



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II  
Attorney General

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900 East Main Street  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

The Honorable Bryce E. Reeves  
Member, Senate of Virginia  
10151 Southpoint Parkway  
Fredericksburg, Virginia 22407

Dear Senator Reeves:

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 inquire whether provisions of the Virginia Property Owners Act that provide or otherwise allow for a developer to maintain control of a homeowners' association for a specific period of time, or until a specific number of lots or units are sold to private persons, facially violate the individual homeowners' constitutional rights to the equal protection of law or to due process of law. You further ask whether an impermissible conflict of interests arises when a lawyer simultaneously serves as the attorney for both the developer and the homeowners' association during the period of developer control.

## Response

It is my opinion that because the Virginia Property Owners Act does not expressly provide or otherwise allow for a developer to maintain control of a homeowners' association for a specific period of time or until a specific number of lots or units are sold, there is no Virginia Code provision to evaluate for constitutionality. It is further my opinion that whether an impermissible conflict of interests exists when a lawyer is employed by the developer to serve simultaneously as the attorney for the developer and the association is not a matter of law upon which this Office can opine, but rather an ethical issue properly addressed by the Virginia State Bar.

## Background

You express concern regarding the legal rights, in relation to one another, of developers, homeowners' associations, and individual homeowners upon transfer of common areas from the developer to the homeowners' association. You describe a scenario in which roads and dams have been neglected during the period of developer control. During this time, per the declaration, the attorney for the developer also serves as the lawyer for the subdivision's homeowners' association.

### Applicable Law and Discussion

The Virginia Property Owners' Association Act<sup>1</sup> (the "Act") governs many aspects of subdivision development control and governance. It includes provisions relating to the transfer of control from the developer,<sup>2</sup> disclosure requirements,<sup>3</sup> and the conduct of meetings of associations' boards of directors.<sup>4</sup> It also provides that "[e]very lot owner . . . shall comply with all lawful provisions of [the Act] and all provisions of the declaration."<sup>5</sup>

Notably, the Act includes but few provisions relating to the contents of the declaration or other documents governing the rights and duties of the parties subject to their terms.<sup>6</sup> Most important to your inquiry, the Act does not expressly provide or otherwise allow for a developer to maintain control of a homeowners' association for a specific period of time or until a specific number of lots or units are sold to private persons (the "declarant control period").<sup>7</sup> There is, therefore, no specific provision to evaluate for constitutionality pursuant to your request. Notwithstanding the absence of such specific provision, it is my opinion that the retention of control of a homeowners' association by the developer for a declarant control period can be done lawfully pursuant to the terms of the declaration.

The relationship between a homeowners' association and the homeowners is contractual in nature.<sup>8</sup> In general, the contracting parties are allowed broad latitude in the terms of their agreement.<sup>9</sup> "As with other contracts, effect must be given to the intention of the parties."<sup>10</sup> Accordingly, a provision establishing a declarant control period is likely valid<sup>11</sup> if it does not violate applicable

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<sup>1</sup> VA. CODE ANN. §§ 55-508 through 55-516.2 (2012).

<sup>2</sup> See, e.g., §§ 55-509.1 (payment of taxes); 55-509.2 (provision of documents).

<sup>3</sup> See §§ 55-509.4 through 55-509.10.

<sup>4</sup> See § 55-510.1.

<sup>5</sup> Section 55-515.

<sup>6</sup> See, e.g., §§ 55-509, 55-509.2, 55-512(A), 55-513, 55-515.2(F), and 55-516.1.

<sup>7</sup> See §§ 55-508 through 55-516.2. It is worth noting that while the Act does not expressly authorize declarant control, it recognizes such control by references to such arrangements. See, e.g., §§ 55-509.1:1 (limits on certain contracts and leases formed during declarant control period); 55-509.2 (provision of documents to association upon termination of declarant control period); 55-510(B)(2) (association's employee salary information not available for examination during declarant control period). Compare the Act with § 55-79.74 of the Condominium Act, which expressly authorizes declarant control of a condominium owners' association. It is noteworthy, however, that unlike homeowners' associations governed by the Act, condominiums are entirely creations of statute. See *Unit Owners Assoc. v. Gillman*, 223 Va. 752, 762, 292 S.E.2d 378, 383 (1982); 1989 Op. Va. Att'y Gen. 288, 292.

