No. COA12-327 THREE-B DISTRICT

NORTH CAROLINA COURT OF APPEALS

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|---|---|---|
| BARBARA L. POHLMAN and ANN L. GARROU, Plaintiffs | ) | |
| v. | ) | From Carteret County |
| MAGEN'S BAY HOME OWNERS ASSOCIATION, INC., Defendant | ) | |

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# PLAINTIFFS-APPELLANTS' BRIEF

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# PLAINTIFFS-APPELLANTS' BRIEF

**********

## ISSUES PRESENTED

I. Did the Trial Court err in granting summary judgment concerning whether a quorum existed at the HOA's annual meetings when Plaintiffs provided evidence disputing the existence of a quorum, and the HOA had no records supporting its position?

II. Did the Trial Court err in its Order on Summary Judgment concerning the HOA's use of ballots, in that the HOA conducted elections of directors in violation of North Carolina law by combining voting at a meeting with voting by mailed, written ballots?

III. Did the Trial Court err by improperly making findings of fact in its Order on Summary Judgment, particularly given that several such findings were rulings on disputed issues of material fact?

IV. Did the Trial Court err in rejecting the fence and imposing fines, when the Board of Directors failed to follow corporate formalities and failed to follow statutory requirements for the imposition of fines?

V. Did the Trial Court err in its Judgment upholding the purported decisions by the HOA that rejected the fence and imposed fines because denial of Plaintiffs' application for approval of the fence was an arbitrary and capricious decision?

VI. Was the Trial Court's Judgment in error because denial of Plaintiffs' application for approval of the fence was not based on any objective or measurable standard for approval or compliance such that the purported standards are void for vagueness?

VII. Did the Trial Court err in its Judgment upholding the purported decisions of the HOA that rejected the fence and imposed fines when the Judgment necessarily relies on the existence of valid corporate actions, which issues were improperly determined to exist on summary judgment?

## STATEMENT OF THE CASE

Plaintiffs Barbara L. Pohlman ("Pohlman") and Ann L. Garrou ("Garrou") (collectively "Plaintiffs") filed suit on 25 February 2010 against the Magen's Bay Home Owners' Association, Inc. ("HOA"). Plaintiffs sought a declaratory judgment that the HOA's denial of their application for approval of a trash enclosure ("fence") on their property was improper, as was the HOA's imposition of fines for the fence. The Complaint included allegations that the HOA's Board of Directors ("Board") had not been properly elected and that the HOA's denial of Plaintiffs' application for fence approval was arbitrary and not in good faith. The HOA moved for summary judgment. The Trial Court granted partial summary

judgment for the HOA, concluding that there was no genuine issue of material fact regarding whether a quorum existed at the HOA's annual meeting. The Trial Court also concluded that there was no genuine issue of material fact regarding whether ballots used at the annual meetings were improper. A bench trial ensued, and the Trial Court entered judgment in favor of the HOA. This appeal followed.

## STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The Trial Court's Order on Summary Judgment and Judgment are final judgments. Plaintiffs have a right to appeal under N.C. Gen. Stat. § 7A-27(b).

## STATEMENT OF THE FACTS

This is a case about an $800.00 fence and more than $30,000.00 in fines allegedly imposed by the HOA concerning the fence. [Tr. (Motions), p. 38; R. p. 6.] Plaintiffs own a home (Lot 92) in the Magen's Bay community in Carteret County, and Plaintiffs are members of the HOA. [R. p. 4.]

The HOA is governed by, among other things, a Declaration of Covenants, Restrictions, and Easements for Magen's Bay Subdivision ("Declaration") and the By-Laws of Magen's Bay Homeowners Association ("Bylaws"). [R. pp. 49, 93.] Certain provisions of the North Carolina Planned Community Act apply to Magen's Bay. See N.C. Gen. Stat. § 47F-1-102(c). The North Carolina Nonprofit Corporation Act also applies. [See R. pp. 4, 16.]

The HOA elects all directors for its Board at each annual membership meeting. Contrary to applicable law and its governing documents, the HOA typically does not retain official minutes of its actions, including membership meetings, Board meetings, and meetings of the Magen's Bay Architectural Control Committee ("ACC"). [Tr. (Motions), p. 12; Tr. (Trial), p. 71; R. pp. 123–76; Depo. of Randy Rosebro, p. 6.] As such, the HOA cannot confirm that its voting procedures at the 2008 and 2009 membership meetings conformed to applicable law. The HOA cannot show that a quorum was present or that proxies or written ballots were used properly.

Plaintiffs rent their home in Magen's Bay to various tenants. [Tr. (Trial), p. 18.] In the fall of 2009, the President of the HOA, Charlie Denmead ("Denmead"), began to believe that Plaintiffs' tenant was operating a catering business and creating excess trash. [Tr. (Trial), p. 261.] The HOA's counsel sent a letter to Plaintiffs stating that trash allegedly was "overflowing and in view" and demanding that Plaintiffs fix the problem. [Tr. (Trial), p. 86.] Plaintiffs responded by erecting the fence to conceal their garbage cans. [R. pp. 83–86; Plaintiffs' Exs. 8, 8A.] The fence was approximately three-feet wide by ten-feet long and was approximately six-feet high. [Id.] The fence was similar in color, materials, size, and location to other trash enclosure fences within Magen's Bay, including

one that was nearly identical. [Tr. (Trial), pp. 23–25, 28–29; Plaintiffs' Ex. 11A.] In fact, Magen's Bay contains over 35 other fences, even though records of ACC approval exist for only five of these fences. [Tr. (Trial), pp. 102–03, 150–51; Plaintiff's Exs. 11A, 14–54; R. pp. 77, 85.] There are numerous fences that appear to delineate property lines, even though these are expressly forbidden by the Magen's Bay Architectural Review Guidelines ("Architectural Guidelines"). [Tr. (Trial), pp. 34, 127-28, 142; R. pp. 46, 77, 85.]

On or about 23 October 2009, Plaintiffs received a letter from the HOA stating that their fence was "unauthorized." [R. p. 90.] The HOA stated that Plaintiffs must remove the fence within seven days and that failure to do so would result in "a daily fine of fifty dollars until the fence is removed." [Id.]

Plaintiffs acknowledged that they made a mistake by not first requesting approval from the ACC for construction of the fence. [Tr. (Trial), p. 16.] They simply had forgotten about this requirement. [Id.] As a result, Plaintiffs immediately sought approval of the fence from the ACC by submitting an Approval Request Checklist and attaching a picture of their fence. [R. p. 136; Tr. (Trial), pp. 19–20.] The ACC provided Plaintiffs a copy of the Architectural Guidelines. [R. pp. 46, 131; Tr. (Trial), pp. 19–20.] The Architectural Guidelines provided no standard for fences, but stated that "material and design of fencing will

be at the approval of the [ACC]." [R. p. 46.] The Declaration itself provided limited guidance, stating that the ACC "shall regulate" improvements "to preserve and enhance property values and to maintain a harmonious relationship among all structures and the natural vegetation and topography" by attempting "to minimize intrusions on the view and the privacy of other owners." [R. pp. 63–64.]

In a letter dated 30 October 2009, the HOA notified Plaintiffs that the ACC "voted to disapprove the fence." [R. p. 134.] The decision allegedly was based on a contention that "the materials used, color and height of the fence were considered inappropriate as they do not preserve and enhance property values and maintain a harmonious relationship with the homes in the subdivision." [Id.] Plaintiffs contacted the HOA to appeal the ACC's decision to the Board. [Tr. (Trial), pp. 26-27.]

Plaintiffs' appeal occurred at a 12 November 2009 Board meeting. [Tr. (Trial), p. 28; R. p. 91.] Plaintiffs tried to present evidence to the Board regarding both their fence and other similar fences in the neighborhood, but this evidence was rejected. [Tr. (Trial), pp. 28–30; R. p. 91.] The Board provided its decision in a 13 November 2009 letter stating that the Board had denied the appeal and was "sustain[ing]" the ACC's decision to disapprove the fence. [R. p. 91.] However, in the letter the Board did not provide Plaintiffs with any specific

reasons for denial of their appeal. [See id.] Fines of $50.00 per day began to accrue, and the HOA currently contends that Plaintiffs owe over $30,000.00 in fines.

Plaintiffs repeatedly requested a copy of the minutes of the ACC meeting wherein their request for approval of the fence was denied, as well as a copy of the minutes of the Board meeting denying their appeal. [Tr. (Trial), pp. 68–74.] Plaintiffs never received minutes from the ACC meeting, and Plaintiffs only received a few short notes associated with their appeal. [Tr. (Trial), p. 71; R. pp. 123–76.]

Plaintiffs additionally requested that the HOA provide them with minutes of any other meetings of the ACC or Board in which the issues of approval or denial of any similar fence were considered. [Tr. (Trial), pp. 18–19.] However, the HOA does not retain official minutes associated with ACC meetings, and it was able to provide records of only five fence approvals or disapprovals. [Id.; Tr. (Trial), pp. 71, 102-03; R. pp. 123–76.]

Frustrated with what they viewed as unfair treatment, the lack of records, and no objective standard for compliance that they were asked to meet, Plaintiffs filed suit against the HOA. [R. p. 4.]

## STANDARD OF REVIEW

On an appeal from an entry of summary judgment, the standard of review is de novo. Finova Capital Corp. v. Beach Pharmacy II, Ltd., 175 N.C. App. 184, 187, 623 S.E.2d 289, 291 (2005). Summary judgment is proper when there is no genuine issue of material fact such that a party is entitled to judgment as a matter of law. Id. The evidence is considered in the light most favorable to the non-movant. Id.

On appeal from the judgment of a bench trial, the standard of review is "whether competent evidence exists to support [the trial court's] findings of fact and whether the conclusions reached were proper in light of the findings." Lewis v. Edwards, 159 N.C. App. 384, 388, 583 S.E.2d 387, 390 (2003). The appellate court reviews de novo whether the "conclusions of law are supported by [the trial court's] findings of fact." D.W.H. Painting Co., Inc. v. D.W. Ward Constr. Co., Inc., 174 N.C. App. 327, 333, 620 S.E.2d 887, 891 (2005).

## ARGUMENT

### I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT CONCERNING WHETHER A QUORUM EXISTED AT THE HOA'S ANNUAL MEETINGS; PLAINTIFFS PROVIDED EVIDENCE DISPUTING THE EXISTENCE OF A QUORUM, AND THE HOA HAD NO RECORDS SUPPORTING ITS POSITION.

Article IV, Section 2, of the Bylaws provides that members of the HOA's Board shall be elected at the HOA's annual membership meeting. [R. pp. 96–97.] In order to hold such a meeting, however, a quorum must be present:

> Presence at the meeting of members, in person or by proxy, at the beginning of any meeting of members constituting fifty-one (51%) percent of the total votes of the association shall constitute a quorum ....

[R. pp. 98–99.] If a quorum is not present, the members must adjourn the meeting. See also N.C. Gen. Stat. § 55A-7-22. The Nonprofit Corporation Act also imposes a quorum requirement. Id.; N.C. Gen. Stat. § 55A-7-25. Therefore, the HOA must have a quorum at its membership meetings to validly elect the Board.

Specific recordkeeping requirements apply to the HOA. Article XI of the Bylaws states that "[t]he [Board] or the manager shall keep detailed records of actions of the Board and the manager, [and] minutes of the meetings of the Association ...." [R. p. 120.] The Nonprofit Corporation Act provides that "[a] corporation shall keep as permanent records minutes of all meetings of its members and board of directors." N.C. Gen. Stat. § 55A-16-01. Members have

the right to inspect such records, which allows them to hold the organization accountable. See N.C. Gen. Stat. § 55A-16-02. The Planned Community Act similarly requires that "[a]ll financial and other records, *including records of meetings of the association and executive board*, shall be made reasonably available for examination by any lot owner and the lot owner's authorized agents." N.C. Gen. Stat. § 47F-3-118 (emphasis added).

In this case, the HOA did not keep official minutes of annual membership meetings. There are only short agendas for these meetings, along with a few handwritten notes. [R. pp. 123–76.] The HOA has no certification that a quorum was present at any relevant membership meeting, and no officer of the HOA would testify that a quorum existed at the 2008 and 2009 meetings. [Tr. (Motions), p. 12; R. pp. 123–76; Depo. of Randy Rosebro, p. 3; Depo. of Charlie Denmead, p. 11.] Further, the HOA did not keep actual Board meeting minutes, or any minutes of ACC meetings. [R. pp. 76, 123–76; Depo. of Randy Rosebro, p. 6.] The HOA failed to follow its corporate obligations under North Carolina law and its governing documents.

In their Complaint, Plaintiffs alleged that "no valid meeting of the members of the [HOA] was held in 2008, 2009, or 2010 and therefore no directors were validly elected and no [ACC] was validly appointed." [R. pp. 6–7.] Plaintiffs

submitted affidavits stating that they had determined through discovery that no quorum was present at the 2008, 2009, or 2010 annual meetings. [R. pp. 77, 85.] Pohlman attended both the 2008 and 2009 annual meetings. [E.g., Tr. (Motions), p. 37.]

As stated in the Complaint, the result of no quorum existing at the annual meetings is that the Board candidates at these meetings were not validly elected. By not being validly elected, the Board that allegedly disapproved the fence and imposed fines on Plaintiffs had no authority to act. Because the membership votes on the *entire* Board at each of these meetings [R. pp. 63, 102], none of the actions taken by the Board against Plaintiffs were valid and enforceable. The ACC itself, having been appointed by an invalid Board, had no authority to disapprove the fence. The nonexistence of a quorum at the annual meetings is a central issue, capable of deciding the entire case in Plaintiffs' favor.

The HOA presented no evidence that a quorum existed at the annual meetings. In response to Plaintiffs' discovery requests on this issue, the HOA did not provide formal minutes for any relevant annual meetings. [R. pp. 123–76.] The records that the HOA did provide contained no reference to the number of members present or if a quorum ever was determined. [See id.] The deposition evidence is also telling. The two Board members who were deposed (the president

and secretary) stated that they did not remember whether a quorum existed at the annual meetings and that they did not know if anyone actually counted to see if a quorum was present. [Depo. of Charlie Denmead, p. 11; Depo. of Randy Rosebro, pp. 3–4; Tr. (Motions), p. 12.]

Plaintiffs raised the issue of a quorum in their Complaint, and they presented affidavit evidence suggesting that a quorum did not exist at the annual meetings. All evidence before the Trial Court indicated that the HOA could not certify that a quorum was present. While the HOA questioned the persuasiveness of Plaintiffs' evidence, the purpose of summary judgment is not to resolve disputed issues of fact or to test the sufficiency of the evidence. Mitchell v. Mitchell, 12 N.C. App. 54, 59, 182 S.E.2d 627, 631 (1971).

Further, the HOA should not be able to hide behind its abysmal recordkeeping. The HOA violated its Bylaws and North Carolina law by failing to keep proper records. [E.g., R. p. 120]; N.C. Gen. Stat. § 55A-16-01; N.C. Gen. Stat. § 47F-3-118. The HOA produced no evidence regarding membership attendance at its annual meetings, including if a quorum existed. The testimonial evidence from the HOA officers suggests that no one checked to see if a quorum was present. The HOA wants to bypass its failures by responding that Plaintiffs had the burden of proof, but this is contrary to the summary judgment standard of

viewing evidence in the light most favorable to the non-movant. Plaintiffs cannot be expected to present additional evidence on this point when the lack of evidence demonstrates the HOA's failures.

