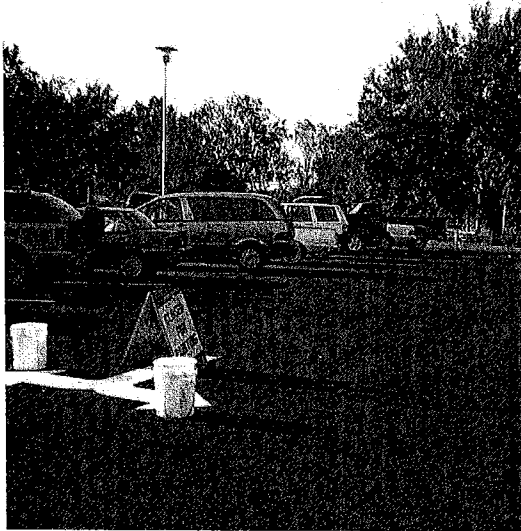


Assign Parking Spaces at Your Own Risk

THE AFTERMATH OF WHITE V. BOUNDARY ASSOCIATION, INC.

By Todd A. Sinkins, ESQ.



Over the past ten years, the Virginia courts have issued a series of decisions that have eroded the power of community associations to assign common area parking spaces. Through a series of decisions during the late 1990s¹, courts addressed the question of whether the board of directors for a community association possessed the legal authority to assign parking spaces in the association's common area parking lot. In each of these cases, the community in question was a mixed townhome community (garage and non-garage townhomes) where the parking policy adopted by the board of directors assigned two common area parking spaces to non-garage townhomes and no common area parking spaces to garage townhomes. In each one of those cases, the court either ruled that: (1) the parking policy adopted by the board violated the governing documents of the association²; or (2) the parking policy adopted by the board violated the "reasonableness" test used by courts to evaluate the business judgment of the board of directors³. Finally, in the Dye

case, the Virginia Supreme Court ruled against the association because: (1) the act of assigning parking spaces to lots constitutes the assignment of a license; and (2) the Declaration required the Board to grant licenses in the common area uniformly - unlike the judge in the Martin case, who found the Board's act of assigning spaces to be an act of regulation.

In *White v. Boundary Association, Inc.*, 624 S.E.2d 5; 2006 Va. LEXIS 15 (2006), the Virginia Supreme Court recently had the opportunity to review the validity of a

...the Virginia Supreme Court ruled that in the absence of an expressed right to assign to an owner the exclusive right to use a designated portion of the common area, an owners' easement of the right of use and enjoyment of the common area prohibits the assignment of the exclusive right to use a common area parking space.

provision in an association's parking policy that assigned each of the nine townhome lots within the association with the exclusive right to use two parking spaces and permitted each owner to enforce the policy through the towing of a vehicle from their assigned parking spaces. In this case, Mr. and Mrs. White, who are lot owners within the association, challenged the association's parking policy assigning two parking

spaces to each lot and sought a declaratory judgment that the assignment of parking spaces for the exclusive use of a lot violated the terms of the association's declaration and Section 55-513 of the Virginia Property Owners' Association Act ("POAA"). The Circuit Court ruled in favor of the association, and the Whites appealed the decision to the Virginia Supreme Court.

On appeal, the Virginia Supreme Court ruled that in the absence of an expressed right to assign to an owner the exclusive right to use a designated portion of the common area, an owners' easement of the right of use and enjoyment of the common area prohibits the assignment of the exclusive right to use a common area parking space. The court also upheld the reasoning behind its decision in the Dye case that the provision in Section 55-513(a) of the POAA that allows an association to regulate the common area does not provide an association with the power to adopt a rule or regulation that assigns owners with the exclusive right to use certain common area parking spaces unless the association's declaration contains express language permitting the association to grant a license or to reserve to owners the exclusive right to use certain portions of the common area. In rendering its decision, the court focused its review on the language in the declaration which granted each owner an easement for the use and enjoyment of the association's common area, since the declaration did not contain expressed language granting the association with the authority to license a portion of the common areas to individual owners, or otherwise contain language permitting the assignment of parking spaces. The court ruled that the declaration only established three exceptions to the individual owners' right to use the common area, and that the act of assigning parking spaces or granting a license

was not one of the three delineated exceptions to the owners' collective right to use and enjoy the common area.

The importance of this decision to Virginia community associations cannot be understated. The Boundary decision appears to irrevocably change the analysis that community associations must undertake before they adopt a parking policy for their common area parking lots that includes the assignment of parking spaces.

