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Mr. Tom Lilly
Merifield Acres Land Owner's Association
174 Wedgewood Lane
Clarksville, Va. 23927

Dear Mr. Lilly:

In considering your question, regarding the Virginia Property Owner's Association Act and its application to the properties in Merifield, I have reviewed the information provided by you, which includes five (5) different sets of restrictive covenants to be described below as well as the by-laws for the Merifield Acres Land Owner's Association as revised on December 2, 1990.

These materials indicate that Merifield Acres is a collective group of separately platted properties, which are subject to distinct covenants. It appears that each section is governed by restrictive covenants and agreements affecting only that particular section, however, as a generalization, the properties can be grouped into five (5) categories. The first category will be referred to as the "Fielding Lots" and is made up of Roanoke Point Units 1, 3, 4 and 5. The second grouping will be referred to as "Merifield Incorporated" and consists of Roanoke Point Sections 7-A, B, C, D, 8-A, B, C, D, E, 9-A, B, C, 10 and 11. The third group is designated as "Unit 1" and consist of Lots only in Unit 1 of Merifield Subdivision. The fourth group is the "Holly Park Subdivision" and the fifth Roanoke Point, Section 2.

FIELDING LOTS:

The "Fielding Lots" are governed by restrictions and covenants committed to record by Fielding Development Company Incorporated, dated May 7, 1962 and recorded in the Clerk's Office in Deed Book 178, Page 241. Although those covenants

spell out no authority for assessment for maintenance fees, there is a provision, whereby Fielding Development Company Incorporated may "...change, alter, amend, abolish or modify..." the restrictive covenants and agreements. The authority that is vested in Fielding Development Company Incorporated under the covenants was appropriately and formally delegated and assigned to Merifield Acres Land Owner's Association by an agreement, dated March 24, 1983 and recorded in Deed Book 307, Page 721. This assignment therefore gives the Association the authority to amend under its by-laws and Articles of Incorporation the covenants affecting the use of Fielding Lots, but does not expressly include the authority to create assessments.

MERIFIELD INCORPORATED LOTS:

The "Merifield Incorporated Lots" are bound by the Declaration of Restrictive Covenants, recorded with each individual section's declaration. The language in each declaration appears to be identical and sets forth a provision for assessments payable to Merifield Acres Land Owner's Association for maintenance for common properties, etc., and further provides that "the Association shall have the right to increase the foregoing assessments by not more than ten percent (10%) per year". This provision would appear to give the Association the right within the limits set forth therein to modify the assessments on the "Merifield Incorporated Lots", however, the general and overall authority to amend the restrictive covenants is contained in language in the second full paragraph of these covenants, which states "these restrictive covenants may be amended, altered, released or terminated at any time during the initial forty (40) year period or the succeeding ten (10) year periods thereafter by appropriate instruments in writing executed and acknowledged by the owners of a majority of lots affected hereby".

UNIT LOTS:

The "Unit 1" Lots are governed by a set of restrictive covenants, recorded in Deed Book 269, Page 877, containing certain similar language to the general amendment authority in the Merifield Incorporated Covenants. However, the annual assessment payable to the Association is set at \$50.00. There is no provision contained in the "Unit 1" Covenants, allowing a modification of the assessments, other than the general modification language contained in the second paragraph, which is identical to that contained in the covenants affecting the "Merifield Incorporated Lots", thereby allowing amendment by a majority of lot owners in that Section.

An amendment to the "Unit 1" Covenants changed the annual assessment on unimproved lots from \$50.00 to \$30.00. This amendment was signed by a number of lot owners in Section 8-A constituting a majority. One lot owner in this Section when sued for the assessment by the Association, defended by producing this amendment and his position was upheld by the General District Court of Mecklenburg County.

HOLLY PARK:

The final set of restrictive covenants reviewed control the "Holly Park Subdivision" and are committed to record in the Clerk's Office in Deed Book 183, Page 492. This particular set of covenants contains no express assessment authority, however, in Paragraph 14 per amendment, dated October 24, 1964, as recorded in Deed Book 186, Page 418, the covenants may be "abolished or altered in whole or in part and as to their application the same may be changed, altered, amended, abolished or modified upon written approval of the owners at the time of seventy five percent (75%) of the lots contained within the "Holly Park Subdivision".