Beside the fact that Plaintiffs presented evidence related to the quorum issue, the HOA's inability to produce records should have created a presumption of invalidity. General corporate law principles support the proposition that an organization's actions are invalid when it fails to follow statutorily mandated recordkeeping requirements. See 18A Am. Jur. 2d Corporations § 792. As stated by the Oklahoma Supreme Court:

> In 14 C.J. 920, par. 1435, we find this language: "The minutes of a stockholders' meeting are the best evidence of its proceedings, hence the keeping of complete minutes of all proceedings of such meetings is the better practice. However, *unless required by statute or charter* the keeping of minutes is not essential to the validity of the acts of the meeting, and such acts may be proved by parol when it appears that no minutes were kept, or that minutes which were made have been lost."
>
> The rule announced in Corpus Juris seems to prevail in states where the statute does not require minutes to be kept, *but the contrary rule prevails where minutes are required to be kept*. [citing Iowa, Massachusetts, and Oklahoma case law].

Kirk Oil Co. v. Bristow, 7 P.2d 682 (Okla. 1932) (emphasis added).

Plaintiffs acknowledge that North Carolina authority recognizes that the failure to keep minutes "is not necessarily fatal to the action taken" because parol

evidence can supplement incomplete minutes. Robinson on North Carolina Corporation Law § 810 (7th ed. 2011); see also S&W Realty & Bonded Commercial Agency, Inc. v. Duckworth & Shelton, Inc., 274 N.C. 243, 252, 162 S.E.2d 486, 492 (1968). However, the HOA's omissions of not having minutes to establish a quorum were not supplemented or explained in any way. To the contrary, the officers of the HOA acknowledged that they could not determine whether a quorum was present. Similarly, the HOA lacked ACC minutes, and there were omissions in the HOA's incomplete Board meeting minutes. Even if the HOA had attempted to supplement these omissions through parol evidence, the parol evidence would have created issues of fact to be resolved by a fact-finder. Cf. Green River Mfg. Co. v. Bell, 193 N.C. 367, 372, 137 S.E. 132, 135 (1927) (explaining how "it was a question for the jury as to whether or not the conveyances were properly authorized by the corporation" when parol evidence was needed to explain omissions in minutes).

To escape its quorum problems, the HOA tries to argue that, even if no quorum existed in 2008 or 2009, the actions of the Board in denying the fence application and imposing fines still would have been effective based on the three Board members (out of six) allegedly elected at the 2006 annual meeting remaining on the Board. [Tr. (Motions), pp. 13–17.] This argument is incorrect.

Pursuant to N.C. Gen. Stat. § 55A-8-05(d), directors continue to serve "until the director's successor is elected, designated, or appointed and qualifies." The three individuals on the six-member Board who had not properly been replaced in 2007, 2008, or 2009 still would have been Board members, and their absence prevented a quorum (majority of directors) from being present at the Board meetings. The Bylaws require "[a] majority of the number of Directors fixed by [the Bylaws]" to constitute a quorum. [R. p. 106.] A quorum therefore required four directors (a majority of six), not three. [R. pp. 101–02.] Therefore, even under the HOA's position, the vote was inadequate, as four directors were needed for a quorum at the relevant meetings. Even if a quorum had been present, only two of the "2006 Directors" voted at the Board meeting (Denmead abstained [Tr. (Motions), pp. 57-58]), and these two votes do not constitute a majority vote to impose fines or disapprove the fence.

In sum, the Trial Court erred in granting summary judgment by concluding that there "was no genuine issue of material fact" regarding the presence of a quorum. Plaintiffs raised genuine issues of material fact, and the HOA cannot hide behind its failure to comply with its recordkeeping duties.

## II. THE TRIAL COURT ERRED IN ITS ORDER ON SUMMARY JUDGMENT CONCERNING THE HOA'S USE OF BALLOTS, IN THAT THE HOA CONDUCTED ELECTIONS OF DIRECTORS IN VIOLATION OF NORTH CAROLINA LAW BY COMBINING VOTING AT A MEETING WITH VOTING BY MAILED, WRITTEN BALLOTS.

The Nonprofit Corporation Act sets out various requirements pertaining to voting procedures used by the HOA. Under N.C. Gen. Stat. § 55A-7-24, the members may vote in person or by proxy. Proxy voting allows a member who chooses not to attend the meeting to assign his vote to another person. See id. Both the attendees in person and by proxy are counted in determining if a quorum is present and if an affirmative vote is reached. [See id.; R. pp. 98–99.]

Pursuant to N.C. Gen. Stat. § 55A-7-08, the membership alternatively could vote by written ballot. Voting by written ballot is wholly distinct and separate from voting in a meeting. The plain language of § 55A-7-08 establishes that voting by written ballot can occur only when there is no actual membership meeting:

> Unless prohibited or limited by the articles of incorporation or bylaws and without regard to the requirements of G.S. 55A-7-04, any action that may be taken at any annual, regular, or special meeting of members may be taken *without a meeting* if the corporation delivers a written ballot to every member entitled to vote on the matter.

§ 55A-7-08(a) (emphasis added).

If the membership votes by written ballot in lieu of a meeting, the specific requirements of § 55A-7-08 must be met. For instance, any written ballot must "set forth each proposed action" and include the time by which the ballot needs to be submitted. N.C. Gen. Stat. § 55A-7-08(b), (d). Quorum requirements apply to written ballot voting just as they apply to in-person and proxy voting. N.C. Gen. Stat. § 55A-7-08(c).

At the summary judgment hearing, Plaintiffs presented evidence that the voting procedures utilized by the HOA were invalid. In particular, Denmead's deposition suggests that the HOA mixed the use of written ballots with normal voting procedures in a meeting:

> A. We consider this a proxy.
> Q. You consider a mail-in ballot a proxy?
> A. Yes.
> ...
> A. ... It's not even a proxy, essentially. It like is an absentee ballot.
> Q. That's what I'm asking, you are using the absentee ballots to take the place of proxies or being in person?
> A. Yes.
> Q. And the directors that were elected for each of those years, the same method was used I take it?
> A. Yes.

[Depo. of Charlie Denmead, p. 14; see also Depo. of Randy Rosebro, p. 2.] Plaintiffs also submitted copies of the ballots used at each of the membership meetings. [Tr. (Motions), p. 19; Depo. of Charlie Denmead, Exs. 3–5.] These

ballots contain two possible times for submission: one before the annual meeting and one at the meeting [Depo. of Charlie Denmead, Exs. 3–5], revealing that the HOA improperly mixed voting outside a meeting by written ballot with the standard process of voting at a meeting. The agendas for the relevant annual meetings further confirm that actual voting took place during the meetings. [R. pp. 150, 156–57.]

Combining voting at a meeting with voting by mailed, written ballots is not allowed under North Carolina law. See N.C. Gen. Stat. § 55A-7-08. Therefore, the voting process for directors at the 2008 and 2009 annual meetings was invalid. If the directors were not validly elected, the purported directors had no authority to appoint the ACC. [See R. p. 63.] If the directors were not validly elected, the purported directors also had no authority to sustain the ACC's decision on the fence or to impose a fine. Any action by the Board or ACC as to the fence and fines was null and void.

Genuine issues of material fact existed regarding whether the HOA conducted elections for directors in violation of North Carolina law, and whether the actions of the Board consequently should be declared null and void. The Trial Court erred in granting summary judgment on this issue.

## III. THE TRIAL COURT IMPROPERLY MADE FINDINGS OF FACT IN ITS ORDER ON SUMMARY JUDGMENT, AND SEVERAL SUCH FINDINGS WERE RULINGS ON DISPUTED ISSUES OF MATERIAL FACT.

Findings of fact generally are inappropriate in an Order on Summary Judgment. See, e.g., Capps v. City of Raleigh, 35 N.C. App. 290, 292, 241 S.E.2d 527, 528 (1978) ("[I]t is not a part of the function of the [trial] court on a motion for summary judgment to make findings of fact and conclusions of law."). "[F]inding the facts in a judgment entered on a motion for summary judgment presupposes that the facts are in dispute." Id.

In this case, the Trial Court improperly made findings of fact. [R. pp. 177-79.] Several of these findings were rulings on disputed issues of material fact:

*Finding of Fact No. 1.* The Trial Court concluded that the fence at issue was a "commercial grade fence." Plaintiffs presented evidence contesting this point, such as a picture of the fence and affidavits and deposition testimony describing the fence. [R. pp. 74–78, 83, 86; Depo. of Charlie Denmead, pp. 16–19.] The particular characteristics of the fence go directly to the issue (discussed in Part V, infra) of whether the Board's decision to reject the fence and impose fines was unreasonable and arbitrary.

*Finding of Fact No. 6.* This detailed Finding assumes that the Board's actions were proper in "[holding] a duly called meeting," "provid[ing] proper notice," "consider[ing] . . . the appeal," and "vot[ing] unanimously to deny the appeal." [R. p. 178.] Plaintiffs presented evidence contesting several of these points. They had evidence challenging the validity of any of the Board's actions, based on the nonexistence of a quorum and the improper mixing of ballots and proxies. Further, Plaintiffs' affidavits directly contradict the statement that "[t]he Board . . . considered all of the evidence presented and gave consideration to the appeal" made in Finding of Fact No. 6. [R. p. 178.] Plaintiffs' affidavits stated:

> At the appeal meeting before the Board of Directors on November 12, 2009 [Pohlman] attempted to present pictures of [the] trash enclosure fence as well as other similar trash enclosure fences in the neighborhood and to offer other evidence to the Board of Directors, including copies of the Declaration of Covenants and copies of the Bylaws for Magen's Bay. The Board of Directors refused to make any of the evidence that was offered by [Pohlman] a part of the record of that meeting.

[R. pp. 76, 84.] The procedures employed by the Board went directly to Plaintiffs' contention that the HOA failed to follow corporate formalities and statutory requirements, and that the HOA's acts therefore were null and void. These contested issues of fact ought not to have been decided by summary judgment.

*Finding of Fact No. 11.* The Trial Court concluded that Plaintiffs "did not provide evidence to support their contention that no quorum was present at the 2008 and 2009 annual meeting of the [HOA]." As discussed in Part I, supra, Plaintiffs did, in fact, present evidence suggesting that no quorum existed. This evidence included their affidavits, Denmead's deposition, Rosebro's deposition, and the HOA's corporate documents. The lack of a quorum would have rendered invalid the actions of the Board and the ACC.

*Findings of Fact No. 14.* The Trial Court concluded that Plaintiffs "failed to provide evidence that the ballots apparently used were improper or that they ultimately affected the outcome of the voting at any annual meeting." As discussed in Part II, supra, Plaintiffs presented evidence challenging the validity of the voting procedures. In particular, they provided Denmead's deposition, Rosebro's deposition, copies of the ballots used for annual meetings, and the HOA's corporate documents. This issue could have rendered invalid all actions taken by the ACC and the Board against Plaintiffs. Therefore, this was a disputed, genuine issue of material fact.

It was improper for the Trial Court to make these findings of fact. The evidence presented does not support them, and they involve disputed factual issues.

## IV. THE TRIAL COURT ERRED IN ITS JUDGMENT UPHOLDING THE PURPORTED DECISIONS OF THE HOA REJECTING THE FENCE AND IMPOSING FINES, WHEN THE BOARD OF DIRECTORS FAILED TO FOLLOW CORPORATE FORMALITIES AND FAILED TO FOLLOW STATUTORY REQUIREMENTS FOR THE IMPOSITION OF FINES.

In addition to the errors in the Trial Court's Order on Summary Judgment, the Judgment from the bench trial also was in error.

A. The HOA is Estopped from Imposing Fines.

Article XI of the Bylaws, § 55A-16-01 of the Nonprofit Corporation Act, and § 47F-3-118 of the Planned Community Act require the HOA to keep detailed records, including minutes of membership meetings and Board meetings. As described supra, the HOA repeatedly failed to comply with these recordkeeping requirements, as well as requirements for conducting proper elections of the Board. [Tr. (Trial ), pp. 11-12, 71; R. pp. 123–76.] Neither Conclusion of Law No. 21 ("The Plaintiffs failed to show that the Defendant did not follow the proper procedure and law when enforcing the covenants.") nor Conclusion of Law No. 22 ("The Plaintiffs failed to show that the Defendant did not follow the provisions of the North Carolina Planned Community Act.") are proper, as they are not supported by the findings of fact or evidence.

"The doctrine of estoppel is a means of preventing a party from asserting a defense which is inconsistent with his prior conduct." Purser v. Heatherlin

Props., 137 N.C. App. 332, 337, 527 S.E.2d 689, 692 (2000). Based on the HOA's failure to follow the corporate duties imposed on it by its own governing documents and applicable law, the HOA is estopped, by its own conduct, from taking the corporate action of imposing fines on Plaintiffs. [Tr. (Trial), pp. 355-56.]

B. The HOA Did Not Follow Statutory Requirements for the Imposition of Fines.

Section 47F-3-107.1 of the North Carolina General Statutes provides requirements for homeowners associations regarding the imposition of fines:

> [A] hearing shall be held before the executive board or an adjudicatory panel appointed by the executive board to determine if any lot owner should be fined .... Any adjudicatory panel appointed by the executive board shall be composed of members of the association who are not officers of the association or members of the executive board. The lot owner charged shall be given notice of the charge, opportunity to be heard and to present evidence, and notice of the decision. If it is decided that a fine should be imposed, a fine not to exceed one hundred dollars ($100.00) may be imposed for the violation and without further hearing ....

N.C. Gen. Stat. § 47F-3-107.1. The ACC that imposed the fines on Plaintiffs did not have the authority to act as an adjudicatory panel or to impose any fine pursuant to § 47F-3-107.1. Section 6 of the HOA's Declaration simply states that the ACC may approve or disapprove building plans and improvements, and that

any appeal will be heard by the Board. [R. pp. 62–65.] The Bylaws reserve the authority to impose fines to the Board. [R. p. 119.] Further, Denmead (HOA president) served on the ACC. [Tr. (Trial), p. 176.] Having a Board member or officer serve on an adjudicatory panel is forbidden under § 47F-3-107.1. Because the ACC did not have any adjudicatory authority, the Board "sustained" an invalid fine imposed by the ACC, such that the fines were void ab initio.

The HOA additionally violated § 47F-3-107.1 by failing to provide Plaintiffs with a hearing on fines prior to attempting to impose the fine. An HOA Board meeting was held on appeal of the ACC's decision regarding the fence, but there was not a hearing on whether the Board should actually impose a fine (as opposed to "sustaining" a fine from a committee without authority to fine). The HOA did not conduct a hearing before imposing a fine. Conclusion of Law No. 23 ("The fine of $50.00 per day is consistent with the North Carolina Planned Community Act and began to apply on November 18, 2009") was improper.

The timeline of Plaintiffs' appeal from the ACC decision reveals that the Board did not provide proper consideration of the fines. In a letter dated 22 October 2009 ("October 22 Letter"), the HOA first notified Plaintiffs about their fence. [R. p. 90.] The HOA stated that failure to remove the fence would result in "a daily fine of fifty dollars until the fence is removed." [Id.] Plaintiffs

subsequently sought approval from the ACC. In a letter dated 30 October 2009 ("October 30 Letter"), the HOA notified Plaintiffs that the ACC "voted to disapprove the fence." [R. p. 134.] The October 30 Letter further stated that Plaintiffs had seven days to remove the fence before the HOA would impose a daily fine. [Id.] Neither the October 22 Letter nor the October 30 Letter provided information regarding a hearing for the imposition of fines, in violation of the Planned Community Act.

Plaintiffs independently contacted the Board and secured an appeal of the ACC's decision. [Tr. (Trial), pp. 26–27.] This was not a hearing noticed by the Board. At the hearing, the Board focused solely on the issue of whether the fence violated the Declaration and Architectural Guidelines. No analysis of the appropriateness of fines occurred while Pohlman was present during the hearing. [Tr. (Trial), pp. 31–32; 182–85.] Trial testimony indicated that any purported decision regarding imposition of fines actually would have been made after the Board meeting without any subsequent hearing. [Id.]

