

00-035

**PROPERTY AND CONVEYANCES: CONDOMINIUM ACT.**

**CONSTITUTION OF VIRGINIA: BILL OF RIGHTS.**

**Authority of board of directors of condominium association to forbid door-to-door solicitation and/or dissemination of material and to censor material is governed by Act and recorded documents. Rules and regulations adopted by board constitute mutual agreements among several unit owners that cannot infringe on free speech and expression. Unit owner's dissemination of printed materials announcing time and place of board meeting and encouraging attendance by other unit owners violates no Virginia law. Attorney General declines to render opinion regarding reasonableness of house rule without availability of condominium documents and specific facts.**

The Honorable Vincent F. Callahan Jr.  
Member, House of Delegates  
June 5, 2000

You ask several questions regarding certain restrictions that a condominium unit owners' association ("association") imposes on its unit owners. You first ask whether a condominium unit owner may distribute printed material to other unit owners without receiving prior approval from the board of directors. You next ask whether an association's board of directors has the authority to preapprove and to censure material that a unit owner seeks to distribute within the condominium. You also ask whether dissemination of printed materials constitutes solicitation under Virginia law. Finally, you seek guidance regarding changes in the law that may be necessary to permit the dissemination of such materials without prior approval of the board of directors.

You advise that a condominium unit owner distributed printed materials by placing them under the entrance doors of unit owners. The materials announced the time and place for upcoming board of directors' meetings and encouraged unit owner attendance and participation. The materials state that unit owners are not provided information about issues scheduled for board discussion and are therefore unable to make informed suggestions and comments for consideration by the board. The materials further state that unit owners are entitled to be heard regarding decisions affecting the quality of life of all unit owners.

You state that the board of directors of the association adopted a house rule at a regular board meeting that may violate free speech. The house rule forbids door-to-door solicitation and/or dissemination of materials, either by residents or others, without prior approval of the board of directors. A violation of this rule must be reported to the site manager.

You also advise that, following adoption of this house rule, a unit owner requested permission from the board of directors to distribute periodically, during the remainder of the year, informational flyers to owner units. In addition, the unit owner indicated that he would not place flyers under the door of any unit owner who objected to such distribution. The board of directors asked to review the proposed materials before granting permission to distribute same. You believe that such a request infringes on free speech and is intended to censor the content of the material before distribution. You conclude that the board may disapprove the content of any material with which it does not agree.

Chapter 4.2 of Title 55, §§ 55-79.39 through 55-79.103 of the *Code of Virginia*, comprises the Condominium Act. The facility referred to and owned as a "condominium" is one in which owners have individual ownership and use of distinct units along with ownership in undivided common

interests in the common elements of the facility.<sup>1</sup> Section 55-79.40(A) provides that the Condominium Act "shall apply to all condominiums." Section 55-79.45 provides that "[n]o condominium shall come into existence except by the recordation of condominium instruments pursuant to the provisions of this chapter." Section 55-79.73(A) provides for the self-government of a condominium by requiring that "[t]here shall be recorded simultaneously with the declaration<sup>[2]</sup> a set of bylaws providing for the self-government of the condominium by an association of all the unit owners." Section 55-79.73(B) provides:

The bylaws shall provide whether or not the unit owners' association shall elect an executive organ. If there is to be such an organ, the bylaws shall specify the powers and responsibilities of the same and the number and terms of its members.... The bylaws may delegate to such organ, inter alia,<sup>[3]</sup> any of the powers and responsibilities assigned by this chapter to the unit owners' association. The bylaws shall also specify which, if any, of its powers and responsibilities the unit owners' association or its executive organ may delegate to a managing agent.

It is clear, both from the language quoted in § 55-79.45, and from an opinion of the Supreme Court of Virginia in the case of *Unit Owners Association of BuildAmerica-1 v. Harry F. Gillman*,<sup>4</sup> that "[n]o condominium shall come into existence in Virginia except on the recordation of condominium instruments pursuant to the ... Condominium Act.... The entire condominium concept, and all pertaining to it, is therefore a statutory creation."<sup>5</sup>

"The power exercised by the Association is contractual in nature and is the creature of the condominium documents to which all unit owners subjected themselves in purchasing their units. It is a power exercised in accordance with the private consensus of the unit owners."<sup>6</sup> Unit owners' concerns about the application of the bylaws of an association to a specific factual situation, such as the house rule adopted by the board, is one that may be settled pursuant to §§ 55-79.79(a) and 55-79.80(B).<sup>7</sup>

You have provided no condominium documents pertaining to the association you describe. Your inquiries regarding the authority of the association's board of directors to forbid door-to-door solicitation and/or dissemination of material and to censor such material is governed entirely by such condominium documents. This Office is required to decline to render an opinion regarding interpretation of any such condominium documents which, in reality, are private agreements among the several co-owners of the association. This Office traditionally has declined to render opinions in matters of a purely private nature and has limited responses to requests for opinions to matters which concern an interpretation of federal or state law, rule or regulation.<sup>8</sup> I trust you will understand the rationale for this long-standing practice.

I am, however, of the view that the house rule adopted by the board of directors cannot constitute infringement of free speech by the board of directors.

