

ROBERT T. VAUGHAN
FRANKLIN M. SLAYTON

KIMBERLEY D. SLAYTON
(ADMITTED VA. AND GA.)

VAUGHAN & SLAYTON

ATTORNEYS AT LAW
THE SECURITY BUILDING
554 MAIN STREET
P.O. BOX 446
SOUTH BOSTON, VIRGINIA 24592
(804) 572-4983

Question #3
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2-37 JAMES S. EASLEY
(1885-1965)

FAX (804) 572-4983

September 26, 1990

Mrs. Helen Albrecht
Merifield Acres
Landowner's Association
Route 1, Box 598
Clarksville, Virginia 23927

Mr. Frank Simes
15 Merifield Drive
Clarksville, Virginia 23927

Dear Mrs. Albrecht and Mr. Simes:

First, let me apologize for being so late in getting back to you. When you were last in the office I expected to have a very quiet summer, but it has turned out to be the opposite. I have taken a trip to Canada and through the New England States and have visited the beaches of Nags Head and Virginia Beach. In addition, my legal work has been much busier than normal at this time of year. As a result of all of this, I have tried on numerous occasions to get down to the questions you posed regarding Merifield Acres only to be distracted either by vacations or by business. So much time has elapsed that I am afraid I am not remembering all that we discussed when you were in the office.

I will now attempt to answer your questions and give you the benefit of my opinion regarding the areas we discussed. If I overlook anything, I am sure you will let me know.

First, let me discuss briefly the Property Owners' Association Act. This act is embodied in §§55-508 through 55-516 of the Code of Virginia. Section 55-508 deals with the applicability of the act. Among other things, it provides that the act does not apply to developments subject to a declaration initially recorded on or before January 1, 1960. This provision does not effect us, because I believe all of the declarations filed on behalf of Merifield Acres were recorded after that date. This section also provides that the act does not apply retroactively but does apply prospectively to all property owners'

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associations in existence on July 1, 1989, or created subsequent thereto, and provides further that the act does not affect the validity of any provision of a declaration recorded prior to July 1, 1989. Finally, this section also provides that §§55-511 and 55-512 do not apply to contracts in existence before July 1, 1989.

Section 55-509 contains definitions, and I will discuss only those definitions which are pertinent to your problems.

"Common Area" means property within a development which is owned, leased or required by the declaration to be maintained by a property owners' association for the use of its members.

"Declaration" means 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 imposes on the association maintenance or operational responsibilities for the common area and creates the authority in the association to impose on lots, or on the owners or occupants of such lots, or on any other entity any mandatory payment of money in connection with the provision of maintenance or services, or both, 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 paragraph.

"Development" means real property located within Virginia subject to a declaration which contains both lots, at least some of which are residential or are occupied for recreational purposes, and common areas.

"Property Owners' Association" or "Association" means an incorporated or unincorporated

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entity that is referred to in the declaration.

Section 55-510, requires the association to keep detailed records which shall be available for inspection by members in good standing and also provides that the association may collect the expense of providing information from the person in good standing seeking the information. Sections 55-511 and 55-512 which do not apply to your Association requires the association to provide packets of information concerning the association and the development to prospective sellers and purchasers of lots within the development.

Section 55-513 provides that the Board of Directors of the Association shall have the power to establish, adopt and enforce rules and regulations with respect to the use of the common areas and as to such other areas of responsibility assigned to the association by the declaration, except where expressly reserved by the declaration to the members. It also provides that the members of the association may, by a majority of the members present and by proxy, at a meeting convened in accordance with the provisions of the association's declaration and called for that purpose, repeal or amend any rule or regulation adopted by the Board of Directors. It further provides that the rules and regulations may be enforced by any normal method, including injunctive relief or damages and that the court may award the association court costs and reasonable attorney's fees.

Paragraph B of §55-513 provides that the Board of Directors of the Association shall also have the power, except where expressly prohibited by the declaration, to seek injunctive relief in the Circuit Court against any member or family member, tenants, guests, etc., for any violation of the rules and regulations.

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Section 55-514 provides that in addition to all other assessments authorized by the declaration, the Board of Directors of the Association shall have the power to levy a periodic 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 are used primarily for upkeep and maintenance of the common areas. Members may rescind any such special assessment. Paragraph B of this section also provides that the failure of a member to pay the special assessment shall entitle the Association to a lien under §55-516 as well as other rights afforded a creditor under law, and Paragraph C provides that the failure to pay the assessment entitles the Association to deny the member the use of the common areas with the exception of access roads to that member's home.