The Board provided their decision in a 13 November 2009 letter that stated that the Board had affirmed "the [ACC]'s decision to disapprove the fence." [R. p. 91.] The letter referenced that fines could begin accumulating, but it did not indicate that the issue of fines was ever considered at any hearing or Board

meeting. [Id.] The Board failed to provide minutes of any hearing or Board meeting on fines, and no mention of the fines appears in the few handwritten notes the Board did provide. [R. p. 141.]

Plaintiffs' appeal hearing focused solely on disapproval of the fence based on the Architectural Guidelines. Under North Carolina law, "[t]he architectural committee's approval of a homeowner's proposal under the [covenants] and the imposition of fines under the Planned Community Act, as revised, are two distinct procedures." Bodine v. Harris Village Prop. Owners Ass'n, Inc., 699 S.E.2d 129, 135–36 (N.C. Ct. App. 2010); see also Reidy v. Whitehart Ass'n, Inc., 185 N.C. App. 76, 78–79, 648 S.E.2d 265, 267 (2007) (where the HOA held a hearing focusing specifically on assessing fines). The Board did not provide any independent consideration for the imposition of fines, but simply assumed that fines would be appropriate. Consequently, the HOA did not comply with § 47F-3-107.1. The Trial Court's Judgment upholding imposition of these fines was improper.

## V. THE DENIAL OF PLAINTIFFS' APPLICATION FOR APPROVAL OF THE FENCE WAS AN ARBITRARY AND CAPRICIOUS DECISION, AND THE TRIAL COURT CONSEQUENTLY ERRED IN ITS JUDGMENT UPHOLDING THE PURPORTED DECISIONS BY THE HOA THAT REJECTED THE FENCE AND IMPOSED FINES.

Covenants granting broad approval authority for the interpretation of restrictive covenants are enforceable "only if the exercise of the power in a particular case is reasonable and in good faith." Page v. Bald Head Ass'n, 170 N.C. App. 151, 156–57, 611 S.E.2d 463, 467 (2005) (citation omitted). Such a decision cannot be arbitrary or capricious. Smith v. Butler Mountain Estates Prop. Owners Ass'n, Inc., 90 N.C. App. 40, 48, 367 S.E.2d 401, 407 (1988). Specifically, architectural approval decisions "[cannot] be arbitrary, but must be based on some standards, either contained within the covenants themselves, or otherwise clearly established." Page, 170 N.C. App. at 156, 611 S.E.2d at 467. It is possible for an architectural review committee to utilize a standard based on "some general plan or scheme of development." Boiling Spring Lakes v. Coastal Servs. Corp., 27 N.C. App. 191, 195, 218 S.E.2d 476, 478 (1975).

In its Conclusions of Law, the Trial Court held that Plaintiffs "failed to show that the [HOA] acted arbitrarily or capriciously in enforcing the covenants" and also "failed to show that the [HOA] acted unreasonably or in bad faith in enforcing the covenants." [R. pp. 202–03.] The Trial Court apparently based these

Conclusions of Law on Finding of Fact No. 12, which stated that "[b]ased on the evidence presented, there does not exist a common scheme or plan within Magens Bay Subdivision of fences similar to the one erected by the Plaintiffs." [R. p. 202.]

First, Finding of Fact No. 12 is not supported by competent evidence. Plaintiffs provided over 40 pictures of other fences within the Magen's Bay community. [Plaintiff's Exs. 11A, 14–54.] Several fences are similar to Plaintiffs' fence, and the Vrablic fence basically was identical. [Tr. (Trial), pp. 25, 265–67; Plaintiffs' Ex. 11A.] The HOA did not provide competent evidence distinguishing Plaintiffs' fence from the Vrablic fence or other similar fences. Testimony from Board members revealed that the fences could not be distinguished based on any objective standard:

> Q. They both appear to be vinyl, is that—are they both vinyl fences?
> A. They appear to be.
> Q. Okay. They appear to be about the same height?
> A. Yes.
> Q. And they appear to be the same color?
> A. This one, the Vrablic fence, matches the house, whereas this one is—does not.
> Q. The Pohlman fence doesn't match the house but it matches the trim on the house; is that right?
> A. Yeah.
> Q. But the fences themselves are both white, are they not?
> A. They are.

[Tr. (Trial), p. 191.]

> A. … And again, let me point out to you that this neighborhood has existed since '94. I became involved in it in 2004. And I can't help what was approved prior to that.
> …
> Q. And what you have would include the 40 pictures that have been introduced?
> A. Well, I didn't approve those. I can't speak to those.

[Tr. (Trial), pp. 265–66.]

Plaintiffs determined that over 35 lots in Magen's Bay contain fences of various sizes, materials, colors, and heights. [Tr. (Trial), pp. 33–34, 102–03; see generally Plaintiffs' Exs.] However, the HOA was able to produce only five records of approval or disapproval of any of these fences. [Tr. (Trial), pp. 71, 102–03, 250–51.] There also are several fences in Magen's Bay that appear to delineate property lines, even though the Architectural Guidelines expressly forbid these fences. [Tr. (Trial), pp. 34, 127–28, 142.] The evidence therefore showed that denial of Plaintiffs' fence was an unreasonable and arbitrary decision. Indeed, the HOA's approval of fences in the community (or total lack of consideration thereof) has been in a wholly subjective, arbitrary, and capricious manner.

Additionally, Finding of Fact No. 12 wrongfully faults Plaintiffs for not establishing that the Magen's Bay community had a common scheme or plan consisting of fences similar to Plaintiff's fence. [R. p. 202.] The Trial Court incorrectly transposed which party had the responsibility of identifying and using a

common-scheme-of-development standard during the architectural review process. Under North Carolina law, the ACC should have utilized such a standard against which to judge the appropriateness of Plaintiffs' fence. See Page, 170 N.C. App. at 156, 611 S.E.2d at 467; Boiling Spring Lakes, 27 N.C. App. at 195, 218 S.E.2d at 478. The Declarations contain no standards for determining what types of fences are proper, and the Architectural Guidelines state only that "material and design of fencing will be at the approval of the ACC." [R. p. 46.] Thus, without the identification of a common scheme of development, there would be no standard, and the actions of the ACC would be arbitrary and improper. See Smith, 90 N.C. App. at 46, 367 S.E.2d at 406.

The Trial Court's Judgment does not identify any actual standards used by the ACC in deciding to reject Plaintiffs' fence. Nor could it. The HOA presented no evidence that any standards existed. For example, Rocky Allen, a Board member at the time the Board rejected the fence, testified as follows:

> Q. Okay. Now, as a board member now, are you aware of any specific requirements regarding fences; that is, are there any standards as to size of fence or length of fence or height of fence or materials to be used?
>
> A. It's specific materials, no. It's more aesthetics, appealing to the type of style of the house. That's why you see so many different types of fences within Magen's Bay. Some wood, some vinyl. It's—depends on the house.
>
> Q. So would you—would you—in your opinion, is

> there a general development scheme for fences in Magen's Bay?
>
> A. There's not a cookie-cutter scheme, by any means, nor would we want one. It's like I say, it depends on the style of the house and—you know, it's all in—*'beauty in the eye of the beholder' kind of thing*. I mean, it's –
>
> Q. So would you say that when you receive an application like in this case, that it's a subjective decision as to whether you think it looks good or not?
>
> A. I think everything is subjective.

[Tr. (Trial), pp. 174–75.] Denmead likewise was unable to articulate a standard, outside of his subjective opinion:

> A. ... [M]ost if not all of the other fences except the one that we keep referring to are architecturally, in our opinion, appealing or they—they enhance the property. They certainly don't detract from the property. This particular one is a molded piece of vinyl. It is just a prefab panel. It just does not, to me, fit the common scheme. It just does not.

[Tr. (Trial), p. 280.] Again, the case law requires the HOA to have "clearly established" standards used in the exercise of its architectural approval authority. Boiling Spring Lakes, 27 N.C. App. at 195, 218 S.E.2d at 478; Smith, 90 N.C. App. at 46, 367 S.E.2d at 406; see also Webster's Real Estate Law in North Carolina § 18.06. The HOA was unable to articulate any standard, let alone a clearly established standard. Its decision to disapprove the fence was unreasonable and arbitrary.

During trial, the HOA attempted to argue that the case of Raintree Homeowners Ass'n, Inc. v. Bleimann, 342 N.C. 159, 463 S.E.2d 72 (1995), somehow altered the above analysis. However, the Raintree Court expressly cited Boiling Spring Lakes and Smith. Id. at 163, 463 S.E.2d at 74. North Carolina legal authority continues to recognize the requirements of identifiable standards. See, e.g., Webster's, supra, § 18.06.

The fact that key members of the HOA had personal concerns with Plaintiffs—as evidenced by the disagreement over the tenant's alleged catering business [Tr. (Trial), p. 231] and the Board's conduct at the appeal hearing [e.g., Tr. (Trial), pp. 28–31]—suggests that the HOA did not make its decision based on reasonable application of objective standards. These facts confirm that denial of Plaintiffs' application for approval of the fence was unreasonable.

Finally, throughout the summary judgment hearing and bench trial, the HOA argued that the business judgment rule insulated its decisions. The HOA misapplies the law. The cases cited above provide the appropriate standard for assessing whether an HOA validly enforced an architectural standard, and this test is well developed in the case law. Additionally, the business judgment rule requires that the organization first "exercise reasonable care and business judgment." State ex rel. Long v. ILA Corp., 132 N.C. App. 587, 602, 513 S.E.2d

812, 822 (1999). The HOA has not exercised reasonable care and business judgment. It kept no real minutes showing consideration of the fence, its votes, or its deliberations. [Tr. (Trial), p. 71; R. pp. 123–76.] Testimony revealed that the Board members' consideration of whether to "sustain" the fine actually occurred after the Board meeting. [Tr. (Trial), pp. 181–85.] At the very least, there are no corporate documents demonstrating that the HOA acted with a rational basis. The HOA is not entitled to the benefit of the business judgment rule.

In sum, the Trial Court improperly granted Judgment for the HOA, as the HOA's decision to reject Plaintiffs' application for approval of the fence was unreasonable, arbitrary, and capricious. Such decisions that are devoid of objective standards are improper and unenforceable.

## VI. DENIAL OF PLAINTIFFS' APPLICATION FOR APPROVAL OF THE FENCE WAS NOT BASED ON ANY OBJECTIVE OR MEASURABLE STANDARD FOR APPROVAL OR COMPLIANCE; THE PURPORTED STANDARDS ARE VOID FOR VAGUENESS.

The ACC's authority over fence construction is based on the architectural covenants outlined in Section 6 of the Declaration. [R. pp. 62–65.] Like any other contract, a covenant must be sufficiently definite for the courts to enforce it. See Snug Harbor Prop. Owners Ass'n v. Curran, 55 N.C. App. 199, 203, 284 S.E.2d 752, 755 (1981). Covenants are void for vagueness if there is no "clear and unambiguous" standard allowing the court to "objectively determine" if particular

conduct conforms to the covenant. See Beech Mountain Prop. Owners' Ass'n v. Seifart, 48 N.C. App. 286, 295, 269 S.E.2d 178, 182 (1980).

There are numerous examples of North Carolina courts concluding that covenants were not sufficiently definite to be enforceable. In Lake Gaston Estates Prop. Owners Ass'n, Inc. v. Cnty. of Warren, 186 N.C. App. 606, 652 S.E.2d 671 (2007), this Court held that a reference to lots being "Reserved Commercial" was void for vagueness where there was no definition or explanation for the term. Id. at 612, 652 S.E.2d at 674–75. The case of Allen v. Sea Gate Ass'n, 119 N.C. App. 761, 460 S.E.2d 197 (1995), held that a covenant requiring an assessment "for the maintenance, upkeep and operations of the various areas and facilities by Sea Gate Association, Inc." was void since there was no standard for how the Association would choose property to maintain. Id. at 764–65, 460 S.E.2d at 199-200. Additionally, this Court held in Harrison v. Lands End of Emerald Isle Ass'n, Inc., 2009 N.C. App. LEXIS 2675 (N.C. Ct. App. April 6, 2009) (unpublished), that a covenant requiring a lot owner to maintain his lot in a "clean and sightly" condition and in a "compatible aesthetic appearance with other well-maintained lots" was void for vagueness. Id. The Court concluded that such a covenant:

> [I]s subject to individual subjective interpretation based on personal preference. As there is no "ascertainable standard"

> contained in the covenant by which this Court can "objectively determine" whether the [homeowner's] conduct conforms with the covenant, [and therefore] enforcement of the covenant would be arbitrary.

Id. (citing Beech Mountain, 48 N.C. App. at 295, 269 S.E.2d at 182 (1980)).

North Carolina courts have recognized the ability of homeowners associations to delegate to architectural review committees the right to approve or disapprove building plans. The review process, however, must be based on clear standards. Magen's Bay attempted to establish standards by adopting its Architectural Guidelines. [R. p. 46.] The purported standard for fencing only states as follows: "Fencing may be used. However, material and design of fencing will be at the approval of the [ACC]. Fences which run the entire length of the property line and are intended as property delineators are not permitted." [Id.]

The Architectural Guidelines fail to provide any objective measure for compliance. Section 6 of the Declaration provides the only guidance with the amorphous standard for the ACC to regulate property in a way to "preserve and enhance property values and ... maintain a harmonious relationship" with the rest of the community based on its "material and design." Like the covenants in Lake Gaston, Allen, and Harrison, the applicable guidelines in this case provide no "clear and unambiguous" standard for a court to "objectively determine" if conduct properly conforms. The testimony from an HOA Board member referencing the

"beauty in the eye of the beholder" standard reinforces this point. [Tr. (Trial), pp. 174–75.]

Plaintiffs had no meaningful guidance regarding the type of fencing that was allowed in the Magen's Bay community. The testimony of Board members provided only generalizations as to what types of fencing would be acceptable and not acceptable.

> Q. So would you say that when you receive an application like in this case, that it's a subjective decision as to whether you think it looks good or not?
>
> A. I think everything is subjective.

[Tr. (Trial), pp. 174–75.]

> A. No. It means that there are three of us that are going to examine these proposals and determine if it's in—in compliance—if it supports the overall plan for how we want the neighborhood to look. Again, there's no cookie-cutter solution.
>
> Q. So is it just a case-by-case basis?
>
> A. Well, we're objective, but yeah. I mean, we know—any of us—and there's three of us. Any of us know when we look at something, does it complement the neighborhood and the property, or not.

[Tr. (Trial), p. 266.]

> A. … And some of the pictures that I saw the few of, when you're taking a picture of just an enclosure, none of

> them look nice. But from a distance, they blend with the home and they're consistent and have some common scheme with neighboring homes.

[Tr. (Trial), p. 304.]

Precedent establishes that the guidelines applicable to this case are not sufficiently definite to be enforceable. The HOA had no authority to hold Plaintiffs in violation of the covenants, or to fine them for the alleged violation.

## VII. THE JUDGMENT NECESSARILY RELIES ON THE EXISTENCE OF VALID CORPORATE ACTIONS, WHICH ISSUES WERE IMPROPERLY DETERMINED TO EXIST ON SUMMARY JUDGMENT; THE TRIAL COURT CONSEQUENTLY ERRED IN ITS JUDGMENT UPHOLDING THE PURPORTED DECISIONS OF THE HOA THAT REJECTED THE FENCE AND IMPOSED FINES.

Any determinations made by the trial court at the summary judgment stage "shall be deemed established" at trial. See N.C.R. Civ. P. 56(d). The Judgment necessarily assumes that the actions taken by the HOA— both to hold Plaintiffs in violation of the covenants and to fine them—were valid corporate actions. However, the Board could not have taken valid corporate actions if it was not properly elected, either due to the lack of a quorum or to improper voting procedures. The erroneous grant of partial summary judgment on these issues necessarily calls into question the Judgment itself. See Fairfield Harbour Prop.

