DO SECURITY CAMERAS IN HOAS AND CONDOMINIUMS INFRINGE ON PRIVACY RIGHTS?

By John C. Cowherd

John C. Cowherd is a member of the Virginia State Bar's Real Property Section with a focus on Northern Virginia clients. He has over 15 years of experience litigating and arbitrating community association, neighbor, construction, and real property disputes. In his spare time, his family enjoys water-related activities in Virginia's Northern Neck.

Use of security cameras is widespread in HOAs and condominiums, but it can also be controversial. Cameras are often positioned to view both the owners' lot and nearby property. Residents install security cameras based on generalized fear or in reaction to a specific incident. Often, someone finds this objectionable because it records his or her lot or common area (or could easily be reconfigured to do so). Many associations install video cameras on common elements in response to security complaints. Video cameras allow property owners to easily monitor their property while doing other things. This can cause neighbors to feel a loss of useful value to the "open" portions of their property due to a sense of being surveilled.

When disputes arise, homeowners want the community to take their side. However, the legal obligations are oftent unclear. The developer constructs the community and files use restrictions in the land records. Thereafter, general law and technology evolve at separate paces.

The camera's owners may be concerned about a threat of wrongful behavior against them or their property, such as theft, assault, or trespassing. For many, the camera functions as a "guarantor" of a variety of property rights, including that of privacy. Sometimes the placement of the camera makes its purpose obvious. If the viewing range includes someone else's unit or lot, this raises a question of possible harassment or invasion of privacy. Use of video cameras relates to other controversies in society; for example, some groups are more likely to find a protective value in owning a properly-placed camera and may be more vulnerable to harassment by improperly placed cameras. A camera can undoubtedly be misused for "peeping tom" purposes. Camera disputes between neighbors can escalate into acrimony involving law enforcement or community managers.

Community associations law intersects with the social concept of etiquette. Restrictive covenants and governing associations proliferated alongside social changes brought on by the industrial revolution. These new developer-designed communities helped organize the lifestyle, investment, and spending practices of a new middle class. Emily Post, in her 1937 edition of her famous book on Etiquette, explained how privacy is a common concern:

> . . . no exaction of perfect behavior is more essential to all thoroughbred people than the right to privacy. . .. In its usual interpretation, the term exclusive society brings to mind an impression of arrogance, and it can of course mean that. But it can also mean the undisturbed companionship of family and chosen friends; the privilege of leading one's life in peace and tranquility. One of the greatest advantages that money grants is the boon of privacy to those who can live in a house guarded by servants, who can build high walls around their garden, who can devise a retreat of their own where they can work or dream or spend the precious hours as they choose. But this protected tranquility is within the reach of very few. In millions of homes, safety from interruption is granted only by the consideration of friends and neighbors. . . . We should never walk into the house of another (as though it were our own) unless such behavior is encouraged.[1]

[1] Post, Emily, Etiquette – The Blue Book of Social Usage, 621-22 (Funk & Wagnalls Co. 1937).

In places where homes are spaced apart and owners can install fences, neighbors rely less on a "social compact" to experience "quiet enjoyment" of property. Where the developer constructs homes close together and the only available open space is community space, individual privacy becomes a collective issue. Community association law reflects the idea that harmonious use requires binding rules because custom is insufficient. Neighbors are happier if they can be amicable, but as it is often said, "good fences make good neighbors" and some degree of separation is desirable to allow space for the private lives of each owner. HOAs can run amok with handbook revisions and fines, but it is difficult to imagine how one could have "safety from interruption" in a condominium or townhouse development without thoughtful community rules.

Many recorded bylaws reflect an earlier age when security cameras were not widely used. Most associations do not have recorded instruments that speak directly about cameras, primarily because individual residential doorbell cameras are a relatively recent product and had previously been prohibitively expensive. Some newer communities may have covenants that require HOA architectural approval for just about any structure or object that is visible from the common areas. In this sense, the association is regulating the way that the camera looks *to* the public, not how the camera looks *at* the public. Overall, HOAs tend to be permissive when it comes to video cameras. Sometimes a board or committee will conduct a vote on a neighbor's camera dispute, but often the association does not intervene. At least one attorney who represents HOA boards in Northern Virginia has taken the position that if a camera on one lot looks into the dwelling of the neighbor, then this may lead to a civil claim of trespass under Virginia law. However, there is not yet any published appellate authority for this position.