<sup>8</sup> 2011 Op. Va. Att'y Gen. 163, 163 (citing *Sully Station II Cmty. Ass'n v. Dye*, 259 Va. 282, 284, 525 S.E.2d 555, 556 (2000); *Farran v. Olde Belhaven Towne Owners Ass'n*, 80 Va. Cir. 508, 511 (Fairfax Cnty. Cir. Ct. 2010)).

<sup>9</sup> See 2011 Op. Va. Att'y Gen. 163, 163.

<sup>10</sup> See *Sully Station II Cmty. Ass'n Inc.*, 259 Va. at 284, 525 S.E.2d at 556 (2000); *Lake Holiday Country Club, Inc. v. Teets*, 56 Va. Cir. 113, 117 (Frederick Cnty. Cir. Ct. 2001).

<sup>11</sup> 2002 Op. Va. Att'y Gen. 266, 269 (noting that a developer owning a majority of the lots may retain control of association).

provisions of law.<sup>12</sup> The question of whether any particular such provision is valid is a fact-specific determination beyond the scope of this Opinion.<sup>13</sup>

Any recourse a homeowner may have against a developer regarding defective community property, in essence, is a private cause of action.<sup>14</sup> If the developer's actions, by and through control of the association, contravene the declaration or the Act, such owner may bring a lawsuit for appropriate redress.<sup>15</sup> Section 55-515(A) of the Act provides that any lack of compliance with the Act or the declaration

[S]hall be grounds for an action or suit to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the association, or by its board of directors or any managing agent on behalf of such association, *or in any proper case, by one or more aggrieved lot owners on their own behalf or as a class action.*<sup>[16]</sup>

The above-quoted language of §55-515(A) would appear to anticipate a wide array of legal claims. Indeed, courts interpreting identical language<sup>17</sup> under the Condominium Act<sup>18</sup> have applied it broadly.

The Condominium Act language “contemplates that a violation of a right held in common by all unit owners shall be maintained by a unit owners’ association, unless the association fails or refuses to assert the common right.”<sup>19</sup> Individual unit owners have standing to bring a claim on their own behalf if the association fails to assert a common claim.<sup>20</sup> Nonetheless, individual owners may maintain only “claims arising from lack of compliance with the [Condominium] Act or relevant condominium instruments. [S]tanding to institute claims or actions concerning common elements . . . is restricted to condominium unit owners’ associations.”<sup>21</sup> Applying these holdings to the identical language in § 55-

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<sup>12</sup> For example, the Act sets certain limits on actions the developer may cause the association to take during the declarant control period. *See* § 55-509.1:1. The Act also specifies certain actions the developer must take at the end of such period. *See* § 55-509.2.

<sup>13</sup> *See* 2012 Op. Va. Att’y Gen. No. 11-053, *available at* <http://www.ag.virginia.gov/Opinions%20and%20Legal%20Resources/Opinions/2012opns/Sept12opndx.html>. *See also, e.g.*, 1991 Op. Va. Att’y Gen. 122, 124, and opinions cited therein for matters requiring factual determinations.

<sup>14</sup> 2006 Op. Va. Att’y Gen. 191, 192.

<sup>15</sup> *Farran v. Olde Belhaven Towne Owners Ass’n*, 83 Va. Cir. 286, 294 (2011).

<sup>16</sup> Section 55-515(A) (emphasis added).

<sup>17</sup> *See, e.g., Farran*, 83 Va. Cir. at 294.

<sup>18</sup> Sections 55-79.39 through 55-79.103 (2012).

<sup>19</sup> *Frantz v. CBI Fairmac Corp.*, 229 Va. 444, 451, 331 S.E.2d 390, 395 (1985).

<sup>20</sup> *Asterita v. Ghent Dev. Partners*, 2009 Va. Cir. LEXIS 23, 40-41 (Norfolk Cir. Ct. 2009).

<sup>21</sup> *Kuznicki v. Mason*, 273 Va. 166, 176, 639 S.E.2d 308, 312 (2007); *313 Freemason v. Freemason Assocs., Inc.*, 59 Va. Cir. 407, 417 (Norfolk Cir. Ct. 2002). *But see* *Millisor v. Anchor Point Ventures, L.L.C.*, 77 Va. Cir. 246, 252 (Hopewell Cir. Ct. 2008)(wherein the court concluded that the plaintiff had standing to assert a claim respecting common elements because the Condominium Act authorized such actions during the declarant control period).