Owners Ass'n, Inc. v. Midsouth Golf, LLC, 715 S.E.2d 273, 279–80 (N.C. Ct. App. 2011).

Part III, supra, details genuine issues of material fact that the Trial Court incorrectly determined at the summary judgment stage of the proceedings. These issues should have been decided at trial, and an appropriate resolution of these issues necessarily impacts the outcome of the entire civil action. As a result, both the Order on Summary Judgment and the Judgment are in error.

## CONCLUSION

Power corrupts, and absolute power corrupts absolutely. An HOA that keeps no records of its actions, fails to follow corporate procedures required by law, and has Board members who admit to making subjective decisions based on the "eye of the beholder" should not have the power to punish its members through fines. Homeowners wrongfully accruing daily fines have little recourse—give in to an unjust power, allow the fines to pile up against them, or file suit to correct the wrong. But these homeowners who stand up by filing suit are left trying to prove a negative—that the HOA did not take proper actions—and then the homeowners are challenged by this same HOA that failed to fulfill its obligations when it asserts that the lack of information prevents the homeowners from meeting their burden of proof. Meanwhile, as the case proceeds, fines continue to accrue, potentially

burying homeowners in debt before a judicial resolution can be reached. This is untenable.

For the reasons set forth herein, Plaintiffs request that this Court reverse the Trial Court's Order on Summary Judgment and Judgment. Plaintiffs request that this Court remand the case for entry of judgment in favor of Plaintiffs declaring the fence not to be in violation of the Declaration of the HOA and declaring the fines to be invalid. In the alternative, Plaintiffs ask that the Court remand the case for a new trial on all issues.

This the 16th day of April, 2012.

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I hereby certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Plaintiffs-Appellants certifies that the foregoing Plaintiffs-Appellants' Brief, which is prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing PLAINTIFFS-APPELLANTS' BRIEF by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail addressed to the following person at the following address which is the last address known to me:

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This the 16th day of April, 2012.

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**§ 47F-3-107.1. Procedures for fines and suspension of planned community privileges or services.**

Unless a specific procedure for the imposition of fines or suspension of planned community privileges or services is provided for in the declaration, a hearing shall be held before the executive board or an adjudicatory panel appointed by the executive board to determine if any lot owner should be fined or if planned community privileges or services should be suspended pursuant to the powers granted to the association in G.S. 47F-3-102(11) and (12). Any adjudicatory panel appointed by the executive board shall be composed of members of the association who are not officers of the association or members of the executive board. The lot owner charged shall be given notice of the charge, opportunity to be heard and to present evidence, and notice of the decision. If it is decided that a fine should be imposed, a fine not to exceed one hundred dollars ($100.00) may be imposed for the violation and without further hearing, for each day more than five days after the decision that the violation occurs. Such fines shall be assessments secured by liens under G.S. 47F-3-116. If it is decided that a suspension of planned community privileges or services should be imposed, the suspension may be continued without further hearing until the violation or delinquency is cured. The lot owner may appeal the decision of an adjudicatory panel to the full executive board by delivering written notice of appeal to the executive board within 15 days after the date of the decision. The executive board may affirm, vacate, or modify the prior decision of the adjudicatory body. (1997-456, s. 27; 1998-199, s. 1; 2005-422, s. 4.)

**§ 47F-3-118. Association records.**

(a) The association shall keep financial records sufficiently detailed to enable the association to comply with this Chapter. All financial and other records, including records of meetings of the association and executive board, shall be made reasonably available for examination by any lot owner and the lot owner's authorized agents as required in the bylaws and Chapter 55A of the General Statutes. If the bylaws do not specify particular records to be maintained, the association shall keep accurate records of all cash receipts and expenditures and all assets and liabilities. In addition to any specific information that is required by the bylaws to be assembled and reported to the lot owners at specified times, the association shall make an annual income and expense statement and balance sheet available to all lot owners at no charge and within 75 days after the close of the fiscal year to which the information relates. Notwithstanding the bylaws, a more extensive compilation, review, or audit of the association's books and records for the current or immediately preceding fiscal year may be required by a vote of the majority of the executive board or by the affirmative vote of a majority of the lot owners present and voting in person or by proxy at any annual meeting or any special meeting duly called for that purpose.

(b) The association, upon written request, shall furnish to a lot owner or the lot owner's authorized agents a statement setting forth the amount of unpaid assessments and other charges against a lot. The statement shall be furnished within 10 business days after receipt of the request and is binding on the association, the executive board, and every lot owner.

(c) In addition to the limitations of Article 8 of Chapter 55A of the General Statutes, no financial payments, including payments made in the form of goods and services, may be made to any officer or member of the association's executive board or to a business, business associate, or relative of an officer or member of the executive board, except as expressly provided for in the bylaws or in payments for services or expenses paid on behalf of the association which are approved in advance by the executive board. (1998-199, s. 1; 2005-422, s. 7.)

**§ 55A-7-08. Action by written ballot.**

(a) Unless prohibited or limited by the articles of incorporation or bylaws and without regard to the requirements of G.S. 55A-7-04, any action that may be taken at any annual, regular, or special meeting of members may be taken without a meeting if the corporation delivers a written ballot to every member entitled to vote on the matter. Any requirement that any vote of the members be made by written ballot may be satisfied by a ballot submitted by electronic transmission, including electronic mail, provided that such electronic transmission shall either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the member or the member's proxy.

(b) A written ballot shall:

(1) Set forth each proposed action; and

(2) Provide an opportunity to vote for or against each proposed action.

(c) Approval by written ballot pursuant to this section shall be valid only when the number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action, and the number of approvals equals or exceeds the number of votes that would be required to approve the matter at a meeting at which the same total number of votes were cast.

(d) All solicitations for votes by written ballot shall indicate the time by which a ballot shall be received by the corporation in order to be counted.

(e) Except as otherwise provided in the articles of incorporation or bylaws, a written ballot shall not be revoked. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 35; 1993, c. 398, s. 1; 2008-37, s. 5.)

**§ 55A-7-22. Quorum requirements.**

(a) Unless this Chapter, the articles of incorporation, or bylaws provide for a higher or lower quorum, ten percent (10%) of the votes entitled to be cast on a matter shall be represented at a meeting of members to constitute a quorum on that matter. Once a member is represented for any purpose at a meeting, the member is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting unless a new record date is or must be set for that adjourned meeting.

(b) A bylaw amendment to decrease the quorum for any member action may be approved by the members entitled to vote on that action or, unless prohibited by the bylaws, by the board of directors.

(c) A bylaw amendment to increase the quorum required for any member action shall be approved by the members entitled to vote on that action.

(d) Unless one-third or more of the votes entitled to be cast in the election of directors are represented in person or by proxy, the only matters that may be voted upon at an annual or regular meeting of members are those matters that are described in the meeting notice. (1955, c. 1230; 1993, c. 398, s. 1.)

**§ 55A-7-24. Proxies.**

(a) Unless the articles of incorporation or bylaws prohibit or limit proxy voting, a member may vote in person or by proxy. A member may appoint one or more proxies to vote or otherwise act for the member by signing an appointment form, either personally or by the member's attorney-in-fact. Without limiting G.S. 55A-1-70, an appointment in the form of an electronic record that bears the member's electronic signature and that may be directly reproduced in paper form by an automated process shall be deemed a valid appointment form within the meaning of this section. In addition, if and to the extent permitted by the nonprofit corporation, a member may appoint one or more proxies by any kind of telephonic transmission, even if not accompanied by written communication, under circumstances or together with information from which the nonprofit corporation can reasonably assume that the appointment was made or authorized by the member.

(b) An appointment of a proxy is effective when received by the secretary or other officer or agent authorized to tabulate votes. An appointment is valid for 11 months unless a different period is expressly provided in the appointment form.

(c) An appointment of a proxy is revocable by the member unless the appointment form conspicuously states that it is irrevocable and the appointment is coupled with an interest. An appointment made irrevocable under this subsection shall be revocable when the interest with which it is coupled is extinguished. A transferee for value of an interest subject to an irrevocable appointment may revoke the appointment if he did not have actual knowledge of its irrevocability.

(d) The death or incapacity of the member appointing a proxy does not affect the right of the corporation to accept the proxy's authority unless notice of the death or incapacity is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises authority under the appointment.

(e) A revocable appointment of a proxy is revoked by the person appointing the proxy:

(1) Attending any meeting and voting in person; or

(2) Signing and delivering to the secretary or other officer or agent authorized to tabulate proxy votes either a writing stating that the appointment of the proxy is revoked or a subsequent appointment form.

(f) Subject to G.S. 55A-7-27 and to any express limitation on the proxy's authority appearing on the face of the appointment form, a corporation is entitled to accept the proxy's vote or other action as that of the member making the appointment. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 35; 1993, c. 398, s. 1; 1999-139, s. 1; 2008-37, s. 6.)

**§ 55A-7-25. Voting for directors; cumulative voting.**

(a) Unless otherwise provided in the articles of incorporation, the bylaws, or an agreement valid under G.S. 55A-7-30, directors are elected by a plurality of the votes cast by the members entitled to vote in the election at a meeting at which a quorum is present. If the articles of incorporation, bylaws, or an agreement valid under G.S. 55A-7-30 provides for cumulative voting by members, members may so vote, by multiplying the number of votes the members are entitled to cast by the number of directors for whom they are entitled to vote, and casting the product for a single candidate or distributing the product among two or more candidates.

(b) Members otherwise entitled to vote cumulatively shall not vote cumulatively at a particular meeting unless:

(1) The meeting notice or statement accompanying the notice states that cumulative voting will take place; or

(2) A member or proxy who has the right to cumulate his votes announces in open meeting, before voting for directors starts, his intention to vote cumulatively; and if such announcement is made, the chair shall declare that all persons entitled to vote have the right to vote cumulatively, shall announce the number of votes entitled to be cast, and shall grant a recess of not less than one hour nor more than four hours, as the chair shall determine, or of such other period of time as is unanimously then agreed upon.

(c) A director elected by cumulative voting may be removed by the members without cause if the requirements of G.S. 55A-8-08 are met unless the votes cast against removal would be sufficient to elect such director if voted cumulatively at an election at which the same total number of votes were cast and the entire number of directors elected at the time of the director's most recent election were then being elected. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 35; 1993, c. 398, s. 1.)

**§ 55A-16-01. Corporate records.**

(a) A corporation shall keep as permanent records minutes of all meetings of its members and board of directors, a record of all actions taken by the members or directors without a meeting pursuant to G.S. 55A-7-04, 55A-7-08, or 55A-8-21, and a record of all actions taken by committees of the board of directors in place of the board of directors on behalf of the corporation.

(b) A corporation shall maintain appropriate accounting records.

(c) A corporation or its agent shall maintain a record of its members, in a form that permits preparation of a list of the names and addresses of all members, in alphabetical order by class, showing the number of votes each member is entitled to cast.

(d) A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.

(e) A corporation shall keep a copy of the following records at its principal office:

(1) Its articles of incorporation or restated articles of incorporation and all amendments to them currently in effect;

(2) Its bylaws or restated bylaws and all amendments to them currently in effect;

(3) Resolutions adopted by its members or board of directors relating to the number or classification of directors or to the characteristics, qualifications, rights, limitations, and obligations of members or any class or category of members;

(4) The minutes of all membership meetings, and records of all actions taken by the members without a meeting pursuant to G.S. 55A-7-04 or G.S. 55A-7-08, for the past three years;

(5) All written communications to members generally within the past three years, and the financial statements, if any, that have been furnished or would have been required to be furnished to a member upon demand under G.S. 55A-16-20 during the past three years;

(6) A list of the names and business or home addresses of its current directors and officers; and

(7) Repealed by Session Laws 1995, c. 539, s. 29, effective July 29, 1995. (1955, c. 1230; 1969, c. 875, s. 6; 1985 (Reg. Sess., 1986), c. 801, s. 31; 1993, c. 398, s. 1; 1995, c. 539, s. 29.)

**§ 55A-16-02. Inspection of records by members.**

(a) A member is entitled to inspect and copy, at a reasonable time and location specified by the corporation, any of the records of the corporation described in G.S. 55A-16-01(e) if the member gives the corporation written notice of his demand at least five business days before the date on which the member wishes to inspect and copy.

(b) A member is entitled to inspect and copy, at a reasonable time and reasonable location specified by the corporation, any of the following records of the corporation if the member meets the requirements of subsection (c) of this section and gives the corporation written notice of his demand at least five business days before the date on which the member wishes to inspect and copy:

(1) Excerpts from any records required to be maintained under G.S. 55A-16-01(a), to the extent not subject to inspection under G.S. 55A-16-02(a);

(2) Accounting records of the corporation; and

(3) Subject to G.S. 55A-16-05, the membership list.

(c) A member may inspect and copy the records identified in subsection (b) of this section only if:

(1) The member's demand is made in good faith and for a proper purpose;

(2) The member describes with reasonable particularity the purpose and the records the member desires to inspect; and

(3) The records are directly connected with this purpose.

(d) This section does not affect:

(1) The right of a member to inspect records under G.S. 55A-7-20 or, if the member is in litigation with the corporation, to inspect the records to the same extent as any other litigant; or

(2) The power of a court, independently of this Chapter, to compel the production of corporate records for examination.

(e) A member of a corporation that has the power to elect, appoint, or designate a majority of the directors of another domestic or foreign corporation, whether nonprofit or business, shall have inspection rights with respect to the records of that other corporation. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 31; 1993, c. 398, s. 1.)

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| STATE OF NORTH CAROLINA<br><br>COUNTY OF CARTERET | IN THE GENERAL COURT OF JUSTICE<br>SUPERIOR COURT DIVISION<br>10 CVS 280 |
| BARBARA L. POHLMAN and ANN L. GARROU,<br>*Plaintiffs,*<br><br>v.<br><br>MAGEN'S BAY HOMEOWNERS ASSOCIATION, INC.,<br>*Defendant.* | T R A N S C R I P T<br>(TRIAL: Volume 1 of 3)<br><br>Monday, July 25, 2011<br>pp. 1 - 78 |

Transcript of proceedings in the General Court of Justice, Superior Court Division, held in Carteret County, Beaufort, North Carolina, commencing on the July 25, 2010, Civil Session, before the Honorable Arnold O. Jones, II, Judge Presiding.

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Ordered: October 6, 2011
Delivered: January 9, 2012

include all related legal fees, are collected through liens placed on the property."

Q. Was that the first notice that you got from anyone that you're going to be fined if the fence was not removed?

A. That's correct.

Q. Prior to receiving that letter, had you received any notice of the homeowners' intention to impose a fine?

A. No.

Q. Had you received any notice of any meeting wherein the homeowners association was to discuss whether or not to impose a fine?

A. No.

Q. In the -- during the discovery stage of this case, Dr. Pohlman, have you requested that the homeowners association provide you minutes of any meeting where a fine was imposed?

A. In my initial e-mail to Randy Rosebro, right after the letter from Attorney Harvell, I requested all secretary's records that he maintained.

Q. And as part of this litigation, haven't you asked that they provide you minutes of all meetings of the board of directors where a fine was imposed?

