



COMMONWEALTH of VIRGINIA

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The Honorable Joseph R. Yost
Member, Virginia House of Delegates
General Assembly Building
Post Office Box 406
Richmond, Virginia 23218

Dear Delegate Yost:

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

Issue Presented

You inquire whether, in light of recent amendments to § 67-701 of the *Code of Virginia*, a property owners' association ("POA") is precluded from enforcing rules and regulations that prohibit homeowners from installing solar panels on their property, when such prohibitions are not contained in the recorded declaration of the POA.

Applicable Law and Discussion

The relationship between a POA and a homeowner is contractual in nature.¹ Generally, POAs possess broad latitude to contract with homeowners to devise and enforce rules and regulations governing the use of private property.² Nevertheless, the power of a POA to restrict the use of private property is not absolute and may be restrained by applicable law.³ Section 67-701, part of the Virginia Energy Plan,⁴ regulates the extent to which a POA may restrict the installation of solar panels on private property. As you note, this statute recently was amended by the General Assembly. Effective July 1, 2014, the statute provides, in relevant part, as follows:

¹ *White v. Boundary Ass'n, Inc.*, 271 Va. 50, 55 (2006); *Sully Station II Cmty. Ass'n v. Dye*, 259 Va. 282, 284 (2000); 2011 Op. Va. Att'y Gen. 163, 163; *cf.* 2000 Op. Va. Att'y Gen. 177, 179-180 (stating that the rules and regulations of a condominium unit owners' association constitute a contract between the owners and the association).

² *See* VA. CODE ANN. § 55-513 (Supp. 2014); 2011 Op. Va. Att'y Gen. 163, 163.

³ *See* 2014 Op. Va. Att'y Gen. No. 13-106; 2011 Op. Va. Att'y Gen. 163, 163. The primary statutory scheme in place for regulating the operation and management of POAs is the Virginia Property Owners' Association Act. *See* VA. CODE ANN. §§ 55-508 through 55-516.2 (2012 & Supp. 2014).

⁴ VA. CODE ANN. §§ 67-100 through 67-1406 (2012 & Supp. 2014).

No community association shall prohibit an owner from installing a solar energy collection device on that owner's property unless the recorded declaration for that community association establishes such a prohibition.

However a community association may establish reasonable restrictions concerning the size, place, and manner of placement of such solar energy collection devices on property designated and intended for individual ownership and use.^[5]

What is noteworthy about the current language of this statute is that it permits only one procedure by which solar panels may be prohibited by community associations: by inclusion in the recorded declaration. The maxim '*expressio unius est exclusio alterius*' "provides that mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute."⁶ Applying this maxim, the current language of the statute must be viewed as meaning that any attempt by a POA to prohibit solar panels on private property by means other than a recorded declaration - such as rules, regulations, bylaws, policies, or other unrecorded instruments - is unenforceable.⁷

When read as a whole, the statute also means that, with the sole exception of recorded declarations, existing prohibitions against solar panels on private property are no longer enforceable. Had the General Assembly intended to create an exception for existing community associations' prohibitions against solar panels, it could easily have done so through a "grandfather clause," such as is contained in the predecessor version of this very statute.⁸ However, the General Assembly did not do so, thereby signaling its intent that the prohibition apply to existing unrecorded prohibitions. When the General Assembly clearly intends an enactment to have such retrospective effect, its intent will govern.⁹ Thus, I must conclude that § 67-701 was intended to preclude a POA from enforcing any existing prohibition on solar panels on private property, regardless of its date of adoption, unless the prohibition is contained in the POA's recorded declaration.

The only remaining question is whether the retrospective application of this statute is constitutionally barred. Statutes with retrospective effect implicate Article I, § 11 of the Constitution of Virginia, which provides that the General Assembly shall not enact laws "impairing the obligations of contract." The constitutional prohibition against impairing the obligations of contracts (the "Contract Clause") is not absolute, however. In certain circumstances, the state is permitted to use its regulatory power in a manner that affects existing contracts. As the Virginia Supreme Court has observed, the language of the Contract Clause "is [facially] unambiguous and appears absolute,"¹⁰ but it is not "the Draconian provision that its words might seem to imply."¹¹ "[T]he Commonwealth is permitted to

⁵ See 2014 Va. Acts ch. 525.

⁶ *Geico v. Hall*, 260 Va. 349, 355 (2000) (quoting *Turner v. Wexler*, 244 Va. 124, 127 (1992)).

⁷ A POA may, however, prohibit the installation of solar panels in *common areas*, whether by recorded or unrecorded provision. See § 67-701 (Supp. 2014). The focus of your request, however, is the installation of solar panels by homeowners on private property.

⁸ In relevant part, the predecessor version of § 67-701 stated, "This section shall not apply with respect to any provision of a restrictive covenant that restricts the installation or use of any solar collection device *if such provision became effective prior to July 1, 2008.*" (Emphasis added.) See 2013 Va. Acts ch. 357.

⁹ See *McIntosh v. Commonwealth*, 213 Va. 330, 331-32 (1972); *Whitlock v. Hawkins*, 105 Va. 242, 249 (1906); *Rainey v. City of Norfolk*, 14 Va. App. 968, 972 (1992).

¹⁰ *The Working Waterman's Ass'n of Va., Inc. v. Seafood Harvesters, Inc.*, 227 Va. 101, 109 (1984).