Under the Boundary decision, a community association's power to assign parking spaces within its common area parking lot is dependent entirely on whether the association's declaration contains language permitting the association to grant licenses to use a portion of the common area, or otherwise contains language that permits the association's board of directors to assign or reserve particular parking spaces for the exclusive use of its members. The Boundary and Dye decisions make it clear that an association cannot rely upon its power under the POAA to adopt rules and regulations relating to the use of the association's common area to allow its board of directors to assign parking spaces. Instead, the association will need to review its declaration to determine: (a) does it contain a provision that grants it members with an easement across the common area for the use and enjoyment of the common area (almost all do); and, if so, (b) does the declaration contain language permitting the association to grant licenses to use a portion of the common area, or otherwise contains language that permits the association's board of directors to assign or reserve particular parking spaces for the exclusive use of its members. If the answer to both of these questions is yes, then the board may assign the exclusive right to use a parking space to one or more of their members, provided the board follows the law established by the Dye case, which held that the Board's power to grant a license must be done equally to all members unless the association's declaration expressly provides otherwise.

You may ask yourself – how does the Boundary decision affect the hundreds of community associations in Virginia that have parking policies that assign to owners the exclusive right to use one or more parking spaces? The simple answer is that in many cases, the validity of such parking policies is suspect. Unfortunately, in the short term, community associations that have adopted parking policies that include the assignment of parking spaces to partic-

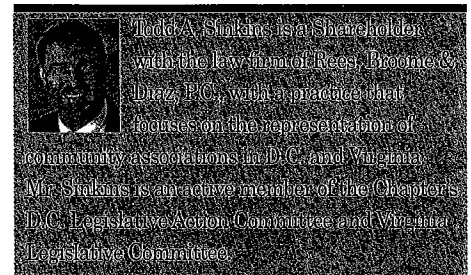
ular lots or units should review the existing parking policy to determine whether it remains valid in the aftermath of the Virginia Supreme Court's decision in the Boundary case. These associations may want to consider contacting their attorney to determine whether the association's declaration permits the licensing of parking spaces to members for the member's exclusive use or otherwise expressly permits the assignment of parking spaces. If not, the association should consider either: (1) revising its existing parking policy to conform with the holding in the Boundary case; or (2) amending its declaration to provide the Association the power to assign to owners the exclusive right to use parking spaces.

From a practical standpoint, most owners who live in a community that assigns specific parking spaces to each of their members are comfortable with this approach. Owners like to know that they have an assigned parking space that is for their own exclusive use. The assignment of parking spaces creates certainty that an owner will have a space to park their vehicle when they return home at night. Unfortunately, many associations no longer will have the right to assign parking spaces to specific lots. In these cases, the association may have no option but to permit parking on a first-come, first-served basis. In these cases, owners that previously were certain of having a space in which they could park a vehicle no longer have that certitude. Instead, many

will come home late at night and be forced to leave their community to find an available space along the road in which they may park. As a result, the Boundary decision has removed a critical tool used by many associations to address the shortage of parking within their association. **□**

¹ Sully Station II Community Association, Inc. v. Dye, 259 Va. 282; 525 S.E.2d 555 (2000); Martin v. Ashburn Farms Homeowners Association, 45 Va. Cir. 124 (Loudoun County Cir. Ct. Feb. 5, 1998); Copernoll v. Cascades Community Association, Inc., 1998 Va. Cir. LEXIS 573 (Loudoun County Cir. Ct., Feb. 3, 1998); Cornwell v. Main Street Village Homeowners Association, 42 Va. Cir. 48 Loudoun County Cir. Ct., Jan. 17, 1997).

² Sully Station II Community Association, Inc. v. Dye, 259 Va. 282; 525 S.E.2d 555 (2000); Martin v. Ashburn Farms Homeowners Association, 45 Va. Cir. 124 (Loudoun County Cir. Ct. Feb. 5, 1998); Cir. 48



HEART
NATIONAL CORPORATION

The Leader in Industrial Cleaning Technology

Building Services

- Trash Chute Cleaning
- Carpet Cleaning
- Garage Cleaning
- Janitorial
- General Pressure Washing
- Bulk Trash Pick Up

BIO DUCT
THE BIOLOGY OF DUCT CLEANING

- HVAC Duct Cleaning
- Dryer Duct Cleaning
- Advanced HEPA Technology
- Removes 99.97% of particulates as small as 0.3 microns in size

Our Cleaning Systems meet or Exceed EPA, OSHA and NADCA Standards

Introducing Our New Affiliate:

CLEAN 2

- Mold Testing
- Mold Remediation
- Certified Technicians
- Testing Lab is Accredited by AIHA EMLAP

All Systems meet or Exceed EPA, OSHA and NADCA Standards

HEART NATIONAL CORP./BIO DUCT CORP./O₂ CLEAN, LLC
PHONE: 703-690-5046 FAX: 703-492-2770