A. We made requests four different times for records, meetings of fines of other approvals or nonapprovals from the architectural control committee, what their process was. And

14:54:26 each time we have been notified that no such records are
14:54:30 maintained.
14:54:38 MR. TANTUM: Approach the witness, Your Honor?
14:54:40 THE COURT: Yes, sir, you may.
14:54:42 (Plaintiff Exhibit 8 marked for identification.)
14:54:58 Q. I'm going to hand you what's been marked Plaintiff's
14:55:01 Exhibit 8 and ask if you can describe that for me?
14:55:06 A. This photograph is our property, 107 Deerfield
14:55:14 Court, in Magen's Bay.
14:55:17 Q. And does it depict the trash enclosure as built on
14:55:22 the back of the house?
14:55:24 A. Yes. This is taken from the back line of our
14:55:27 property, the backyard, and it shows the trash enclosure that
14:55:32 we built, as well as some shrubbery and a bird feeder that we
14:55:37 put in front of it to spruce it up a little bit.
14:55:42 Q. Now, after having received the letter that was
14:55:49 marked Exhibit 7 saying you had an unauthorized fence, did
14:55:54 you -- what steps, if any, did you take to have the trash
14:56:01 enclosure approved by the architectural control committee?
14:56:06 A. I immediately contacted Secretary Rosebro via e-mail
14:56:13 to request all architectural guidelines, standards, any forms
14:56:19 that may exist, as those were not part of the covenants and
14:56:23 bylaws, so that we could see what they were and go through
14:56:29 the process.
14:56:33 Q. And did you receive any such guidelines?

15:02:02 wrong with the height?
15:02:02 A. No, there is not.
15:02:03 Q. Any suggestion as to what color would be acceptable?
15:02:08 A. No, there is not.
15:02:09 Q. What height would be acceptable?
15:02:11 A. No.
15:02:16 Q. Or what materials would be acceptable?
15:02:18 A. No.
15:02:24 Q. Now, when you received that letter, did you make any investigation as to other fences in the Magen's Bay community?
15:02:33 A. Yes, we did.
15:02:34 Q. Who is "we"?
15:02:35 A. Ann Garrou and myself.
15:02:37 Q. What did you do?
15:02:39 A. We drove around the neighborhood looking at all manner of fences, trash enclosures, screening, barriers, throughout the neighborhood, and noted that there were a wide variety of such structures, of varying heights, materials, colors, and we found the structure at 115 Lookout Ridge, and it appeared to be nearly identical to the one that had been erected on our property.
15:03:13 Q. Where is 115 Lookout Ridge in relationship to your property?
15:03:18 A. It's on the street behind our property. The same

15:03:23 street that association president Charlie Denmead lives on
15:03:29 and five lots down, on a corner.
15:04:25 Q. I haven't had this one marked. It is listed on the
15:04:28 pretrial order. It's a photograph of the trash receptacle at
15:04:42 115 Lookout Ridge, property owned by last name V-r-a-b-l-i-c.
15:04:57 I don't know what number is on that.
15:05:15 (Discussion ensued off the record.)
15:05:28 (Plaintiff Exhibit 11A marked for identification.)
15:05:52 MR. TANTUM: I marked it 11A just to keep it in
15:05:55 order.
15:05:55 THE COURT: Yes, sir.
15:05:56 Q. I'll hand you what's been marked Plaintiff's
15:05:59 Exhibit 11A and ask if you can identify that for me?
15:06:06 A. This is the trash enclosure at 115 Lookout Ridge
15:06:16 that we took when investigating fences throughout the
15:06:20 neighborhood.
15:06:25 Q. Who took that photograph?
15:06:29 A. I believe I did. One of us was driving and the
15:06:33 other taking pictures. I believe I was the photographer that
15:06:36 day.
15:06:37 Q. And my next question is going to be, where were you
15:06:41 when you took that picture?
15:06:42 A. Sitting in our vehicle on the public roadway.
15:06:48 Q. So I take it, it goes without saying, that enclosure
15:06:52 is visible from the roadway in front of that house?

15:06:55 A. Yes, it is. That house sits on a corner lot. And
15:06:59 although the enclosure is behind the house, it is readily
15:07:05 visible from the side street.
15:07:07 Q. Now, how does that compare with the structure on the
15:07:11 back of your house as to whether it's visible or not from the
15:07:15 street?
15:07:16 A. This one is far more visible because you are looking
15:07:19 at it from the side street, possibly 20 yards away from the
15:07:25 street itself.
15:07:26 Q. And the materials of that structure?
15:07:28 A. It's a vinyl fencing. The wide-plank design that we
15:07:34 used on the structure on our property. It's approximately
15:07:39 six feet high with a gate. It looks almost identical to the
15:07:44 structure that is erected on our property.
15:07:51 MR. TANTUM: We would introduce that photograph into
15:07:54 evidence, Your Honor.
15:07:55 THE COURT: Allowed.
15:07:56 MR. COLLINS: Just the photo?
15:07:57 THE COURT: And for illustrative purposes?
15:07:59 MR. COLLINS: No objection.
15:08:00 THE COURT: Allowed. For my records, that's the
15:08:07 only exhibit that's been introduced so far. These others
15:08:10 that have been put up here, are you moving --
15:08:12 MR. TANTUM: If I haven't, I ask that they all be
15:08:14 introduced into evidence, Your Honor.

15:11:34 A. That's correct.
15:11:35 Q. It was set the 12th; is that right?
15:11:37 A. That's correct.
15:11:38 Q. And did you actually attend the meeting of the board
15:11:44 of directors on the 12th of November, 2009?
15:11:48 A. I did. I had to attend that meeting by myself as
15:11:52 Ann had to attend to the family issues previously noted.
15:11:58 Q. And at that meeting, was Mr. Denmead present?
15:12:05 A. Yes, Mr. Denmead was present.
15:12:09 Q. Now, he's the chairman of the architectural control
15:12:13 committee; is that right?
15:12:13 A. That's correct. Both president of the board and
15:12:18 chairman of the architectural control committee.
15:12:20 Q. Any other members of the architectural control
15:12:23 committee that were directors at that meeting?
15:12:28 A. None of the other architectural control committee
15:12:31 members are directors.
15:12:33 Q. Okay. And at that meeting, did you attempt to
15:12:39 present evidence with regard to your appeal from the
15:12:44 architectural control committee?
15:12:46 A. I did. I started out with some photographs of other
15:12:54 fences -- well, first of all, I asked, you know, what
15:12:59 specifically was not right with our fence as it was, and
15:13:07 asked if there was anything that could be done to the current
15:13:11 fence that would meet the approval of the board of directors.

15:13:16 And I was told that it was too tall. And that's when I
15:13:22 started to show pictures from other structures throughout the
15:13:25 community that were the same height, approximately six feet,
15:13:29 as our fence. And I told -- and I had three copies of
15:13:36 everything; a copy for myself, a copy for Secretary Rosebro,
15:13:40 and a copy for President Denmead. And I told Secretary
15:13:46 Rosebro specifically that this copy was to be kept with the
15:13:51 permanent records that he maintained for Magen's Bay as
15:13:55 secretary so there would be evidence of this hearing having
15:13:59 taken place. And that's when I was told there were no
15:14:02 permanent records, again.
15:14:06 So we diverged at that point. And I noted in our
15:14:11 bylaws that there were five specific references to where
15:14:14 records are to be maintained, and that's when the board told
15:14:19 me that there were no bylaws to Magen's Bay, that because the
15:14:25 last page had no date or signature and had not been filed
15:14:29 with the register of deeds, that they were not valid and
15:14:35 there were no bylaws controlling the actions of the board of
15:14:40 directors for the homeowners association at that time.
15:14:44 I then submitted sections of 47F and 55A, state
15:14:52 statutes, that, again, specify requirements for maintaining
15:14:55 records, that regardless of whether or not they believed
15:14:59 bylaws existed, they still fell under State regulations.
15:15:06 Mr. Denmead opined that their legal counsel had said that
15:15:14 because they were a small, nonprofit --

15:15:16 MR. COLLINS: Objection.

15:15:17 Q. Don't --

15:15:17 THE COURT: Whoa, whoa. Stop.

15:15:21 Sustained. I'll strike that last.

15:15:24 Q. Did Mr. Denmead make any reference to the -- whether the approval procedure was an objective procedure or not?

15:15:33 A. He specifically said it was a subjective one, that it was handled on a case-by-case basis, that the architectural control committee was not bound by what any prior architectural control committee had authorized, and that there were no specific objective standards available.

15:16:01 Q. Other than that your fence was, quote, too tall, was there any specifics given to you as to what height was allowed?

15:16:10 A. No. There are no specifics. You know, again, I asked if there was any way -- we offered to plant bushes in front of it but was -- they did not specify what type of changes we could do would make it approved under their guidelines, whatever those guidelines happen to be at the time.

15:16:39 Q. Now, at that meeting of the board of directors, did the architectural review committee make any presentation to the board regarding their findings or reasons why they denied the fence?

15:16:58 A. None of -- there was only one member of the

15:17:04 architectural control committee present other than Mr. Denmead, and that was Pete Timmons. And he made no comments during the meeting.

Q. All right. Were you there when the board voted to deny your appeal?

A. No, I was not.

(Plaintiff Exhibit 12 marked for identification.)

Q. Okay. Let me hand you what's been marked as Plaintiff's Exhibit 12 and ask if you can identify that for me?

A. This is handwritten notation of November 12, 2009. It says MB, space, HOA underlined, and it appears to be some handwritten notes from the meeting I attended November 12.

Q. Are these, in fact, the minutes that were taken by the secretary at that meeting?

A. They appear to be those minutes.

Q. Is there anything in these minutes that would indicate there was any discussion about imposing a fine against you?

A. There is nothing in regards to a fine. There is a big question mark about bylaws and that they were going to check with Cecil Harvell regarding the bylaws, apparently.

MR. TANTUM: I move to have that introduced.

THE COURT: Allowed.

(Plaintiff Exhibit 12 received in evidence.)

16:32:10 THE COURT: Yes, sir.

16:32:10 REDIRECT EXAMINATION by MR. TANTUM:

16:32:11 Q. Dr. Pohlman, you indicated on the -- when the board
16:32:16 of directors had their appeal meeting that as you tried to --
16:32:23 you tried to present evidence to the board that a Mr. Pete
16:32:26 Timmons viewed some of the evidence; is that correct?

16:32:29 A. That's correct.

16:32:29 Q. But he's not a director, is he?

16:32:31 A. No, he is not.

16:32:32 Q. And who presided over that meeting?

16:32:35 A. Charlie Denmead.

16:32:38 Q. And there have been several questions about your
16:32:42 request for minutes and information from the board. I'm
16:32:47 going to hand you -- and this is in rebuttal of the other
16:32:52 questions. I didn't know, quite frankly, it was going to
16:32:55 come up. But I hand you a packet of what appear to be
16:32:58 e-mails from you to Mr. Rosebro and regarding Magen's Bay and
16:33:06 the records. Will you just go through each one of those,
16:33:10 identify it for me, and tell me -- tell me what it is?

16:33:15 A. Yes. On Saturday, October 17, 2009, I sent this
16:33:20 e-mail to Randy --

16:33:21 THE COURT: I'm sorry, what's the date again?

16:33:24 THE WITNESS: October 17, 2009.

16:33:25 THE COURT: Okay. I'm sorry. Thank you.

16:33:27 A. I sent this e-mail to Randy Rosebro, and I stated

16:33:36 specifically I would like to review the secretary's records
16:33:41 for Magen's Bay. Please let me know a convenient time and
16:33:46 place for me to review them.
16:33:48 And I also stated, "Please inform me as to the time
16:33:50 and place of the next board of directors meeting. I would
16:33:53 like to speak to the entire board regarding issues brought up
16:33:56 by the recent letter I received."
16:34:00 This was prior to any fence. It was just to address
16:34:03 the issues that Charlie Denmead had.
16:34:08 Q. That would be regarding your tenant?
16:34:10 A. Regarding the tenant.
16:34:12 Q. Did you get a response from the secretary?
16:34:17 A. Yes. Randy was very prompt. He responded to me
16:34:27 later that same day. I had also requested who is the current
16:34:30 president. So he said, "Charlie is president now, or at
16:34:33 least until the next election in January as Warren resigned.
16:34:39 What in particular are you looking for in the secretary
16:34:42 records? I have notes but no formal records. I will let you
16:34:46 know when the next board meeting is."
16:34:51 Q. Did you make any further requests for --
16:34:54 A. On Friday, October 23, 2009, I noted to again
16:35:00 Secretary Randy Rosebro, "We have the covenants and bylaws of
16:35:05 Magen's Bay. Are there any other published rules,
16:35:07 regulations, et cetera? If yes, please e-mail a copy to me
16:35:11 and who are the current members of the architectural

committee." This would have been immediately after we received the letter regarding the unauthorized fence.

And on October 24, 2009, Randy responded, "Charlie has a copy of the architectural guidelines that we give to lot owners before they build, and they also apply to fences, et cetera. I'll scan them later on today when Charlie gets home and e-mail them to you."

Q. And did he do that?

A. Yes, he did.

Q. Okay. That would have been Plaintiff's Exhibit 10, is that what was e-mailed to you, entitled, "Magen's Bay Architectural Review Guidelines"?

A. Yes.

Q. Did you make any further requests for records?

A. Let's see. He also responded to me who the current architectural committee members were. And he responded also on October 24, 2009, that the only published rules and regulations besides the covenants are rules about golf carts, pool parties, and signup for the tennis courts.

And then on November 3, 2009, I sent an e-mail to Randy Rosebro that "Ann and I are generating a formal appeal of the architectural committee denial on the enclosure on our lot. Please forward to me the names and e-mail addresses of all Magen's Bay board members and architectural committee members."

16:36:57 And I stated again, "I have unexpectedly free time
16:37:00 tomorrow, Wednesday, to look at your Magen's Bay's secretary
16:37:03 records. I assume the architectural committee
16:37:06 recommendations are part of those records. If not, where
16:37:09 would they be? What time and where should we meet? If this
16:37:12 will not work for you, please suggest time and place that
16:37:14 will work for you."
16:37:20 Q. Did you get a response from that e-mail?
16:37:23 A. Yes. Randy responded on Wednesday, November 4th,
16:37:32 2009. He declined giving me e-mail addresses, even though
16:37:37 they were board members or architectural committee members.
16:37:40 "I can't give them to you. You have the name and addresses
16:37:42 of the architectural and board members as they are listed on
16:37:47 the directory I forwarded to you. I also told you previously
16:37:50 that I don't have formal minutes of board member meetings.
16:37:55 All I have are notes that I took during the meetings and I
16:37:59 can't let you have those notes. The architectural review
16:38:01 committee works independently, and I do not have any
16:38:05 minutes/notes from them. I am going to set up a board
16:38:08 meeting for next week, and we usually meet at the Western
16:38:08 Carteret community Center, usually in the 6:00 to 7:00 time
16:38:13 frame, depending on what room we can use. I'll let you know
16:38:16 when and what time after I set it up. I'm waiting for a call
16:38:21 back concerning the date and time."
16:38:27 Later that same day, Ann sent this e-mail to Randy

16:38:36 Rosebro. She noted that she had been spending every other
16:38:40 week in the mountains tending to her mother's care in a
16:38:42 rehabilitation unit. "She's being discharged this Friday.
16:38:44 I'm leaving there tomorrow to go there to coordinate her home
16:38:47 care next week. I really would like to be able to attend
16:38:49 this meeting with Barbara, therefore I am requesting a
16:38:51 meeting on or around November 18th and beyond if at all
16:38:55 possible."
16:38:56 New paragraph. "Are your architectural approvals
16:38:59 and rejections formally recorded in your board of director's
16:39:03 minutes? Who keeps the architectual applications from the
16:39:06 past? In Crystal Shores, we have a separate filing system
16:39:09 for all of these in lot file, and they are duly noted in the
16:39:12 board of directors minutes. We would like to examine past
16:39:15 filings and board of director meeting papers per Article XI,
16:39:19 'Records, books, and audits,' of the bylaws of Magen's Bay
16:39:22 Homeowners Association, Inc., as organized under NC Statute
16:39:27 55A for nonprofit corporations prior to our meeting with the
16:39:32 board of directors and the architectural committee.
16:39:36 I understand about your e-mail restrictions. Will
16:39:40 my e-mail to you be sufficient to file an appeal to the board
16:39:44 of directors for the architectural committee's ruling? If
16:39:47 so, Barbara Pohlman and Ann Garrou are appealing the
16:39:51 architectal committee's denial of enclosed trash area at 107
16:39:56 Deerfield, Lot 92 in Magen's Bay, dated 10/30/2009 per

