

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

**Act applies to every mandatory membership homeowners' association upon which maintenance or operational responsibilities are required or which possesses authority to impose regular annual assessment in any amount per lot, pursuant to declaration recorded before July 1, 1991, and to every mandatory membership homeowners' association upon which maintenance or operational responsibilities are required in amount exceeding \$150 per year per lot or which possesses authority to impose regular annual assessment in excess of \$150 per lot, pursuant to declaration recorded after July 1, 1991.**

The Honorable Linda T. Puller

Member, House of Delegates

November 7, 1997

You ask whether the Virginia Property Owners' Association Act applies without exception to every mandatory membership homeowner association in a development subject to a declaration recorded among land records before July 1, 1991.

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>

Originally, the Act applied to developments subject to a declaration initially recorded after January 1, 1960, and property associations incorporated or otherwise organized after such date.<sup>4</sup> The General Assembly explicitly provided that the Act "shall not apply retroactively, but shall apply prospectively to all property owners' associations in existence on the effective date of [the Act, July 1, 1989,] or created subsequent thereto."<sup>5</sup> Thus the Act, as originally enacted in 1989, applied prospectively to those property owners' associations incorporated after January 1, 1960, and still in existence on or created after July 1, 1989, for developments subject to a declaration recorded after January 1, 1960.

Section 55509 provides the definitions of the various terms used in the Act. A "development" refers to real property "subject to a declaration which contains both lots  $\frac{1}{4}$  and common areas with respect to which any person, by virtue of ownership of a lot, is a member of [a property owners' association] and is obligated to pay assessments provided for in a declaration."<sup>6</sup> A "property owners' association" is "an incorporated or unincorporated entity upon which responsibilities are imposed and to which authority is granted in the declaration."<sup>7</sup>

Central to your inquiry is the definition of the term "declaration." When enacted, § 55509 defined the term to mean

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 imposes on the [property owners'] association maintenance or operational responsibilities for the common area *and* creates the authority in the association to impose on lots, or on the owners or occupants of such lots,  $\frac{1}{4}$  *mandatory payment of money* in connection with the provision of maintenance or services, or both, for the benefit of some or all of the lots, the owners or occupants of the lots, or the common area.<sup>[8]</sup>

It is a basic rule of statutory construction that when construing statutes on the same subject matter, the statutes should be harmonized if possible.<sup>9</sup> Construing §§ 55508 and 55509 together, as originally enacted, a property owners' association meeting the year limitations of § 55508 would have fallen within the purview of the Act, if the duties required in the definition of "declaration" as set forth in § 55509 were required of the association along with the authority to impose a monetary assessment upon its members.

In 1991, however, the General Assembly amended the definition of the term "declaration" in § 55-509 to mean

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 ~~and in an amount in excess of \$150 per year per lot as a regular annual assessment or~~ (ii) creates the authority in the association to impose on lots, or on the owners or occupants of such lots ~~any mandatory payment of money in an amount in excess of \$150 per year per lot as a regular annual assessment in connection with the provision of maintenance and/or services, or both,~~ for the benefit of some or all of the lots, the owners or occupants of the lots, or the common area.<sup>[10]</sup>

The inclusion of a threshold of \$150 per year per lot as a minimum monetary amount for which a property owners' association is responsible or, alternatively, the minimum amount of the mandatory payment to a property owners' association results in limiting the applicability of the Act to those property owners' associations responsible for maintenance or operational duties amounting to at least \$150 per year per lot, or which have the authority to impose a mandatory regular annual assessment in excess of \$150 per year per lot.<sup>11</sup>

When new provisions are added to existing legislation by amendatory act, a presumption normally arises that a change in law was intended.<sup>12</sup> The presumption in this instance is that by inserting the \$150 threshold amount, the General Assembly intended to exempt from the requirements of the Act smaller associations with lower mandatory annual assessments. In so doing, such associations are relieved of the duties imposed upon them under the Act.

When amending § 55509 in 1991, the General Assembly simultaneously amended § 55508 to provide:

*The provisions of this Act which exclude the applicability of this chapter to developments which impose on the association maintenance or operational responsibilities or on the owners or occupants of lots a mandatory payment of money less than \$150 per year per lot as a regular annual assessment shall not be applied retroactively to any development subject to a declaration recorded prior to July 1, 1991.*<sup>[13]</sup>

The General Assembly amended § 55508 to specifically address which property owners' associations would receive the exclusion provided in § 55509. Whereas the original language of § 55508 made the Act's provisions applicable prospectively to all mandatory property owners' associations incorporated after January 1, 1960, and still in existence on July 1, 1989, the General Assembly, by its 1991 amendment to § 55508, restricted the associations exempted pursuant to § 55509 to those subject to a declaration recorded after July 1, 1991. Therefore, reading these statutes together, property owners' associations subject to declarations recorded before July 1, 1991, do not receive the exclusion benefit of § 55509, regardless of the fact that their members may pay \$150 or less per year per lot.<sup>14</sup>

Accordingly, it is my opinion that the Act applies (i) to every mandatory membership homeowners' association upon which maintenance or operational responsibilities are required or which possesses the authority to impose a regular annual assessment in any amount per lot, pursuant

to a declaration recorded before July 1, 1991, and (ii) to every mandatory membership homeowners' association upon which maintenance or operational responsibilities are required in an amount exceeding \$150 per year per lot or which possesses the authority to impose a regular annual assessment in excess of \$150 per lot, pursuant to a declaration recorded after July 1, 1991.

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<sup>1</sup>1989 Va. Acts ch. 679, at 1575 (consisting of §§ 55508 to 55516). Sections 55508 to 55516.2 currently comprise the Property Owners' Association Act.

<sup>2</sup>See §§ 55510 to 55516; see also 1992 Op. Va. Att'y Gen. 53, 55. The 1992 opinion concerns whether a local ordinance may require a subdivider to create a property owners' association when developing a new subdivision, and does not address the issue of retroactive application of the Act.

<sup>3</sup>Examples of such requirements include the keeping of financial records by the association (§ 55-510(A)), making available a financial disclosure packet to prospective buyers (§ 55512), and the filing of an annual report with accompanying fee (§ 55516.1).

<sup>4</sup>See 1989 Va. Acts, *supra*, at 1575 (enacting § 55508).

<sup>5</sup>*Id.* at 157576.

<sup>6</sup>Section 55509.

<sup>7</sup>*Id.*

<sup>8</sup>1989 Va. Acts, *supra*, at 1576 (emphasis added).

<sup>9</sup>See 19851986 Op. Va. Att'y Gen. 108, 111.

<sup>10</sup>1991 Va. Acts ch. 667, at 1237, 1238.

<sup>11</sup>Section 55508(A), however, currently allows a declaration to specifically provide for the Act's applicability regardless of the \$150 threshold.

<sup>12</sup>See *Wisniewski v. Johnson*, 223 Va. 141, 144, 286 S.E.2d 223, 22425 (1982); Op. Va. Att'y Gen.: 1996 at 61, 61; 1992 at 42, 44.

<sup>13</sup>1991 Va. Acts, *supra*, at 1237.

<sup>14</sup>*Accord Anderson v. Lake Arrowhead Civic Association*, 253 Va. 264, 271 n.4, 483 S.E.2d 209, 213 n.4 (1997) (stating, in discussion of Act's application, that \$150 minimum threshold for annual assessment is not retroactively applicable to development subject to declaration recorded after 1960 and for which property owners' association was incorporated in 1970).