Section 55-515 provides that lot owner, and all those entitled to occupy a lot shall comply with all lawful provisions of this chapter and all provisions of the declaration and that lack of compliance will 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.

Section 55-516 gives the association a lien for unpaid assessments against the lot of land of the member failing to pay and provides means for perfecting this lien.

As you can see, the key to the applicability of this Act to the lots in Merifield Acres is the declaration. I assume that the declaration would be considered to be that contained in the restrictive covenants adopted for Merifield Acres, Inc., during the time of Mr. Wilson. I have one of said declarations which is dated December 31, 1976, but I am not certain that that particular declaration was ever put on record, and the first page fails to identify the

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sections of units of Merifield Acres governed by the declaration. The other declaration is dated November 20, 1977, has obviously been recorded in the Clerk's Office of the Circuit Court of Mecklenburg County in Deed Book 269, Page 877, and identifies Unit 1 as being the area covered by the declaration. It is not entirely clear to me, perhaps because my memory of our conversation has dimmed, as to how many of the units of Merifield Acres, Inc., are covered by this declaration.

The declaration I refer to contains restrictive covenants and then, beginning with Paragraph 10 provides for assessments to maintain the common areas which may be imposed by "the Merifield Acres Landowner's Association" (the 'Association').

This Paragraph 10 provides also ". . . each lot owner shall be a member of the Association, and for himself, his heirs and assigns, covenants and agrees to pay the Association, its successors and assigns, annually, an amount assessed against each lot owned by said owner by the Association in accordance with the following provisions:" (here follows a provision for an annual assessment of \$50.00, indicates that the streets and other common areas will have to be maintained out of the proceeds of this assessment, gives the declarant the right to transfer to the Association title to any common areas, provides for a lien for the amount of the assessment against each lot, etc.). Unfortunately, the declaration which I know has been recorded seems to limit the amount of the annual assessment to \$50.00, but I suppose a special assessment could be made in accordance with the Property Owners' Association Act. Paragraph 11 of this particular declaration gives owners of lots within the development the right to enforce the restrictions.

The declaration dated December 31, 1976, which may or may not have been recorded, provides for an annual assessment of \$75.00 for a lot and \$125.00

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for a lot with a completed dwelling constructed thereon and also provides that the Association shall have the right to increase the foregoing assessments by not more than 10% per year. Inasmuch as this declaration was made prior to the declaration of November 20, 1977, it is surprising that it gives the Association the right to assess for greater amounts.

In addition to these two declarations, I also have in my possession an amendment to declaration of restrictive covenants which is dated May 25, 1977, and recorded in Deed Book 379, Page 440 which provides that the annual assessment for each lot shall be \$30.00 but that the assessment may be increased to \$50.00 for any lot which has a completed dwelling constructed thereon as of January 1st of the calendar year. This amendment also provides that the Association shall have the right to increase the foregoing assessments by not more than 10% but not to exceed \$160.00. But this amendment also appears to apply only to Section A of Unit 8.

I shall now undertake to answer, as best I can, questions posed by the two of you.

In his letter to me of July 26, 1990, Mr. Simes posed the question: "Can a special assessment be levied on lot owners who do not pay the \$50.00, even though they use the roads. To put it another way, can special assessments be levied on all lot owners in Merifield Acres, whether members of the Association or not? Or can or should the by-laws be changed to grant membership to all lot owners?" I have the following answers to these questions:

1. I do not believe that the Property Owners' Association Act applies to any lot in the Merifield Acres subdivision unless a declaration, as defined by the Act, has been placed on record and is applicable to that particular lot.

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2. MALA has no jurisdiction over any lot unless there is a declaration on record which gives MALA such jurisdiction.

3. MALA has the authority to assess all lots to which the recorded declaration creating MALA apply and no other.

4. Ideally, declarations creating MALA should apply to all lots in the subdivision, and it should be mandatory for all lot owners to be members of MALA and subject to MALA's rules and regulations and assessments.

Mr. Simes also stated that I expressed the opinion that Mrs. Lewis had the right to take the position she did with regard to the property she bought at the Trustee's Sale. He asked what our options are.