16:40:02 Section 6(c) of the declaration of covenants, restrictions,
16:40:06 and easements for Magen's Bay subdivision as filed with the
16:40:10 Registrar of Deeds of Carteret County in Book 738, Page 433."
16:40:19 Q. Is there a response to that request?
16:40:21 A. There is no response to that request. And there
16:40:28 never was a response.
16:40:29 THE COURT: May I see that, please?
16:40:37 (Document tendered to the Court by the witness.)
16:42:14 THE COURT: Anything else?
16:42:15 Q. Are there any other requests?
16:42:17 A. There's just one other e-mail from myself to Randy
16:42:21 Rosebro on November 12th, 2009. I informed him that "I plan
16:42:27 to attend the board of director meeting this evening,
16:42:31 6:30 p.m. start time, at the Western Carteret Community
16:42:34 Center. It would be useful if all board of directors present
16:42:37 brought their bylaws and declarations to that meeting as I
16:42:41 will be referencing those documents in my comments to the
16:42:44 board. Also, it will be helpful if any and all records
16:42:48 maintained by the association be brought to that meeting.
16:42:51 See you soon."
16:42:59 Q. Now, you were asked on cross-examination about your
16:43:03 affidavit that you filed concerning any notice required to be
16:43:08 given to you before the imposition of fines?
16:43:11 A. Correct.
16:43:15 Q. Did you receive any notice of any intent on the

16:43:21 board of directors to impose a fine prior to getting the
16:43:26 first letter saying if you don't take something down you're
16:43:29 going to be fined?
16:43:29 A. No.
16:43:45 MR. TANTUM: I think that's all that I have, Your
16:43:47 Honor. I would ask that this last -- the stack of e-mails be
16:43:54 marked.
16:43:58 THE COURT: What number?
16:44:04 MR. TANTUM: I suppose I'll mark them 13A.
16:44:10 (Plaintiff Exhibit 13A marked for identification.)
16:44:11 THE COURT: And I will allow it into evidence.
16:44:14 (Plaintiff Exhibit 13A received in evidence.)
16:44:26 THE COURT: 13A, a multi-page exhibit, speaks for
16:44:30 itself. I mean, she's testified as to what the e-mails say.
16:44:46 Mr. Tantum, anything else right now?
16:44:48 MR. TANTUM: No.
16:44:48 THE COURT: Any recross?
16:44:51 MR. COLLINS: Yes. Briefly, Judge. I do need to
16:44:56 look at those.
16:44:57 THE COURT: You may. For purposes of redirect.
16:45:03 RECROSS-EXAMINATION by MR. COLLINS:
16:45:03 Q. Dr. Pohlman, Mr. Rosebro, I think you've described
16:45:06 him as an acquaintance of yours, or friend of yours, or you
16:45:10 had his e-mail, phone number, contact information. I can't
16:45:14 recall exactly the way you put it, but you indicated

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| STATE OF NORTH CAROLINA | IN THE GENERAL COURT OF JUSTICE<br>SUPERIOR COURT DIVISION |
| COUNTY OF CARTERET | 10 CVS 280 |
| BARBARA L. POHLMAN and ANN L. GARROU,<br>*Plaintiffs,*<br><br>v.<br><br>MAGEN'S BAY HOMEOWNERS ASSOCIATION, INC.,<br>*Defendant.* | **T R A N S C R I P T**<br>(TRIAL: Volume 2 of 3)<br><br>Tuesday, July 26, 2011<br>pp. 79 - 268 |

Transcript of proceedings in the General Court of Justice, Superior Court Division, held in Carteret County, Beaufort, North Carolina, commencing on the July 25, 2010, Civil Session, before the Honorable Arnold O. Jones, II, Judge Presiding.

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Reported by: Jennifer C. Carroll, RPR, CRR
Official Court Reporter
Jennifer.C.Carroll@nccourts.org

Ordered: October 6, 2011
Delivered: January 9, 2012

09:59:02 Q. First one is Plaintiff's Exhibit 14?
09:59:12 A. Do you want the address of it?
09:59:15 Q. If you know.
09:59:16 A. Yes. This is Rocky and Marion Allen, 106 Fawn Creek
09:59:21 Court, Lot 83.
09:59:22 Q. That's in Magen's Bay?
09:59:24 A. Yes.
09:59:24 Q. Now, is Mr. Allen, he's actually a board of
09:59:28 directors member, is he not?
09:59:29 A. Yes, he is.
09:59:30 Q. All right.
09:59:33 A. And this appears to be a white vinyl fence. I did
09:59:36 not go on anyone's property to take any of these pictures.
09:59:40 Q. This is not a trash enclosure fence, is it?
09:59:45 A. I -- it may just be a fence.
09:59:50 THE WITNESS: Do you want me to pass these to help?
09:59:52 Would that help?
09:59:53 THE WITNESS: You finish first.
09:59:55 MR. TANTUM: I've got an extra copy.
09:59:58 THE COURT: That's fine. I'll look at them after
10:00:00 she's finished.
10:00:01 Q. In the course of discovery in this action, had you
10:00:04 requested that the board of directors and architectural
10:00:08 control committee provide to you, or to me, copies of any
10:00:14 applications that anyone in the neighborhood had ever made to

10:00:18 build a fence?
10:00:18 A. Yes.
10:00:19 Q. Was there one provided for the Rocky Allen fence?
10:00:24 A. Not -- no. Uh-uh.
10:00:31 Q. In fact, there were some -- how many provided?
10:00:33 A. After we filed the lawsuit, they provided five documents total out of the 35 fences in the neighborhood that
10:00:43 were requests for -- to put up their fences.
10:00:46 Q. They had some record of it?
10:00:47 A. Uh-huh. Yes. But it wasn't provided to us prior
10:00:53 when we had requested it.
10:01:07 (Plaintiff Exhibit 15 marked for identification.)
10:01:07 Q. I hand you what's been marked Plaintiff's
10:01:12 Exhibit 15.
10:01:12 MR. TANTUM: And Your Honor, I would ask -- I'm
10:01:14 going to ask that these all be admitted. If I need to do it
10:01:17 on each one or --
10:01:18 THE COURT: I'll just make sure I don't miss one.
10:01:21 For illustrative purposes, Madam Clerk, Plaintiff's
10:01:23 Exhibit Number 14 is admitted into evidence.
10:01:25 (Plaintiff Exhibit 14 received into evidence.)
10:01:25 MR. TANTUM: I then ask for 10A. I ask for 10A to
10:01:29 be admitted.
10:01:29 THE COURT: 10A is also admitted into evidence.
10:01:29 (Plaintiff Exhibit 10A received into evidence.)

10:54:36 A. It goes into the backyard. Whether that back fence
10:54:40 is their property line or not, I don't know. But I do know
10:54:46 that Magen's Way, some of the houses on that street, their
10:54:52 backyards abut Crystal Shores' nature trail. And a lot of
10:54:57 those fences are just about on the property lines when we
10:55:01 looked into it.
10:55:02 Q. Are you aware of any application for approval of
10:55:05 this Perry fence?
10:55:06 A. No.
10:55:07 Q. And Mrs. Cathy Perry, she's now a board of directors
10:55:12 member; is that right?
10:55:17 A. Possibly.
10:55:17 Q. Or do you know?
10:55:18 A. I'm not sure. I know there was a Cathy.
10:55:21 MR. TANTUM: I would ask that that photograph be
10:55:22 introduced, Your Honor.
10:55:23 THE COURT: It is admitted.
10:55:25 (Plaintiff Exhibit 44 received in evidence.)
10:55:43 (Plaintiff Exhibit 45 marked for identification.)
10:55:43 Q. I'm going to show you what's been marked Plaintiff's
10:55:46 Exhibit 45.
10:55:48 A. This is Ken and Pat Raper, 109 Deerfield Court, Lot
10:55:54 91. And this is a lattice, stained or natural trash
10:56:05 enclosure, possibly. Four feet high.
10:56:08 Q. And this property is right next to your property; is

10:56:12 that right?
10:56:12 A. Yes.
10:56:12 Q. So from your backyard, is this fence clearly visible?
10:56:16 A. Yes.
10:56:19 Q. And to your knowledge, was that fence -- was there ever application for approval of that fence?
10:56:25 A. When I talked to Ken Raper, they put the fence up, did not have approval, and they retroactively got approval for it.
10:56:35 Q. Okay. And what did you say the materials of that fence are?
10:56:44 A. It's wooden lattice with a brick house.
10:56:52 MR. TANTUM: We would ask that that photograph be introduced, Your Honor.
10:56:54 THE COURT: It is admitted.
10:56:55 (Plaintiff Exhibit 45 received in evidence.)
10:56:56 (Plaintiff Exhibit 46 marked for identification.)
10:57:12 Q. I show you what's been marked Plaintiff's Exhibit 46.
10:57:12 A. This is Paul and Debra Rosenblum, 150 Magen's Way, Lot 26. It appears to be a stained wooden fence with arrows at the top of it, and appears to be about four feet high. And at the back of their property, or behind the basketball goal, anyway.
10:57:17 Q. And are you aware of any application that was made prior to the erection of that fence?
10:57:23
10:57:33
10:57:38
10:57:46
10:57:48
10:57:51

11:48:03 Bay, do they not?
11:48:06 A. Yes.
11:48:08 Q. And the way those are written is at the discretion
11:48:11 of the architectural control committee upon proper
11:48:13 application?
11:48:14 A. Correct.
11:48:16 Q. And you don't have any -- you can't provide any
11:48:23 evidence to the Court as it relates to the photographs that
11:48:26 you have provided other than the ones where you have provided
11:48:30 applications as well? You don't have any evidence you could
11:48:34 provide to the Court as to whether those were approved or
11:48:38 disapproved by a previous board of the homeowners
11:48:42 association, do you?
11:48:42 A. We have requested documents, and the only that were
11:48:46 provided for us were the five that we just entered into --
11:48:49 Q. Okay.
11:48:50 A. -- here.
11:48:50 Q. But for those five, except for those five, the rest
11:48:53 of them you don't really know whether there was an
11:48:55 application --
11:48:55 A. I have no idea.
11:48:56 Q. -- or whether there wasn't, and when they were
11:48:58 approved or disapproved, correct?
11:48:59 A. No idea.
11:49:01 Q. Okay. And you're aware that on page 24 of our

11:49:21 covenants, which I can provide a copy -- I think it's -- if I
11:49:26 can look back in my exhibits.
11:49:31 MR. TANTUM: Exhibit 1.
11:49:38 Q. Plaintiff Exhibit 1.
11:49:39 A. I have it. What page?
11:49:41 Q. Page 24. If you look under "Enforcement"?
11:49:49 A. Yes.
11:49:53 Q. And read that into the record, please.
11:49:55 A. "The declarant, the association, or any owner shall
11:49:59 have the right to enforce by any proceeding at law or in
11:50:03 equity all restrictions, conditions, covenants, reservations,
11:50:08 liens, and charges now are hereinafter imposed by the
11:50:12 provisions of this declaration. Failure by the association
11:50:15 or by any owner to enforce any covenant or restriction herein
11:50:20 contained shall in no event be deemed a waiver of the right
11:50:23 to do so thereafter."
11:50:27 Q. So after reading this provision of the covenants
11:50:32 into the record, are you taking the position before this
11:50:35 Court that the association has to allow your application for
11:50:41 your fence because other fences have been allowed?
11:50:47 A. In another part of this covenant, it pertains to
11:50:55 trash enclosures, that your trash can must be in your
11:50:58 residence, in your garage, or in a storage unit. And I find
11:51:02 it very unhealthy sanitary-wise to keep it in a house or a
11:51:07 garage. So I'm putting it in this storage unit. It is

16:56:54 request to put up a fence that consisted of a bunch of
16:56:58 mermaids, for instance, we would say no. That's not --
16:57:01 that's not what our plan is for the neighborhood. If it
16:57:04 enhances your property and it looks nice, and it doesn't in
16:57:09 any way hurt your neighbors and so forth, we're not going to
16:57:13 find a reason to deny you the right to build your fence.
16:57:16 Q. But now, you don't have any mermaid fences in the --
16:57:19 in the Magen's Bay, do you?
16:57:21 A. No, sir.
16:57:22 Q. But you do have at least however many pictures there
16:57:27 were, I'm going to say 40 other fences?
16:57:29 A. Yes, sir.
16:57:30 Q. Okay. And they're as high as six feet tall?
16:57:34 A. Well, I'm not aware of any that are six feet tall
16:57:37 other than the ones that we talked about at Vrablic's and at
16:57:42 the plaintiffs'. There may have been one or two others. I
16:57:44 don't recall. There were a lot of them in there.
16:57:46 And again, let me point out to you that this
16:57:49 neighborhood has existed since '94. I became involved in it
16:57:54 in 2004. And I can't help what was approved prior to that.
16:57:59 But the bylaws say that I am to use my best judgment in my
16:58:06 duties to ensure the tranquility and beauty and property
16:58:11 values in the neighborhood, and that's what I've tried to do.
16:58:13 Q. Now, does that mean to you that you are responsible
16:58:16 to now decide what the general aesthetics are in a community?

16:58:24 A. No. It means that there are three of us that are
16:58:26 going to examine these proposals and determine if it's in --
16:58:31 in compliance -- if it supports the overall plan for how we
16:58:36 want the neighborhood to look. Again, there's no
16:58:40 cookie-cutter solution.
16:58:41 Q. So is it just a case-by-case basis?
16:58:46 A. Well, we're objective, but yeah. I mean, we know --
16:58:54 any of us -- and there's three of us. Any of us know when we
16:58:59 look at something, does it complement the neighborhood and
16:59:04 the property, or not.
16:59:07 Q. But -- well, my question to you is, do you feel it's
16:59:10 your duty as a committee member to somehow establish what the
16:59:15 general scheme of fences are in a community?
16:59:19 A. I think it's our responsibility to ensure that the
16:59:22 scheme remains constant, that what we have is either enhanced
16:59:30 or at least maintained.
16:59:32 Q. And what you have would include the 40 pictures that
16:59:35 have been introduced?
16:59:36 A. Well, I didn't approve those. I can't speak to those.
16:59:39 Q. Okay. And I don't mean to say that you did approve
16:59:42 those. But they're all in the community; is that right?
16:59:44 A. Well, yes.
16:59:45 Q. So when you took over the job, you basically
16:59:49 inherited that scheme of anyone's that had been erected
16:59:53 before you took it over?

16:59:54 A. Correct.

16:59:55 Q. And any ones you've approved since have added to the
16:59:58 scheme?

16:59:59 A. I would hope so. And I would also point out to you
17:00:02 that since 1994 that the materials that are available to be
17:00:06 used for these types of things have dramatically changed.
17:00:10 And what might have gotten approved in 1994, such as a
17:00:14 pressure-treated fence or some of these type things, may not
17:00:18 get approved today because there are better-looking things.
17:00:21 Also, the original vinyl fencing would warp and crack and
17:00:24 turn yellow and everything else. Today's vinyl fencing is a
17:00:29 quality product.

17:00:32 THE COURT: Stop right there. We're going to take a
17:00:35 recess until tomorrow morning at 9:30. Start back tomorrow
17:00:39 morning at 9:30.

17:00:54 (Recess taken at 5:00 p.m.)

END OF TRANSCRIPT
(Volume 2 of 3)

COPY

STATE OF NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF CARTERET — FILE NO: 10-CVS-280

BARBARA L. POHLMAN and ANN L. GARROU,

PLAINTIFFS,

VS.