Most of the protections for individual rights and liberties contained in the Constitution [of the United States] and its amendments apply only to the actions of governmental entities. The safeguards against deprivations of individual rights ... specifically apply only to the activities of either the state or federal governments. Similarly, the Bill of Rights by its terms and necessary implications has been viewed only to limit the freedom of the government when dealing with individuals.<sup>[9]</sup>

Consequently, the actions by the association's board of directors do not implicate First Amendment issues. The actions of a private association, such as the association you describe, do not constitute governmental or "state" action of a type proscribed by the First Amendment. "While the unit owners are vested with an undivided interest in the common elements [of the condominium], the authority to control the use of the common elements is vested in the Association by the condominium documents and such amendments thereof as may thereafter be

adopted."<sup>10</sup> Furthermore, when rules and regulations of the Association are adopted by the board of directors, such become "a mutual agreement entered into by the condominium unit owners."<sup>11</sup>

Freedom of speech and expression is also protected by Article I, § 12 of the Constitution of Virginia (1971). Generally, however, the Virginia Supreme Court "has treated section 12 of the Virginia Bill of Rights as coextensive with the First Amendment"<sup>12</sup> to the United States Constitution. In the case of *Claude F. Finney v. Harley A. Hawkins*,<sup>13</sup> the Court observed that Article I, § 12 and the First Amendment are quite similar. "Both guarantee to the citizen certain inherent rights, and, in our opinion, if the act ... does not offend the Federal Constitution, then it will not offend the Virginia Constitution."<sup>14</sup> Consequently, since the actions of the board of directors cannot offend the First Amendment to the United States Constitution, such actions also cannot offend the Virginia Constitution.

You next ask whether the dissemination of such printed materials as you describe by a unit owner to other unit owners constitutes solicitation under Virginia law. I can find no Virginia statute that responds to the factual matters you describe. Consequently, I must conclude that the dissemination of printed materials by a unit owner to other unit owners, as you describe, does not violate any Virginia law.

You finally request suggestions for changes in Virginia law to permit condominium unit owners to disseminate information to other unit owners without first seeking approval from the board of directions.

As noted above, the condominium concept is a statutory creation. Therefore, the powers exercised by an association of unit owners through its board of directors "are limited by general law and by the Condominium Act itself."<sup>15</sup>

[A]mendments to condominium restrictions, rules, and regulations should be measured by a standard of reasonableness, and ... courts should refuse to enforce regulations that are found to be unreasonable. In doing so, inquiry must be made whether an association has acted within the scope of its authority as defined under the Condominium Act and by its own master deed and bylaws, and whether it has abused its discretion by promulgating arbitrary and capricious rules and regulations bearing no relation to the purposes of the condominium.<sup>[16]</sup>

Ultimately, however, the determination whether such a house rule is reasonable depends on a complete and detailed set of facts, as well as a review of the condominium documents. You have not detailed specific facts upon which a precise conclusion may be drawn. When such case-by-case determinations are required, this Office has refrained from rendering an opinion on general hypothetical questions without specific facts being set forth.<sup>17</sup>

Therefore, resolution of the inquiry regarding whether the house rule is reasonable depends on the particular facts and circumstances of the matter, as well as the condominium documents. Since you provide no such facts, I must respectfully decline to render an opinion regarding whether such a house rule is reasonable, and, consequently, whether a change in the Condominium Act is appropriate.<sup>18</sup>

<sup>1</sup> See § 55-79.41 (defining "common elements," "condominium," "condominium unit," "convertible space," "limited common element," "unit").

<sup>2</sup> See § 55-79.54 (explaining contents of declaration as containing, e.g., name of condominium, its location, metes and bounds description, delineation of common elements and unit boundaries, etc.).

<sup>3</sup> *Inter alia* means "[a]mong other things." Black's Law Dictionary 815 (7<sup>th</sup> ed. 1999).

<sup>4</sup>223 Va. 752, 292 S.E.2d 378 (1982).

<sup>5</sup>*Id.* at 762, 292 S.E.2d at 383.

<sup>6</sup>*Id.* at 766, 292 S.E.2d at 385.

<sup>7</sup>Except as prohibited by the condominium instruments, § 55-79.79(a) places the responsibility for upkeep of condominiums (1) in the association "in the case of the common elements," and (2) in the unit owner "in the case of any unit"; and § 55-79.80(B) gives to the executive organ of the association, or the association itself, "irrevocable power as attorney-in-fact on common elements." *Compare* *Montgomery v. Columbia Knoll Condo. Council*, 231 Va. 437, 344 S.E.2d 912 (1986) (differentiating between authority of unit owners' association to replace windows in common elements and windows within individual units).

<sup>8</sup>1986-1987 Op. Va. Att'y Gen. 347, 348.

<sup>9</sup>John E. Nowak et al., *Handbook on Constitutional Law* 451 (1978).

<sup>10</sup>*Unit Owners Assoc. v. Gillman*, 223 Va. at 766, 292 S.E.2d at 385.

<sup>11</sup>*Id.*

<sup>12</sup>A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 258 (1974).

<sup>13</sup>189 Va. 878, 54 S.E.2d 872 (1949).

<sup>14</sup>*Id.* at 884, 54 S.E.2d at 875 (quoting *Reynolds v. Milk Commission*, 163 Va. 957, 963, 179 S.E. 507, 509 (1935)).

<sup>15</sup>*Unit Owners Assoc.*, 223 Va. at 763, 292 S.E.2d at 383.

<sup>16</sup>*Id.* at 768-69, 292 S.E.2d. at 386-87.

<sup>17</sup>See 1986-1987 Op. Va. Att'y Gen. 189, 190; *id.* at 274, 275.

<sup>18</sup>I reach this conclusion based on the following language in the case of *Unit Owners Association v. Gilman*:

"The power exercised by the Association is contractual in nature and is the creature of the condominium documents to which all unit owners subjected themselves in purchasing their units. It is a power exercised in accordance with the private consensus of the unit owners. While the unit owners are vested with an undivided interest in the common elements, the authority to control the use of the common elements is vested in the Association by the condominium documents and such amendments thereof as may thereafter be adopted."

223 Va. at 766, 292 S.E.2d at 385.