The operation of security cameras by community associations as equipment installed on common areas raises additional issues. Condominiums and HOAs ordinarily have significant latitude as to how to operate the common areas for their intended purposes.[2] The association's mandate with respect to the common areas may be limited by provisions in the recorded instruments. Perhaps the greater controversy surrounds the accumulated videos and photographs taken by the camera. The Property Owners Association Act ("POAA") and Virginia Condominium Act allow members to submit books and records requests for data kept by the association.[3] Those statutes contain specific categories of documents that the association may withhold from inspection requests.[4] The collection of security camera video footage or license plate images is not something that the POAA or Condominium Act address specifically in the statutes. Associations that keep such records but refuse to divulge them (or explain how the information is used) may find themselves in litigation, especially if the keeping of such records impacts a homeowner's rights or may contain information useful to someone's investigation.

If Virginia law does not provide a clear standard, it is useful to ask what the laws of neighboring states may require. Maryland, the District of Columbia, and some other states recognize a tort of intrusion upon solitude or seclusion, following, more or less, the Restatement of Torts approach:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.[5]

---

[2] See, e.g., Va. Code § 55.1-1819(A) & Va. Code § 55.1-1956(A)(2).

[3] Va. Code § 55.1-1945(B) & Va. Code § 55.1-1815(B).

[4] Va. Code § 55.1-1945(C) & Va. Code § 55.1-1815(C).

[5] *Harleysville Preferred Ins. Co. v. Rams Head Savage Mill, LLC,* 237 Md. App. 705 (2018); *Wolf v. Regardie,* 553 A.2d 1213 (D.C. 1989); Rest. 2d. Torts § 652A.

This would forbid peering into a window behind which the occupants had secluded themselves.[6] A homeowner or tenant ought not to be forced to completely block her own window in order to avoid such intrusion, particularly for the second story or back of the house. The restatement rule extends to a variety of other activities unrelated to security cameras, such as wiretapping, unauthorized entry, opening of mails or searching of a wallet.[7] Some of these activities are also forbidden by other common law or statutory restrictions.

The laws restricting the undisclosed recording of "audio" conversations are statutory and vary by jurisdiction in ways that do not necessarily track the court's recognition of "visual" privacy torts. For example, D.C. and Maryland have adopted the restatement approach for intrusion upon seclusion, but Maryland is much more restrictive than D.C. when it comes to audio recordings.[8]

Casting a floodlight is not evaluated by the same legal standard as use of a video camera. This can be confusing - sometimes lights are used in tandem with security cameras. In Virginia, shining a floodlight onto the lot of another can be the basis of tort liability, particularly if it interferes with sleep.[9] In some instances, it may constitute a zoning violation.

Virginia law contains different privacy protections than some other states. In 2002, the Supreme Court of Virginia expressly declined to recognize a tort of the unreasonable intrusion of privacy. Because the General Assembly adopted legislation recognizing other privacy rights but not that one, the Supreme Court would not hold otherwise. In *WJLA-TV v. Levin*, Dr. Levin sued Channel 7[10] news for defamation after it aired the conclusions of an investigation.[11] The televised program alleged that Dr. Levin sexually assaulted patients.[12] Dr. Levin's claims included one for invasion of privacy. The jury returned a verdict in Dr. Levin's favor on the defamation and unauthorized use of image claims.[13] The Supreme Court affirmed the defamation part of the verdict. In a footnote, the Court observed that by only codifying the tort of misappropriation of name or likeness for commercial purposes, the General Assembly implicitly excluded the other privacy torts.[14] Based on this authority, trial-level courts in Virginia often disallow any claims for intrusion upon seclusion. However, in 2017, the General Assembly enacted Va. Code § 18.2-130.1:

> It is unlawful for any person to knowingly and intentionally cause an electronic device to enter the property of another to secretly or furtively peep or spy or attempt to peep or spy into or through a window, door other aperture of any building, structure, or other enclosure occupied or intended for occupancy as a dwelling, . . . without just cause, upon property owned by him . . under circumstances that would violate the occupant's reasonable expectation of privacy.[15]

---

[6] Rest. 2d. Torts § 652A, comment b.