First, I do not think I made myself completely clear in regard to Mrs. Lewis's position with regard to this property. I think it is true that the deed of trust pre-dated the declaration. Ordinarily, under these circumstances, Mrs. Lewis would not be bound by any action taken with regard to the property subject to the lien of the deed of trust unless she consented in writing to such, and I think that is what I referred to in my statements. However, since Mrs. Lewis has been intimately bound up with Merifield Acres, has known that Mr. Wilson sold lots in accordance with plats which were not in existence when the deed of trust was placed on record, has known of the restrictive covenants, has been acquainted with MALA and even a member of MALA, I think it is highly possible that the Court would say that she is estopped to deny the validity of the plats, the declarations, the restrictions, etc. However, I do not think that she can be compelled to convey the common areas to which she has title to MALA.

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In her letter to me of July 18, 1990, Mrs. Albrecht asked whether or not MALA has a legal right to collect special assessments from owners who acquired their properties under the terms of covenants recorded before 1976. My opinion is that you do not have that right, because the pre 1976 covenants did not create an association or provide for assessments but were confined to the use of the property. If any of these property owners have chosen not to be a member of MALA, I think they are within their rights to refuse to belong to MALA.

In that letter, Mrs. Albrecht also stated that a majority of the owners in Roanoke Point Section A, Unit 8, of Merifield Acres filed an amendment to the restrictive covenants establishing a lower level of assessments and that MALA takes the position that they are governed by the original declaration of restrictive covenants by Merifield Acres, Inc. Assuming that Roanoke Point Section A, Unit 8, was covered by an original declaration of restrictive covenants which established MALA as the governing body, I think the amendment is void. However, if these various sections of Merifield Acres have had separate individual declarations filed applying only to that particular section, the answer becomes quite fuzzy.

In her letter to me of July 26, 1990, Mrs. Albrecht asked if it were possible to re-plat two lots into one lot. The declaration of restrictive covenants dated November 20, 1977, applying to Unit 1 provides that "the lay of the lots as shown on the record plat hereinabove referred to shall be substantially adhered to; provided, however, the size and shape of any lot may be altered so long as no lot or group of lots are resubdivided to produce a greater number of lots." If this has been consistent, I see nothing wrong with using two lots as one lot and replatting them as such.

If I could handle this matter the way I think

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it should be handled and get the consent of all of the lot owners in Merifield Acres, I would have the owners of all of the lots in the subdivision declare all previous covenants and restrictions and provisions concerning assessments and creation of MALA, etc., revoked. I would then put a new declaration of restrictive covenants signed by every lot owner in the subdivision on record. These restrictive covenants would provide for the establishment of MALA, the powers and duties of MALA, assessments, etc., would require all lot owners to be members of MALA and subject to the assessments and make all of the provisions of the restrictive covenants apply to all property within the subdivision, including Mrs. Lewis's. Of course, a part of this would be to make the common areas owned by MALA and subject to its regulations.

Unfortunately, it appears to me that the restrictive covenants and especially any that can be called declarations within the meaning of the Property Owners' Association Act have been made at different dates, have been made applicable to only a small section of the subdivision, have not been consistent in their provisions or their applicability, etc. No one has taken the trouble to see how all of these various declarations apply to all or only a few of the lots in the subdivision.

In order for me to have a real clear opinion as to all of these matters, I think it will be necessary for me to make a complete examination of all of the records in the Clerk's Office and, unless you have some assurance of successfully getting the consent of all of the lot owners in the subdivision, I do not recommend that you incur that expense.

When you were in my office, you requested me to address myself to several questions.

The first question was whether or not the

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people who bought from the Fielding Corporation were obligated to pay this special assessment called for in §55-508 of the Code of Virginia. My answer to this is no, because they were never subject to any declaration which created an association.

The next question was: "Who are members?"
It appears from what I see that you may have a number of different kinds of members. The specific answer I would give to this question is that those people who bought subject to restrictive covenants which created an association and provided for assessments (in other words those subject to a declaration as defined in the Act) are members.

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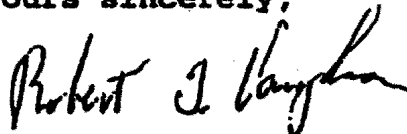
The next questions is: "Can a special assessment be levied by the association against those who choose not to be members." My answer is no, because only those who are mandated to be members by a declaration are subject to the special assessment.

You requested me to write a letter which could be sent to the people in 8A letting them know why the amendment will prevent the proper financing of roads, etc. Rather than hold this letter up, I am sending it on without the proposed letter to the 8A people. I will try to get that letter to you before the week is over.

If you feel that it would be beneficial, I would be glad to meet with you again.

I again apologize for this delay.

Yours sincerely,



Robert T. Vaughan