



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

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

February 19, 2016

The Honorable Bryce E. Reeves
Member, Senate of Virginia
Post Office Box 396
Richmond, Virginia 23218

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*.

Issue Presented

You inquire whether it is legal under the Virginia Property Owners' Association Act (the "Act")¹ for a property owners' association (a "POA") to deactivate a member's barcode decal if he or she is more than sixty days late paying an assessment. Deactivation of the barcode decal will restrict but not completely deny entry into the neighborhood.

Background

You relate that the board of directors of a POA in your district adopted a resolution providing that after giving a member an opportunity for a hearing, the board of directors has the right to suspend a member's and his or her tenants' or family's use of a barcode decal, in the event of nonpayment of assessments, fees, or fines owed to the POA where payment is more than sixty days past due. The barcode decal is used to facilitate the manned main gate at the front of the subdivision and is required to use the unmanned gate to enter at the back of the subdivision. Without the barcode decal, an owner can still access his or her home by using the manned main gate, but for those owners whose homes are closer to the unmanned back gate, this access may be less convenient. The location of the back gate is approximately five miles from the main gate when driving around the subdivision, and it is approximately three miles from the main gate when driving through the subdivision. The streets within the subdivision are common area private roads.

Applicable Law and Discussion

The Act provides that the board of directors of a POA has "the power to establish, adopt, and enforce rules and regulations with respect to use of the common areas," and such enforcement may be "by

¹ Virginia Property Owners' Association Act, VA. CODE ANN. §§ 55-508 through 55-516.2 (2012 & Supp. 2015).

any method normally available to the owner of private property in Virginia.”² The board of directors also has the power, to the extent the declaration or rules and regulations of the POA expressly so provide, to

suspend a member’s right to use facilities and services . . . provided directly through the association for nonpayment of assessments which are more than 60 days past due, to the extent that access to the lot through the common areas is not precluded and provided that such suspension shall not endanger the health, safety, or property of any owner, tenant, or occupant^[3]

For a member who fails to timely pay an assessment, this statute bars a POA from suspending the right to use facilities and services if the suspension either denies access to the lot or if the suspension endangers the health, safety, or property of any owner, tenant, or occupant.

If the member fails to pay a *special* assessment, a second statute, § 55-514(C),⁴ may impose an additional restriction on a POA’s ability to suspend the right to use facilities and services:

The failure of a member to pay the special assessment . . . will provide the association with the right to deny the member access to any or all of the common areas. Notwithstanding the immediately preceding sentence, *direct* access to the member’s lot over any road within the development which is a common area shall not be denied the member.^[5]

For failure to pay a regular assessment, the question is whether denial of access to the back gate “endanger[s] . . . health, safety, or property.” There could conceivably be situations where an owner needs to return to his or her property for an emergency affecting health, safety, or property. If the property is close to the back gate but distant from the main gate, and if the owner approaches from that direction, then denial of access through the back gate could possibly endanger health, safety, or property in violation of the Act.

For failure to pay a special assessment, the additional question under § 55-514 is whether denial of access to the back gate denies the owner “direct” access to his or her lot. For certain lots that are a significant distance from the main gate but close to the back gate, and depending on the direction from which the owner arrives, “direct” access might be only through the back gate, while for other lots, “direct” access may be through the main gate. For certain lots, deactivating the barcode and thereby

² VA. CODE ANN. § 55-513(A) (Supp. 2015). Under the Act, a “common area” is “property within a development which is owned, leased or required by the declaration to be maintained or operated by a property owners’ association for the use of its members and designated as common area in the declaration.” Section 55-509 (Supp. 2015).

³ Section 55-513(B). Before any action can be taken, the member must have the opportunity to correct the violation, and, if the violation remains uncured, the member must be given an opportunity “to be heard and to be represented by counsel before the board of directors or other tribunal specified in the [POA’s] documents.” Section 55-513(C).

⁴ The unpaid special assessments statute does not apply if authority to impose a special assessment derives from the recorded governing documents. If the recorded governing documents are the source of authority for special assessments, then the controlling statute remains § 55-513. It grants and limits powers under recorded governing documents, and it imposes a slightly different limit for remedies for unpaid assessments, namely, that any remedy may not “endanger . . . health, safety, or property.”

⁵ Section 55-514(C) (2012) (emphasis added) (authorizing a POA to levy special assessments and providing penalties for nonpayment).

denying use of the back gate could thus deny the owner "direct" access to his or her property in violation of the Act.

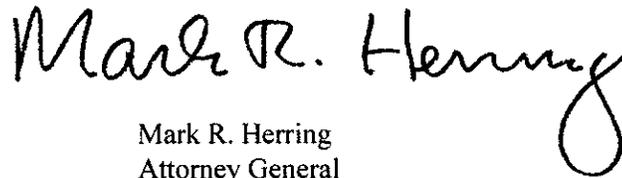
These are questions of fact. The Office of the Attorney General has consistently declined to answer questions resolving factual matters.⁶ Accordingly, I can express no opinion about the overall legality of the resolution in question, other than to say that it may not be applied in such a way as to violate the Act.

Conclusion

For the reasons stated, while I express no opinion about the overall legality of the resolution in question, it is my opinion that it may not legally be applied against any owner if deactivation of the owner's bar code for nonpayment of a regular assessment would endanger health, safety, or property; or if deactivation for nonpayment of a special assessment under § 55-514 would deny the owner "direct" access to his or her property through the roads of the development which are common areas.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Mark R. Herring". The signature is written in a cursive style with a large, looping "H" and a long, sweeping tail on the "g".

Mark R. Herring
Attorney General

⁶ 2013 Op. Va. Att'y Gen. 118, 120.