¹¹ *Id.* (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240 (1978)).

“[exercise the power] that is vested in it for the common good, even though contracts previously formed may be affected thereby.”¹² This power commonly is known as the police power.¹³

Courts examine three factors to determine whether a statute affecting contracts is lawful as an exercise of the state’s police power. First, as a preliminary matter, it must be shown that the statute does in fact impair existing contracts. Second, it must be determined whether the impairment is substantial. Third, if the impairment is substantial, it must next be determined whether the impairment is nevertheless “a legitimate exercise of the state’s sovereign powers.”¹⁴

Under the first part of this test, § 67-701 does in fact impair the operation of existing contracts by precluding the enforcement of unrecorded POA prohibitions that became effective prior to July 1, 2014.¹⁵ However, under the second part of the test, the impairment is not absolute: POAs may still prohibit solar panels, so long as they do so by recorded declarations. In addition, pursuant to the statute, community associations still retain unrestricted authority to impose reasonable restrictions on the size, location, and manner of placement of solar panels on private property. Given this overall context, I conclude that the impairment of existing contractual relationships is not substantial.¹⁶

In addition, it is particularly noteworthy that the statute in question is contained in Title 67, which is entitled the “Virginia Energy Plan.”¹⁷ The placement of this statute within the *Code of Virginia* evinces a legislative intent that solar panels are to be viewed as part of Virginia’s overall energy policy. Indeed, the uncodified enactment clause of the amended statute provides that the recent revisions were intended as “an exercise of the police power of the Commonwealth that is necessary for the general good of the public,” representing “a necessary and appropriate response to the valid public need to increase the use of solar power as a means of reducing reliance on energy sources that contribute to greenhouse gas emissions.”¹⁸ Accordingly, in amending § 67-701, the General Assembly expressly has exercised the power “that is vested in it for the common good, even though contracts previously formed may be affected thereby.”¹⁹ The exercise of police powers for environmental protection purposes generally has

¹² *Id.* at 109-110.

¹³ *Id.* at 110.

¹⁴ *Waste Mgmt. Holdings, Inc. v. Gilmore*, 64 F. Supp. 2d 537, 545 (E.D. Va. 1999); *cf. Working Waterman’s Ass’n*, 227 Va. 101.

¹⁵ *See Virginia & W. Va. Coal Co. v. Charles*, 251 F. 83, 128-29 (W.D. Va. 1917) (stating that, in order to impair the obligation of contract, a statute must “affect the validity, construction, discharge, or enforcement of the contract”), *aff’d*, 254 F. 379 (4th Cir. 1918).

¹⁶ *See generally City of Charleston v. Public Service Comm’n*, 57 F.3d 385 (4th Cir. 1995) (setting forth the various factors courts use in determining whether a contract has been substantially impaired, including whether the contract was “abolished or merely modified”).

¹⁷ *See supra* note 4 and accompanying text.

¹⁸ 2014 Va. Acts ch. 525, ¶ 2. The addition of this clause in the Acts of Assembly further supports the conclusion that the General Assembly intended its amendments to § 67-701 to have retroactive effect. By appealing to the police power, the legislature acknowledged that the effect of its amendments would be to impair existing contracts between POAs and homeowners. “We ‘assume that the legislature chose, with care, the words it used when it enacted the relevant statute.’” *Alger v. Commonwealth*, 267 Va. 255, 261 (2004) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295 (1990)).

¹⁹ *Working Waterman’s Ass’n*, 227 Va. at 109-110.

been held to be a substantial and legitimate purpose.²⁰ I therefore conclude that, under the third part of the test, the restriction on enforcing certain existing bans on solar panels should be considered a legitimate exercise of Virginia's sovereign powers.

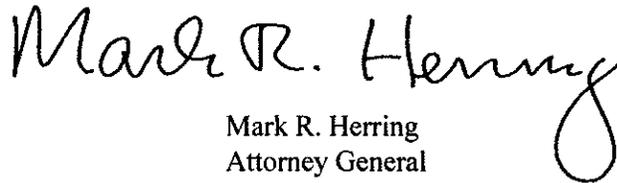
For the foregoing reasons, and bearing in mind the overriding principle that all statutes are presumed to be constitutional,²¹ I conclude that § 67-701 does not violate the constitutional prohibition against legislation impairing the obligations of contract, and it is thus enforceable as duly enacted by the General Assembly.

Conclusion

Accordingly, it is my opinion that, under § 67-701 as amended, effective July 1, 2014, a POA may prohibit solar panels on private property only through a recorded declaration but not through any other means. Other than as may be contained in recorded declarations, such prohibitions are unenforceable, regardless of when or how they were imposed. It is further my opinion that a POA retains the authority under § 67-701 to establish reasonable restrictions concerning the size, location, and manner of placement of solar panels on private property, either through a recorded declaration or by any other legal means.

With kindest regards, I am

Very truly yours,


Mark R. Herring
Attorney General

²⁰ See, e.g., *United States Trust Co. v. New Jersey*, 431 U.S. 1, 28 (1977) (“Mass transportation, energy conservation, and environmental protection are goals that are important and of legitimate public concern.”).

²¹ See *Marshall v. N. Va. Transportation Authority*, 275 Va. 419, 427 (2008).