MAGEN'S BAY HOMEOWNERS ASSOCIATION, INC.,

DEFENDANT.

D-E-P-O-S-I-T-I-O-N

OF

RANDY ROSEBRO

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

AUGUST 12, 2010, AT THE LAW OFFICES OF TANTUM AND HUMPHREY, P.A., 604 CEDAR POINT BLVD., SUITE C CEDAR POINT, NORTH CAROLINA

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Rosebro Deposition

A. YES.

Q. HOW WOULD YOU DETERMINE IF THERE WAS A QUORUM TO HAVE THE MEETING?

A. I DO NOT KNOW.

Q. DO YOU KNOW IF ANYONE ATTEMPTED TO DETERMINE IF THERE WAS A QUORUM PRESENT BEFORE THE MEETING WAS HELD?

A. I DO NOT KNOW.

Q. YOU PERSONALLY DID NOT?

A. NO.

Q. AT THE MEETING IN 2010, DO YOU KNOW HOW MANY PROPERTY OWNERS ATTENDED THE MEETING?

A. I DO NOT KNOW.

Q. WOULD IT HAVE BEEN LESS THAN TWENTY?

A. I HAVE NO IDEA.

Q. WELL, YOU WERE THERE, RIGHT?

A. THAT IS CORRECT.

Q. HOW MANY PEOPLE WERE IN THE ROOM?

A. I DON'T KNOW.

Q. DO YOU HAVE ANY ESTIMATE?

A. NO.

Q. SO YOU DON'T KNOW WHETHER IT WAS A THOUSAND OR TWO?

A. THAT'S CORRECT.

Q. DO YOU KNOW IF ANYBODY ELSE WOULD HAVE ANY RECORD OF HOW MANY PEOPLE ATTENDED THE MEETING?

A. DON'T KNOW.

Q. SO ARE YOU SAYING THERE'S NO WAY OF KNOWING WHETHER THERE WAS A QUORUM OR NOT AT ANY OF THOSE MEETINGS?

A. NOT THAT I KNOW OF.

Q. ARE YOU AWARE OF THE FENCE THAT - IN QUESTION HERE?

A. YES.

Q. DO YOU LIVE ANYWHERE NEAR THAT FENCE?

A. I LIVE RIGHT NEXT TO MISTER DENMEADE ON 101 LOOKOUT RIDGE.

Q. SO YOU'RE A STREET AND A YARD OVER ALSO?

A. THAT'S CORRECT.

Q. YOU'RE NOT, I TAKE IT, ON THE ARCHITECTURAL REVIEW COMMITTEE, IS THAT RIGHT?

A. THAT'S CORRECT.

Q. BUT YOU ARE ON THE BOARD OF DIRECTORS?

A. YES.

Q. YOU WERE PRESENT AT THE MEETING ON NOVEMBER 12TH, 2009 WHEN THE APPEAL WAS TAKEN TO THE BOARD?

A. YES.

Q. WHAT HAD PREVIOUSLY BEEN MARKED AS PLAINTIFF'S EXHIBIT [16] IN MISTER DENMEADE'S DEPOSITION, ARE THEY ACTUALLY YOUR NOTES THAT WERE TAKEN AT THE MEETING?

A. YES.

Q. THOSE NOTES REFLECT THAT THE BOARD VOTED TO DENY

THE APPEAL, IS THAT CORRECT?

A. YES.

Q. DO YOU RECALL ANYONE MAKING A MOTION TO DENY THE APPEAL?

A. THERE WAS NOT A MOTION MADE.

Q. DO YOU RECALL ANY DISCUSSION FROM THE BOARD MEMBERS REGARDING THE REASONS FOR ALLOWING OR DENYING THE APPEAL?

A. NO.

Q. DO YOU RECALL, DURING YOUR TERM ON THE BOARD OF DIRECTORS, HAVING ANY OTHER APPEALS REGARDING FENCES FROM AN ARCHITECTURAL REVIEW COMMITTEE DECISION?

A. NOT ON FENCES.

Q. DURING THE MEETING ON NOVEMBER 12TH, WERE YOU GIVEN ANY REASONS AS TO WHY THE ARCHITECTURAL REVIEW COMMITTEE HAD DENIED THE APPLICATION FOR THE FENCE?

A. NOPE.

Q. IF YOU WOULD JUST LOOK THROUGH THE EXHIBITS THAT WERE PREVIOUSLY PROVIDED REGARDING OTHER FENCES IN MAGEN'S BAY?

A. RIGHT.

Q. I JUST WANT TO ASK YOU IN GENERAL, AS SECRETARY OF THE ASSOCIATION ARE YOU AWARE OF ANY DOCUMENTS INDICATING THAT ANY OF THOSE FENCES RECEIVED ARCHITECTURAL APPROVAL PRIOR TO BEING ERECTED?

A. SAY AGAIN?

Q. I'M ASKING YOU, AS SECRETARY OF THE MAGEN'S BAY HOMEOWNERS ASSOCIATION, DO YOU HAVE DOCUMENTATION REGARDING ANY OF THE FENCES THAT ARE IN THESE PICTURES?

A. NO.

Q. SO YOU DON'T HAVE ANYTHING THAT WOULD INDICATE SOMEBODY APPLIED FOR APPROVAL?

A. NO.

Q. AND YOU DON'T HAVE ANYTHING INDICATING SOMEBODY WAS GRANTED OR DENIED APPROVAL?

A. NO.

Q. DOES ANYONE KEEP THE RECORDS FROM THE ARCHITECTURAL REVIEW COMMITTEE OTHER THAN YOU?

A. I DON'T KEEP THOSE RECORDS.

Q. ARE THERE ANY RECORDS FROM THE ARCHITECTURAL REVIEW COMMITTEE TO YOUR KNOWLEDGE?

A. I HAVE NO IDEA.

Q. HOW WOULD YOU, AS A DIRECTOR, BE ABLE TO DETERMINE IF, FOR INSTANCE, THE FENCE SHOWN ON EXHIBIT [15] HAD BEEN APPROVED OR NOT APPROVED?

A. THERE IS NO WAY I WOULD KNOW.

Q. DID YOU RECEIVE A COPY OF THE REQUEST FOR APPROVAL BY DOCTOR POHLMAN AND MS. GARROU FOR THE FENCE IN QUESTION?

A. I THINK I DID.

COPY

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|---|---|
| STATE OF NORTH CAROLINA | IN THE GENERAL COURT OF JUSTICE |
| | SUPERIOR COURT DIVISION |
| COUNTY OF CARTERET | FILE NO: 10-CVS-280 |

| | | |
|---|---|---|
| BARBARA L. POHLMAN and ANN L. GARROU, | ) | |
| PLAINTIFFS, | ) | D-E-P-O-S-I-T-I-O-N |
| VS. | ) | OF |
| MAGEN'S BAY HOMEOWNERS ASSOCIATION, INC., | ) | CHARLIE DENMEADE |
| DEFENDANT. | ) | |

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

AUGUST 12, 2010, AT THE LAW OFFICES OF TANTUM AND HUMPHREY, P.A., 604 CEDAR POINT BLVD., SUITE C CEDAR POINT, NORTH CAROLINA

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFFS - JOHN E. TANTUM, ESQ.

TANTUM & HUMPHREY, P.A.
ATTORNEYS AT LAW
604 CEDAR POINT BOULEVARD
SUITE C
CEDAR POINT, NC 28584

FOR THE DEFENDANT - WESLEY A. COLLINS, ESQ.

HARVELL & COLLINS, P.A.
ATTORNEYS AT LAW
1107 BRIDGES STREET
MOREHEAD CITY, NC 28557

COURT REPORTER - LISA O. BENNETT

A. YES.

Q. AT EACH OF THOSE ANNUAL MEETINGS WERE THERE MORE THAN SIXTY-TWO MEMBERS PRESENT AT THE ANNUAL MEETING?

A. I DON'T KNOW.

Q. DID YOU COUNT HOW MANY WERE THERE?

A. I DID NOT.

Q. WOULD IT BE FAIR TO SAY THAT THERE WERE FEWER THAN SIXTY-TWO MEMBERS PRESENT?

A. I DON'T KNOW.

Q. NOW, YOU WERE IN A ROOM WITH A CERTAIN NUMBER OF PEOPLE, WERE YOU NOT?

A. CORRECT.

Q. DID ANYONE COUNT HOW MANY MEMBERS WERE PRESENT?

A. I DON'T KNOW.

Q. YOU'RE NOT AWARE OF WHETHER ANYBODY MADE A COUNT OR NOT?

A. I DON'T KNOW.

Q. WERE THERE ANY PROXIES RETURNED TO YOU OR TO ANY OTHER MEMBERS OF THE BOARD OF DIRECTORS FROM ANY MEMBERS, TO YOUR KNOWLEDGE?

A. TO MY KNOWLEDGE, YES.

Q. THERE WERE PROXIES RETURNED?

A. YES.

Q. HOW MANY PROXIES WERE RETURNED AND WHO WERE THEY SENT TO?

# MAGENS BAY ARCHITECTURAL REVIEW GUIDELINES

August, 1994

GENERAL: Any construction, including remodeling, exterior painting, landscaping and/or erosion control within the development must be from plans that have been approved in writing by the Architectural Control Committee. Emphasis shall be placed on house designs that are in harmony with the subdivision and are compatible with existing homes for both character and quality. The Committee may take up to fifteen (15) days to review plans. All building and landscaping must be completed within one (1) year after construction started.

SITE DEVELOPMENT: The site should be disturbed as little as possible with special care to protect vegetation. Start of construction without approval can result in suspension of work and denial of access to the contractor.

LANDSCAPING: New homes must have landscaping as part of the construction plan request. Homes completed in June through August may delay planting until September. Landscaping plans must be through and include sufficient plants to screen and to break up the house foundation. Plans should provide ground cover for bare areas and disturbed soil around the house and extend to the road. If sod is not used, the minimum ground cover will be Bermuda mixed with rye and fescue. Quality plants are needed to survive the initial acclimation period. Therefore, minimum sizes are three gallon containers or six feet high, balled and burlapped. Ground cover plants like shore juniper can be in smaller containers.

DRIVEWAYS: Drives and parking areas must be concrete, asphalt, or other substances such as brick pavers approved by the Committee. Drives should provide adequate drainage to handle a heavy downpour.

BUILDING MATERIALS: These should be capable of withstanding harsh weather conditions. Treated pine, vinyl or aluminum may not be used as siding. Decking material, if wood, must be a minimum of 5/4-inch thick. As far as code and safety, we recommend no less than six(6) inch width.

FENCING: Fencing may be used. However, material and design of fencing will be at the approval of the Architectural Control Committee. Fences which run the entire length of the property line and are intended as property delineators are not permitted.

SCREENING: A/C units and solar collectors must be screened either with fencing or hidden with foliage.

EXTERIOR LIGHTING: Illumination of steps, drives and parking areas should be subdued. Recessed lighting mounted as low as practical.

SETBACKS: Codes require ten (10) feet setback on the sides of the lot, thirty (30) feet setback from the rear of the lot and thirty (30) feet from the front (street) side. In the case of a corner lot there is a twenty (20) foot setback required along the side street.

DIMENSIONS: Houses within the development must have at least 1600 sq. Ft. of heated space (1800 for rows two (2) and three (3) and 2300 for Sound Front). No house may be taller than thirty-five (35) feet measured from the mean level of the ground around the house to the roof peak. Flood insurance rates vary with elevations above mean sea level. The Review Committee does not attempt to ensure that construction meets ideal insurance rates, and it has no responsibility for this. The home builder must check with his insurance agent and architect on these matters. Plans should plainly indicate the square feet and height in an easy to read manner.

PARKING: Each house is required to have on its property parking space for at least two cars.

SEPTIC TANKS: Septic tanks must comply with state and county health departments. All above ground equipment used with septic systems must be shielded from, view of the road or adjacent lots by use of fencing or heavy or heavy planting.

DETACHED BUILDINGS: Detached workshops, storage buildings and garages are authorized provided they are not placed closer toward the water (on sound lots) than the house or deck, are not within the setback requirements, and are architecturally compatible with the house. Minimum size for detached building is 400 sq. ft..

BUILDING PLAN SUBMISSION REQUIREMENTS: A detailed site plan is required that shows the following to scale: lot boundaries; house outline; driveway and parking; paths; septic tank and tile field; and landscaping. Landscaping must be specific with a symbol representing each plant. These symbols are to be keyed to a boxed table on the plan which lists the name of each species to be planted, their total number and their size.

ELEVATIONS: Professional drawn plans must show elevation views of buildings and any other structures.

PLANS VIEWS: Plans are required for each level of construction. Preliminary, incomplete plans may be submitted for concept approval if desired, but final approval is dependent on construction plans with dimensions.

COLORS: Color, material and manufacture of roofing must be listed. Similarly any siding stain or paint color and manufactured must be identified. If the Committee is unfamiliar with the roofing or the siding stain, samples may be requested.

ROOF COLORS: The three colors should be variations of Black, Brown or Green.

FOR ADDITIONAL INFORMATION OR CLARIFICATION, CALL THE CHAIRMAN OF THE ARCHITECTURAL COMMITTEE.

## CONTRACTOR REGULATIONS

1. CONSTRUCTION HOURS: Construction workers are allowed on the site Monday through Saturday, from 7:00 A.M. to 6:00 P.M.. We expect all workers to be off the site by 6:30 P.M.

2. APPROVED PLANS: All building plans must be approved by the Architectural Review Board Before construction. Significant changes during construction must be approved by the Board.

3. VEGETATION: Do not clear or damage any vegetation except that which has been approved.

4. CONSTRUCTION SITE: Access to site will be only from the owner's frontage on hard Surface road. Do not cross over any adjacent lots or public lands. Do not storage material Or equipment on adjacent lots. Should it be necessary to park along the roadway, be sure to Have vehicles off the road, on one side of the road only.

5. SIGNS: Sandblasted signs are permitted only and should be no larger than nine (9) sq. ft.

6. FACILITIES: A portable toilet faoility is required. Facility must b e keep out of view as much As possible.

7. SPEED LIMITS: Speed limits in the development is twenty-five (25) M.P.H. Maximum. Less when congested.

8. PETS: No animals allowed by anyone working within the development.

9. TRASH: Site must keep clean. Police site daily and especially before leaving on Friday. Please remember that you must use a dumpster to prevent debris from littering the Subdivision.

Prepared by:
Cecil S. Harvell, P.A.
1107 Bridges Street, Morehead City, North Carolina 28557

STATE OF NORTH CAROLINA

COUNTY OF CARTERET

**DECLARATION OF COVENANTS, RESTRICTIONS, AND EASEMENTS FOR MAGENS BAY SUBDIVISION**

This Declaration of Covenants, Restrictions, and Easements made and entered into this 20th day of June, 1994, by L. ARDAN DEVELOPMENT CORPORATION, a North Carolina Corporation, with its principal offices in Carteret County, North Carolina, hereinafter called "Declarant".