ROANOKE POINT SECTION 2

Roanoke Point Section 2 has no covenants. Where there are no covenants there is no power to amend, abolish or create covenants. Under case law restrictions upon land that are not in existence upon its purchase, or subsequently expressly accepted by the owner may not be imposed.

MALA BY-LAWS:

Also reviewed were the by-laws of the Merifield Acres Land Owner's Association. Paragraph 1 of the such by-laws states that "the membership of the Association shall be composed of the owners of the lots of land, located in the subdivision known as Roanoke Point in the Clarksville Magisterial District, Mecklenburg County, Virginia. Under Article 3, Paragraph D, titled "Additional Membership", property owners of land located in Holly Point, Holly Park and Units 1, 2 3, 4 and 5 of Roanoke Point Subdivision known as Merifield Acres may become members of the Association. This paragraph also provides initial assessments of \$50.00 per year, which may then range up to \$160.00. Also under Article 3 is a second paragraph labeled D, entitled "Additional Membership", which reads, "property owners of land located in Holly Point, Holly Park, Cedar Lane and Units 1, 2, 3, 4, and 5 of Roanoke Point known as Merifield Acres will be members of the Association upon payment of a privilege fee each year for the use of common facilities, security, and for road maintenance".

Paragraph C of Article 3, provides for a Seventy Five Dollar (\$75.00) initial assessment, increasing to a \$125.00 for any lot on which a dwelling has been constructed, as well as a provision which allows increases, as voted by the Board, with no maximum limitation.

PROPERTY OWNER'S ASSOCIATION ACT:

The property Owner's Association Act is found in Chapter 26 of the Virginia Code, Sections 55-507 through 55-516. Such chapter applies to developments subject to a declaration initially recorded after January 1, 1959 and Property Owner's Association incorporated or otherwise organized after such date. Under the definition of "Declaration" in 55-509, a Declaration is 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: (1) imposes on the Association, maintenance or operational responsibilities for the common area as a regular annual assessment or (2) creates the authority in the Association to impose on lots or on the owners or occupants of such lots or any other entity any mandatory payment of money as a regular annual assessment in connection with the provision of maintenance and/or services for the benefit of some or all of the lots, the owners or occupants of the lots or the common area.

"Declaration" includes any amendment or supplement to the instruments described in this definition. Provisions in the definition of "Declaration" under 55-509 exclude from that definition any document which fails to impose assessments in excess of \$150.00 per year or fails to give authority to those Association to impose such assessments. However, under 55-508 in the second sentence, that exclusion will not apply to any declaration recorded prior to July 1, 1991. This dollar amount exclusion from the definition "Declaration" will have no effect on the aforementioned groups of lots.

APPLICATION OF SECTION 55-513 AS TO ASSESSMENTS:

Under Section 55-513, the Board of Directors of the Association has the power to establish, adopt and enforce rules and regulations with the respect to the use of the common areas and with respect to such other areas of responsibility assigned to the Association by the Declaration, except where expressly reserved by the Declaration to the members. The majority of votes cast in person or by proxy at a meeting convened in accordance with the provisions of the Association's by-laws and called for that purpose shall appeal or amend any rule or regulation adopted by the Board of Directors.

Section 55-513 is therefore a regulation as to use. The language in that section deals with the use of common areas and rules and regulations therefore, it does not encompass assessments or assessment authority. When Section 55-513 is viewed in light of its language and the fact that 55-514 deals with assessment authority, Section 55-513 cannot reasonably be interpreted to establish the authority in the Property Owner's Association to levy annual assessments.

APPLICATION OF SECTION 55-514 AS TO SPECIAL ASSESSMENTS:

Section 55-514 entitled "Authority to Levy Special Assessments" grants the Board of Directors in the Association the power to levy a special assessment against its members if the purpose in so doing is found by the Board to be in the best interest of the Association and the proceeds of the assessment are to be used primarily for the maintenance and up-keep, including capital expenditures, of the common areas. Section 55-514 may be used despite the reservation in the members of the power to establish, adopt and enforce rules and regulations. However, a majority of the votes cast in person or by proxy at a meeting of the membership convened in accordance with the provisions of the Association's By-laws within sixty days of promulgation of the notice of the assessment may rescind or reduce the special assessment.