[7] *Id.*

[8] Md. Code, Cts. & Jud. Proc. § 10-402 & D.C. Code § 23-542.

[9] *Willems v. Batcheller,* 109 Va. Cir. 319, 327-28 (Fairfax Co. Mar. 6, 2022), *discussing, Bowers v. Westvaco Corp.,* 244 Va. 139 (1992) *and Bellamy v. Husbands*, 13 Va. Cir. 433 (Arlington Co. 1972).

[10] WJLA-TV broadcasts over the air as Channel 7 in the Washington, DC and surrounding area. –Ed.

[11] *WJLA-TV v. Levin,* 264 Va. 140 (2002).

[12] *WJLA-TV,* 264 Va. at 146-47.

[13] *Id.,* 149-50.

[14] *Id.,* 160, fn. 5

[15] Va. Code § 18.2-130.1(tarting on July 1, 2023, this offence will start including use of drones as within the scope of the offense).

This criminal statute does not have a corresponding enactment making the prohibited conduct also a civil action.

Also in 2017, the General Assembly created a civil action corresponding to the criminal offense of creating an authorized image of someone in a state of undress.[16] That corresponding criminal statute outlawed creating a video or still image of a nonconsenting person who is nude, in their undergarments or in an exposing state of undress, etc. in a place like a dressing room, bathroom, or bedroom in situations where the victim had a reasonable expectation of privacy.[17]

These enactments raise questions as to whether the Virginia courts ought to recognize unreasonable intrusion upon seclusion as a tort, by the Restatement approach or some other formulation. The General Assembly's 2017 enactments do not seem to expressly overcome the implied non-enactment reasoning used by the Supreme Court in *WJLA-TV v. Levin*. That judicial analysis makes sense considering that the privacy rights at issue were not already recognized as coming down to contemporary Virginia through the English common law. In 2021, Justice Arthur Kelsey penned a dissent joined by two other justices that criticized a practice of following the Restatement Second of Torts in instances where it reflected academic views that deviated from the common law.[18] To ask Virginia courts today to innovate a protection in tort law against invasion upon seclusion would likely raise analogous controversies. But that's no reason to abandon exploration of potential solutions.

My opinion is that the development of privacy law in Virginia has not kept pace with urbanization or technological innovation. I think Virginia could recognize the restatement tort of intrusion upon seclusion without infringing upon a homeowner's right to use video cameras defensively or other legitimate purposes. The intrusion upon seclusion rule focuses on peering into windows and doors. Taking a photograph of someone in a public place, even in some instances when many people would consider it downright rude, does not subject the photographer to liability for invasion of privacy.[19] The Restatement approach still requires a case-by-case analysis. Recognizing this specific privacy right might discourage escalating acrimony among neighbors in use of video cameras. Of course, Restatement (Second) of Torts § 652B would create a civil action for other privacy rights not addressed in this article.

The controversies surrounding security cameras illustrate the inherent limitations of the community association model of residential development. Humans naturally crave privacy, order, convenience, and self-determination. Human emotions and conflicting interests run up against each other in the physical and legal structures of the association. Adoption of the restatement approach in Virginia of intrusion upon seclusion could restore the value of windows, doors, and open spaces in light of the developing technology and ever-increasing density of humanity. To do so would keep pace with the suburbanization of the Commonwealth.

---

[16] Va. Code § 8.01-40.4.

[17] Va. Code § 18.2-386.1.

[18] *Shoemaker v. Funkhouser,* 299 Va. 471, 489-514 (2021)(Kelsey, J. dissenting).

[19] *Deteresa v. American Broadcasting Cos. Inc.,* 121 F.3d 460 (9th Cir. 1997).