] I therefore conclude that this restrictive covenant is enforceable as written under the circumstances you have presented.

I express no opinion about whether any particular use of any particular property is for "residential purposes," because that is a question of fact rather than an interpretation of law. "Attorneys General consistently have declined to render official opinions on specific factual matters . . . ."[14]

Conclusion

For the reasons set forth above, it is my opinion that section 2(a) of Brandermill's restrictive covenants limiting the use of lots in residential areas for residential purposes exclusively is enforceable, subject to the exception that a home office that does not generate customer or client traffic is deemed a residential use.

With kindest regards, I am

Very truly yours,

Mark R. Herring

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Attorney General

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[12] *See* Gillespie v. Commonwealth, 272 Va. 753, 758 (2006) (citing Brown v. Lukhard, 229 Va. 316, 321 (1985)) ("Language is ambiguous if it admits of being understood in more than one way, refers to two or more things simultaneously, is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness."). *See also Scott*, 274 Va. at 213 (quoting *Schwarzschild*, 186 Va. at 1058) ("[S]ubstantial doubt or ambiguity [in restrictive covenants] is to be resolved in favor of the free use of property and against restrictions.").

[13] The Supreme Court of Virginia has held the term "residential" to encompass the short-term rental of residential properties (*Scott*, 274 Va. at 219), a four-unit apartment house (Jernigan v. Capps, 187 Va. 73, 81 (1948)), and the rental of rooms without meals (*Schwarzschild*, 186 Va. at 1064-65), but not the commercial operation of a tourist home (*Deitrick*, 175 Va. at 177).

When the General Assembly does not define a term, it is assumed to have intended for the term to have its ordinary meaning in common usage. 1995 Op. Va. Att'y Gen. 91, 91. In the absence of a contrary definition, words are presumed to have their usual and ordinary meaning. Moyer v. Commonwealth, 33 Va. App. 8, 35 (2000) (citing McKeon v. Commonwealth, 211 Va. 24, 27 (1970)). *See also* Anderson v. Commonwealth, 182 Va. 560, 565 (1944).

[14] 2009 Op. Va. Att'y Gen. 80, 81; 2002 Op. Va. Att'y Gen. 321, 325.