515(A) of the Act, it appears individual owners in a homeowners' association may pursue claims arising from lack of compliance with the Act or the declaration.<sup>22</sup>

Additionally, the Act requires every association to conduct a capital reserve study at least once every five years and to budget adequate cash reserves for the repair or replacement of capital components.<sup>23</sup> The provisions of the Act establishing these requirements do not distinguish between the declarant control period and other time periods.<sup>24</sup> During the declarant control period, therefore, the association must meet the Act's capital study and reserve requirements. Failure of an association to satisfy these requirements may give individual homeowners the right to pursue an action under § 55-515(A).

Another course of redress potentially available to individual homeowners is a derivative suit to enforce any cause of action the association, as a corporate entity, may have against the developer. "A derivative claim enforces a corporate cause of action where the corporation has not sued to protect its own right."<sup>25</sup> A party may "sue in a derivative capacity only upon a showing either that the managing agents are themselves the authors of the wrong, or that their refusal to bring suit in the name of the corporation is an act of bad-faith, or an abuse of the discretionary power vested in them."<sup>26</sup> Thus, if the association is incorporated and homeowners can make these showings, they may have standing to assert a derivative claim against the developer on behalf of the association.

In regard to your second question, Virginia's conflict of interests law, the State and Local Government Conflict of Interests Act,<sup>27</sup> provides minimum rules of ethical conduct for state and local government officers and employees. In general, the law relates to certain personal interests of such officers and details certain types of conduct that are improper.<sup>28</sup> This law applies only to state and local government officers and employees;<sup>29</sup> it does not govern private business actors.

Thus, there is no law for this Office to construe related to any potential conflict of interests a lawyer may have when serving as counsel to both to a developer and a homeowners' association. Rather, such questions concern ethical rules promulgated by the Virginia State Bar. I am therefore not in a position to render an opinion in response to your second inquiry.<sup>30</sup>

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<sup>22</sup> See *Farran*, 83 Va. Cir. at 294. I note declarations often place an obligation on the association to properly maintain common property. Failure to comply with such provisions of a declaration may permit individual homeowners to pursue an action under § 55-515(A) to compel compliance.

<sup>23</sup> Section 55-514.1.

<sup>24</sup> See *id.*

<sup>25</sup> *Efessiou v. Efessiou*, 41 Va. Cir. 142, 149 (Fairfax Cnty. Cir. Ct. 1996). See also *Richelieu v. Kirby*, 48 Va. Cir. 260, 261 (Fairfax Cir. Ct. 1999) (derivative actions may be brought on behalf of both stock and non-stock corporations).

<sup>26</sup> *Abella v. Universal Leaf Tobacco Co.*, 495 F. Supp. 713, 717 (E.D. Va. 1980) (citations omitted).

<sup>27</sup> VA. CODE ANN. §§ 2.2-3100 through 2.2-3131 (2011).

<sup>28</sup> See § 2.2-3103.

<sup>29</sup> "[F]or the purpose of establishing a single body of law applicable to all state and local government officers and employees on the subject of conflict of interests, the General Assembly enacts this State and Local Government Conflict of Interests Act so that the standards of conduct for such officers and employees may be uniform throughout the Commonwealth." Section 2.2-3100.

<sup>30</sup> Section 2.2-505 articulates the authority of an Attorney General to render official legal opinions. Generally, it is recognized that such opinions must be confined to matters of law; thus the Attorney General historically has limited responses to requests for opinions to matters that require an interpretation of federal or state law or

**Conclusion**

Accordingly, it is my opinion that because the Virginia Property Owners Act does not expressly provide or otherwise allow for a developer to maintain control of a homeowners' association for a specific period of time or until a specific number of lots or units are sold, there is no Virginia Code provision to evaluate for constitutionality. It is further my opinion that whether an impermissible conflict of interests exists when a lawyer is employed by the developer to serve simultaneously as the attorney for the developer and the association is not a matter of law upon which this Office can opine, but rather an ethical issue better addressed by the Virginia State Bar.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Ken C. II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II  
Attorney General