FIELDING LOTS - MALA MAY NOT SET SPECIAL ASSESSMENTS:

With the respect to the "Fielding Lots" no language in the covenants expressly reserves rights in the owners to establish, adopt, or enforce rules and regulations. The Board of Directors of MALA does have the power to establish, adopt and enforce rules and regulations as to use.

However, absent the express authority to create assessments, it seems the appropriate conclusion is that no such authority exist. This writer is not unfamiliar with his previous letter dated March 4, 1992, addressed to Mr. Donald C. Ellington in which it was opined that the authority in the Fielding Lot Covenants "...certainly contemplate the ability to create assessments...". Based on extensive case law research there appears to be no decision in which this question is addressed. This leads to the conclusion that assessment authority not expressly stated would not exist by implication. After the assignment to Merifield Acres Property Owner's Association of the right held by Fielding Development Company Incorporated, Merifield Acres Property Owner's Association imposed assessments on the "Fielding Lots". The assessments are in the amount of \$50.00 per year with the power in the Association to increase such assessment by ten percent (10%) per year, but not to exceed the sum of \$160.00. The assessments made by the Merifield Acres Property Owner's Association appear to be unenforceable as the Property Owner's Association may only be assigned such rights as the Fielding Development Company had the power to assign. Because the Fielding Development Company only had the power to establish and adopt or enforce rules and regulations and no express language empowering the Fielding Development Company to create assessments was included in the covenants, since there is no annual assessment nor the authority to impose an annual assessment the Property Owner's Association Act of Virginia does not apply to the Fielding Development Company lots as there is no authority for assessments as required by Section 55-508 and the definition of "Declaration" under the code.

MERIFIELD INCORPORATED LOTS - MALA MAY SET SPECIAL ASSESSMENTS:

Under the covenants of the "Merifield Incorporated Lots", the Association has reserved the power to increase annual assessments up to ten percent (10%) per year to a maximum of \$160.00, however, the covenants also provide for amendment, by a majority of the lots owners affected, of any or all the covenants. As amendment authority has expressly been reserved by the members in the Merifield Incorporated Covenants, the Association will only have the powers expressly given to it which include increasing the assessment up to ten percent (10%) per year to a maximum of \$160.00. Under Section 55-514, Merifield Acres Land Association will have the power to levy special assessments on the "Merifield Incorporated Lot" owners when they are found by the Board to be in the best interest of the Association and the proceeds are used primarily for the maintenance and up-keep, including capital expenditures of the common area. However, such special assessments may be rescinded or reduced by a majority of votes from the "Merifield Incorporated Lot" owners.

UNIT 1 LOTS- MALA MAY SET SPECIAL ASSESSMENTS:

With respect to the "Unit 1 Lots", paragraph 10 of such covenants, entitled "Assessments" makes each lot owner of a "Unit 1 Lot" a member of the Merifield Acres Land Owner's Association and covenants their agreement to pay the Association an annual assessment. The fact that the "Unit 1 Lot" covenants make each lot owner a member of Merifield Acres Land Owner's Association is not enough to subject those lot owners to the full assessment authority found in the Merifield Acres Land Owner's Association by-laws. The "Unit 1 Lot" owners must pay the Merifield Acres Land Owner's Association assessment as defined in the "Unit 1" covenants. Such assessment is \$50.00 in the covenants and has been lowered to \$30.00 by amendment. Because the power to amend these covenants is reserved in the "Unit 1 Lot" owners, Merifield Acres Land Owner's Association will have no authority to amend the amount of such assessments.

The Property Owner's Association Act of Virginia will apply to the "Unit 1 Lots", even though MALA's authority as to annual assessments is limited. Under Section 55-514 Merifield Acres Land Owner's Association will have the authority to levy special assessments where the purpose in doing so is found by the Board to be in the best interest of the Association and such proceeds are used primarily for the maintenance and up-keep, including capital expenditures, of the common area. However, such special assessments may be rescinded or reduced by a majority of votes of the "Unit 1 Lot" owners.

