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Board of Directors
Village East Property
Owners' Association
c/o Gavin Hager

Re: Virginia Property Owners' Association Act
Applicability to Village East POA

Dear Members of the Board:

This correspondence addresses the **non-applicability** of the Virginia Property Owners' Association Act to Village East Property Owners' Association.

First, the presumption that the POAA applies to every non-condominium community association is not unique. In fact, in 1989, the original Act was much shorter than it is now, and it seemed to apply to practically all such associations except campgrounds. Until that time (July 1, 1989) the law governing (lower case) "property owners' associations" was limited to (1) the Nonstock Corporation Act, if an association was incorporated, and (2) the internal governing documents of each association (declaration of covenants and bylaws). Also, some (but not all) were covered by the Subdivided Land Sales Act. There was no overriding state law that applied to all of them.

Second, §55.1-1801 of the POAA states that the statute applies to "developments subject to a **declaration** initially recorded after January 1, 1959 ..."

Third, in the years that passed subsequent to 1989, the General Assembly adopted many amendments to the POAA. It is, therefore, very likely that many communities around the Commonwealth *were* covered by the POAA at its inception, but now are not. Two provisions of the Act are key.

Virginia Code §55.1-1800 is the definitional section of the Act. Two terms are relevant to this discussion.

> "Declaration" - key to the statute's application; see §55.1-1801, above - is defined as an instrument recorded in the county land records that "either (i) imposes on the association maintenance or operational responsibilities for the common area or (ii) creates the authority in the association to impose on lots ... any mandatory payment of money in connection with the provision of maintenance or services for the benefit of some or all of the lots."

For many years it was, therefore, presumed that if an association had one of these two rights in its declaration of covenants it qualified under the POAA. But approximately twenty years ago a series of opinions (which came to be known as the *Dogwood Valley* cases, since two of them involved that association) were handed down by the Virginia Supreme Court.[1]

The Court acknowledged the definition of "declaration," but held that the two elements were both required to be present in an association's recorded covenants, not just one. It pointed out that in the same section, §55.1-1800, there lay the definition of "property owners' association." This term is defined as one that

> means an incorporated or unincorporated entity upon which responsibilities are imposed and to which authority is granted in the declaration.

The Court reasoned that the only "responsibilities" that could be imposed relate to the maintenance and upkeep of common areas. Likewise, the only "authority" that this could mean is that of imposing mandatory assessments. It went on to state that the duty to maintain common areas cannot be inferred but must be stated plainly in the way of a mandate.

Article 10 of the Village East Declarations[2] contains the requisite authority to impose and collect annual assessments. That same article provides that such assessments are to be

> in connection with their efforts to maintain an attractive community appearance and the privacy and general safety of lot owners, including such services as garbage

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[1]*See Dogwood Valley Citizens Association, Inc., et al. v. Winkelman*, 267 Va. 7 (2004) and *Dogwood Valley Citizens Association, Inc. v. Shifflett*, 275 Va. 197 (2008).

[2]There are two, each virtually identical to the other, but referring to the different sections of the community.

> pick-up arrangements, and in order to operate and maintain such common areas as Declarant may designate for the general use of lot owners without separate charge thereto, including such common areas as picnic areas, community docks, clubhouse, swimming pool, tennis courts and similar facilities or areas, ...

There being no **affirmative** mandate to maintain the common areas, the POAA, therefore, does not apply to Village East POA. That said, the Association may take advantage of some of the guidance provided by the POAA, such as the provision of resale disclosure packets (§§55.1-1808 through -1814) or the policy for electric vehicle charging stations (§55.1-1823.1). The Association may not, however, take advantage of statutory *rights* that are found only in the POAA (as opposed to its own internal governing documents).

In some respects, not being bound by the POAA is advantageous to the Association as it may create its own policies, drawing from the POAA if necessary as well as other sources, and including them in either the Declarations (which requires the approval of the members) or the Bylaws (which the Board of Directors may adopt without member approval).

I trust that the foregoing is of assistance. This subject has perplexed many boards of directors, so if further questions arise, please contact me at your earliest opportunity and we can address individual issues in due course.

Sincerely,

Stephen H. Moriarty