HOLLY PARK SUBDIVISION - MALA NOT SET SPECIAL ASSESSMENTS:

The covenants of "Holly Park Subdivision" fail to provide any authority for assessment on such lots as required by the definition of "Declaration" in Section 55-509 of the Property Owner's Association Act of Virginia. Therefore, the Property Owner's Association will not expand the Board's authority with respect to alteration of the "Holly Park Subdivision" covenants. As there is no mention of the Merifield Acres Land Owner's Association in the "Holly Park Subdivision" covenants and the Merifield Acres Land Owner's Association's by-laws makes such property owners in the "Holly Park Subdivision" members of the Association only after their payment of fees, Merifield Acres Land Owner's Association rules and by-laws will have no affect upon the "Holly Park Subdivision" residence, unless individual landowners voluntarily subject themselves to the rules.

ROANOKE POINT SECTION 2 - MALA MAY NOT SET SPECIAL ASSESSMENTS

Because there are no covenants controlling the Roanoke Point Section 2 Lots, Merifield Acres Land Owner's Association has no authority to set assessments and the Virginia Property Owners Association Act does not apply.

CONCLUSIONS AND RECOMMENDATIONS:

As discussed above, the powers of Merifield Acres Land Owner's Association, which extend from the five (5) individual sets of covenants and the Virginia Property Owner's Association Act range considerably with the respect to each of the five types of covenants from no powers to the full powers as contemplated by the Merifield Acres Land Owner's Association by-laws and the statute. On the low end of the scale are the Roanoke Point Section 2 lot, which includes no covenants. As there are no covenants to bind the lot owners to an assessment or the authority of a Property Owner's Association, Merifield Acres Land Owner's Association through the use of its by-laws or the statute will not be able to levy any assessments on the Roanoke Point, Section 2 lots. The Merifield Acres Land Owner's Association also has no power over the "Holly Park Lots" under either the Holly Park Covenants and Merifield Acres Land Owner's Association by-laws or the Virginia Code.

With respect to the "Fielding Lots" Merifield Acres Land Owner's Association has no authority other than that contemplated in the "Fielding Lot" covenants. Because such covenants fail to make assessments or grant authority to make assessments, Merifield Acres Land Owner's Association will have no assessment power against the "Fielding Lot" Owners under either the covenants and by-laws or the Virginia Code.

If Merifield Acres Land Owner's Association's desires to levy assessments across the board against the "Roanoke Point" lots the "Holly Park Lots", the "Unit 1 Lots", the "Merifield Incorporated" and the "Fielding Lots" may only be done with respect to the analysis above. The "Fielding Lots" will be subject to any assessment levied by Merifield Acres Land Owner's Association, but the "Merifield Incorporated" and "Unit 1 Lots" must amend their covenants by a majority vote to subject to such assessments. The "Holly Park Lot" cannot amend their covenants to be subject to such assessment and they, along with any lots which lack covenants, may only subject themselves to the Merifield Acres Land Owner's Association assessments voluntarily and on individual basis.

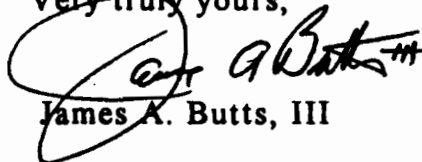
In order for the Association to have the authority as a whole to set assessments for the individual developments the authority must be given to the Association by the required number of property owners in each section. If the covenants are interpreted as above this plan would require that all property owners in the "Fielding Lots", "Holly Point Lots" and Roanoke Point Section 2 Lots consent to the assessment as well as a majority of the lot owners in the "Merifield Inc. Lots" and the "Unit 1 Lots".

Likewise the authority under the Property Owner's Association Act is dependent on the Association's ability to make annual assessments. Where no such authority exist, the special provisions of the Act do not apply.

One alternative may be considered. The association may file a motion for declaratory judgment in the Mecklenburg County Circuit Court seeking to adjudicate and establish the Association as the authority for setting assessments for all the lot owners. As discussed in my prior letter to the president of your association dated March 4, 1992, such a suit may have been prohibitively expensive but recent changes to the rules of procedure in Virginia may present a less expensive means of joining all property owners in such a suit. However, the success of such a suit can not be guaranteed and the court is likely to view the developments as individual communities as explained above.

Should you have any questions, please feel free to contact me and I await your advice as to how I can be of assistance to you in the future.

Very truly yours,

A handwritten signature in black ink, appearing to read "James A. Butts, III", is written over a circular stamp or seal. The signature is fluid and cursive.

James A. Butts, III

JAB,III:sth