W I T N E S S E T H:

WHEREAS, Declarant is the owner of a certain tract or parcel of land located in White Oak Township, Carteret County, North Carolina, hereinafter known as "Magens Bay Subdivision" or "Subdivision", and containing approximately eighty-four (84) acres, more or less, as the same is shown in that certain plat prepared by Prestige Engineering and Land Surveying, P.A., dated June 17, 1994, prepared for Lowell A. Fredeen, of record in Map Book 28, Page 622, Carteret County Registry (the "Plat"), which survey is incorporated herewith by reference as if fully set forth; and

WHEREAS, Declarant has caused to be prepared a plan of development wherein said property referred to hereinabove would be subjected to the same Declaration of Covenants, Restrictions and



(26)

BOOK 738 PAGE 433

Easements, and that these Covenants, Restrictions and Easements shall apply evenly and equally to all Lots developed in Magens Bay Subdivision; and

WHEREAS, it is the stated intent of these Covenants, Restrictions, and Easements to promote the following, to-wit:

A. In order to ensure the best and highest possible land use, and the most appropriate development and improvements within the Subdivision; and

B. To protect the Owners of the Subdivision Lots against any improper use that might impair or depreciate the value of their property and/or other Lots or property within the Subdivision; and

C. To guard against poorly designed or proportioned structures and to ensure against structures being constructed of unsuitable or inferior building materials; and

D. To preserve within the plan or scheme of development, insofar as is practical or feasible, the natural beauty and aesthetic value of the Subdivision; and

E. To promote and ensure that harmonious color schemes exist; and further, in order to expressly forbid any radical, extremely unusual or "garish" color schemes from existing within said Subdivision; and

F. To encourage and secure construction or erection of attractive homes within said Subdivision, with uniform and appropriate positioning of all homes on Lots, and to ensure that proper minimum side and front set-backs are maintained; and

G. To ensure that each individual Owner of each Lot shall have one (1) vote in the Association, and that each Lot shall be proportionally responsible for its share of maintenance of any roads or drainage easements within said Subdivision, said proportion to be determined as stated hereinafter; and

H. In general, to provide a Subdivision or development for the Owners, wherein they remain assured that their interests will be protected, their investment protected, and that each individual property Owner shall be treated equally and fairly.

NOW, THEREFORE, for the mutual benefit of all Owners and purchasers of Lots within said Subdivision, the Declarant hereby declares that all the Lots shown and designated for development, as hereinafter set forth, shall be held, transferred, owned, sold and conveyed subject to the following Restrictive Covenants and Conditions, to-wit:

1. DEFINITIONS

(a) "Association" shall mean and refer to MAGENS BAY HOMEOWNERS ASSOCIATION, INC., the association of Lot Owners of the MAGENS BAY SUBDIVISION.

(b) "Common Properties" shall mean and refer to all real property, together with all improvements located thereon, either owned by the Association for the common use and enjoyment of the Owners of Lots, or designated as "common areas" on any Subdivision plat of any portion of the properties.

(c) "Declarant" shall mean L. ARDAN DEVELOPMENT CORPORATION, a North Carolina corporation, with its principal

Lot shall not affect the assessment of the lien. However, the sale or transfer of any Lot pursuant to mortgage foreclosure, or any proceeding in lien thereof, shall extinguish the lien of such assessments as to payments which become due prior to such sale or transfer. No sale or transfer shall relieve such Lot from liability for any assessments thereafter becoming due or from the lien thereof.

(j) Declarant's Exemption. Until Declarant has conveyed eighty (80%) percent of the Lots within the Subdivision, the Lots owned by Declarant shall not be subject to assessments, with the following exceptions:

(i) Should Declarant cause a dwelling to be constructed on any Lot owned by Declarant and thereafter lease the same, said Lot shall be assessed as any other non-Declarant Owner.

(ii) After Declarant has conveyed eighty (80%) percent of the Lots within the Subdivision, Declarant's remaining Lots will be assessed as any other non-Declarant Lot.

6. ARCHITECTURAL CONTROL. Development and construction within the Subdivision shall be controlled as follows:

(a) The Declarant shall establish an Architectural Control Committee ("Committee") which shall consist of three (3) Members. The Committee shall, upon recordation of this Declaration, be composed of the following Members for the term ending December 31, 1995, or until their earlier resignation: Lowell A. Fredeen, Larry T. Watson and James S. Moffit, Jr.

Upon the expiration of the term of each initial Member of the Committee, a successor Member shall be appointed by the Board of Directors of the Association to serve for a two (2) year term and each successor thereafter shall be appointed by the Board of Directors of the Association to serve for a two (2) year term.

However, should any Member of the initial Committee resign prior to the expiration of his term, the Declarant shall have the right to name a successor, to fill said unexpired term.

The Board of Directors of the Association shall have the right to remove, with or without cause, any Member of the Committee appointed by such Board. Except as listed in the preceding paragraph, the Board of Directors of the Association shall also have the right to appoint a successor Member to fill a vacancy on the Committee created by the death, resignation or removal of a Member appointed by the Board to serve for the unexpired term of such Member.

(b) Purpose. The Committee shall regulate the external design, appearance, landscaping, color, use, location and maintenance of the property subject to this Declaration and of the improvements located thereon in such a manner so as to preserve and enhance property values and to maintain a harmonious relationship among all structures and the natural vegetation and topography. In addition, the Committee shall attempt to minimize intrusions on the

view and the privacy of other Owners, and shall attempt to insure compliance with all conditions of this Declaration, and of all set backs, easements, and other restrictions as shown on the Plat.

(c) Procedure. Two (2) copies of the complete set of elevations, plans and specifications, including landscaping plans, describing any improvement, alteration, repair, or other item requiring approval of the Committee, shall be submitted to the Committee, at the place or address designated by the Association, at least thirty (30) days prior to application for a building permit, or before construction is actually scheduled to begin, whichever is the earlier event. The Committee shall either approve or disapprove the proposed work in writing within fifteen (15) days of the receipt of said plans and specifications. If the Committee disapproves the proposed work, the Committee shall state its reasons for such disapproval in the written notification. In the event the Committee fails to approve or disapprove in writing any proposed work within said fifteen (15) day period, approval shall be deemed granted. An applicant shall have the right to appeal within thirty (30) days an adverse decision of the Committee to the Board of Directors of the Association who may reverse or modify such decision by a two-thirds (2/3) vote of the directors present at a duly called meeting.

(d) Required Approval. No improvements, alterations, repairs, or excavations, nor any maintenance which requires or would result in a change in appearance (such as a change of color), or any other activity which would noticeably and visibly change the

exterior appearance of a house or a Lot, or any improvement located thereon, shall be made or done without the prior approval of the Committee. No building, fence, wall, residence, dock, pier, gazebo, or other structure shall be commenced, erected, maintained, improved, altered or otherwise modified, without the prior approval of the Committee, upon compliance with the procedures for approval as set out in subparagraph (c) of this Paragraph 6.

(e) Deposit. A One Thousand and 00/100 ($1,000.00) Dollar deposit shall be required by any Owner or agent at the time of submitting plans for approval. This is a security deposit to cover any damage caused by the contractor and/or its agents and the same shall be refunded upon the total completion of construction as long as the Committee considers there to be no damage to the property.

7. MINIMUM DESIGN REQUIREMENTS.

(a) The following minimum requirements must be met by each dwelling within the Subdivision and may not be varied or waived by the Architectural Control Committee:

(i) All homes within the Subdivision shall be single family residences with a minimum constructed dwelling size of 1,600 square feet of heated space for interior Lots, 1,800 square feet of heated space for second and third row Lots, and 2,300 square feet of heated space for water front Lots. Notwithstanding the above, the Architectural Control Committee may alter or amend the minimum constructed dwelling size on any Lot if it deems the same to be desirable in light of that particular Lot's

# BY-LAWS

# OF

# MAGENS BAY HOMEOWNERS ASSOCIATION, INC.

## ARTICLE I

## PLAN OF COMMON PROPERTY CONTROL

Section 1. Lands Affected. L. ARDAN DEVELOPMENT CORPORATION, a North Carolina corporation, with its principal office in Carteret County, North Carolina, hereinafter known as "Declarant" is the owner of certain lands lying in White Oak Township, Carteret County, North Carolina, and has subjected said lands to a Declaration of Covenants, Restrictions, and Easements (herein "Declaration") recorded in Book 738, Page 433, Carteret County Registry, and amended in Book 743, Page 543, and Book 749, Page 421, Carteret County Registry.

Section 2. Name. The lands on which said Declaration is imposed shall be known as MAGENS BAY SUBDIVISION.

Section 3. Applicability of By-Laws. All present and future owners, mortgagees, lessees, and occupants within the Property, and their agents, servants, and employees, and any other persons who may make use of the facilities of the Property in any manner, are subject to these By-Laws and to the Rules and Regulations adopted pursuant hereto, and to any amendments to these By-Laws upon the same being duly adopted.

The acceptance of a deed or conveyance to, or the entering into a lease to, or the act of occupancy of, any Lot

within the Property by any person shall conclusively establish the acceptance and ratification by such person of these By-Laws (and any Rules and Regulations adopted pursuance hereto), the Articles of Incorporation, and the Declaration as they may be amended from time to time, and shall constitute and evidence an agreement by such persons to comply with those governing documents.

## ARTICLE II

## DEFINITIONS

Section 1. "Association" shall mean and refer to MAGENS BAY HOMEOWNERS ASSOCIATION, INC., its successors and assigns.

Section 2. "Property" shall mean and refer to that certain real property described in the Declaration of Covenants, Restrictions and Easements of Magens Bay Subdivision, and all additional property thereto, as may be hereafter brought within the jurisdiction of the Association.

Section 3. "Common Properties" shall mean and refer to all real property, together with all improvements located thereon, either owned by the Association for the common use and enjoyment of the Owners of Lots, or designated as "common areas" on any subdivision plat of any portion of the properties.

Section 4. "Lot" shall mean and refer to any numbered plot of land shown on any recorded Subdivision map of any portion of the properties, which numbered Lot is intended to be conveyed for the purpose of allowing construction thereof of a single family home.

Common Properties and buildings, including, but not limited to the establishment and imposition of fines, fees and penalties for violation of the Declaration, By-Laws or Rules and Regulations.

## ARTICLE III

## OFFICES

Section 1. The principal office of the Association shall be located at ~~204 Clubhouse Drive~~ 243 Rovel Road, Swansboro, North Carolina 28584.

Section 2. The registered office of the Association may, but need not be, identical with the principal office, but shall be located in North Carolina.

Section 3. The Association may have such other offices, either within or without the State of North Carolina, as the Board may from time to time determine or as the affairs of the Association may require.

## ARTICLE IV

## MEETING OF MEMBERS

Section 1. Members. The qualification of members, the manner of their admission to membership and termination of such membership shall be as set forth in the Articles of Incorporation of the Association and the Declaration.

Section 2. Annual Meetings. An annual meeting of the Association shall be held for the purpose of electing members of the Board of Directors and for the transaction of such other

business as may be properly brought before the meeting. The annual meetings shall be held at 7:00 p.m. on the third Thursday of June of each year, unless such day shall be a legal holiday, in which event the meeting shall be held at the same time of the day next following which is not a legal holiday, and the first annual meeting shall be held on the 15th day of June, 1995.

Section 3. Substitute Annual Meetings. If an annual meeting is not held on the day designated in these By-Laws, a substitute annual meeting may be called in the same manner as a special meeting. A meeting so called shall be designated and treated for all purposes as the annual meeting.

Section 4. Special Meetings. Special meetings of the Members may be called at any time by the President, or by the Board of Directors, or upon the written request of the Members who are entitled to vote one-fourth (1/4) of all the votes of the Association.

Section 5. Place of Meetings. All meetings of the Association shall be held at the Property, or at such other place in the County where the Property is located as shall be designated in the notice of the meeting.

Section 6. Notice of Meetings. Written or printed notice stating the place, day and hour of the meeting of the Members shall be given by, or at the direction of, the Secretary or person authorized to call the meeting, by mailing a copy of such notice by first class mail, postage prepaid, not less than thirty (30) days nor more than sixty (60) days prior to the date of the

meeting by the Secretary to each person entitled to vote at such meeting.

In the case of an annual meeting, substitute annual meeting, or special meeting, the notice of meeting shall state the time and place of the meeting, as well as the items on the agenda to be considered, including, but not limited to, the general nature of any proposed amendment to the Declaration or By-Laws, any budget matters, or any proposal to remove an officer or director.

When a meeting is adjourned for thirty (30) days or more, notice of the reconvening of the adjourned meeting shall be given as in the case of an original meeting. When a meeting is adjourned for less than thirty (30) days in any one adjournment, it shall not be necessary to give notice of the reconvening of the adjourned meeting other than by an announcement at the meeting at which the adjournment is effective.

Section 7. Quorum. Presence at the meeting of members, in person or by proxy, at the beginning of any meeting of members constituting fifty-one (51%) percent of the total votes of the Association, shall constitute a quorum for any action except as other provided in the Articles of Incorporation, the Declaration or these By-Laws. If, however, such quorum is not present or represented at any meeting, the members entitled to vote thereat shall have power to adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum as aforesaid shall be present and represented.

If a quorum is not present at the opening of any meeting, the meeting may be adjourned from time to time by vote of a majority of the voting interests present, either in person or by proxy, and shall be reconvened at the date and time determined at the adjourned meeting, subject to the notice requirements set forth in Section 6 of this Article. Upon the reconvening of any meeting adjourned for lack of a quorum, the quorum required at such subsequent meeting shall be one-half (1/2) that required at the preceding meeting.

Section 8. Voting Members; Proxies. There shall be one person with respect to each Lot who shall be entitled to vote the voting interest of that Lot at any meeting of the Association, herein referred to as the "voting member". The voting member may be the Owner of a Lot, or an Owner designated by a majority of the several Owners of a Lot, or may be some other person designated by such Owner or Owners to act as proxy on his or their behalf and who need not be an Owner. Designation of the voting member or of a proxy shall be made in writing to the Secretary and shall be revocable at any time prior to the meeting by actual notice to the Secretary by the Owner or a majority of Owners. Once a meeting has been commenced, a Lot Owner may not revoke a proxy given except by written notice of revocation delivered to the person presiding over the meeting. A proxy is void if not dated, and a proxy shall terminate at the time specified in the proxy, or one (1) year from date, whichever is earlier.

Section 9. Voting Rights; Multiple Owners. If only one of the multiple owners of a Lot is present at a meeting of the Association, he is entitled to cast the votes allocated to the Lot. If more than one of the multiple owners is present, the vote allocated to that Lot may be cast in accordance with the agreement of a majority in interest of the multiple owners. Majority agreement is conclusively presumed if any one of the multiple owners casts the vote allocated to that Lot without protest being made promptly to the person presiding over the meeting by any of the other Owners of the Lot.

Section 10. Voting Rights; Cumulative Voting. The vote cast by, or on behalf of, the Owner or Owners of a Lot shall be that voting interest specified in the Articles of Incorporation. In all elections for members of the Board of Directors, no voting member shall be entitled to vote on a cumulative voting basis for the director or directors to be elected, and the candidate or candidates receiving the highest number of votes with respect to the number of offices to be filled shall be deemed elected.

Section 11. Waiver of Notice. Any Lot Owner, at any time, may waive notice of any meeting of the Association in writing, and such waiver shall be deemed equivalent to the giving of such notice. Attendance by a Lot Owner at any meeting of the Association shall constitute a waiver of notice by him of the time and place thereof except where a Lot Owner attends a meeting for the express purpose of objecting to the transaction of any business because the meeting was not lawfully called. If all of the voting

members are present at any meeting of the Association, no notice shall be required, and any business may be transacted at any meeting.

Section 12. Informal Action by Lot Owners. Any action which may be taken at a meeting of the Association may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the persons who would be entitled to vote upon such an action at a meeting and filed with the Secretary of the Association to be kept in the Association minute book.

## ARTICLE V

## BOARD OF DIRECTORS

Section 1. General Powers. The business of the Association shall be managed and directed by the Board of Directors or by such executive committees as the Board may establish pursuant to these By-Laws. If any of the authority of the Board of Directors is vested in any committee, one member of each such committee shall be a Board member.

Section 2. Initial Board. There shall be an initial Board of six (6) directors, appointed by the Declarant, who shall serve until their successors are appointed or elected and qualified as herein provided.

Section 3. Subsequent Number and Qualification. Until such time as the Class B Membership shall terminate, Declarant shall be the only member to select, or elect the Board of Directors.

Notwithstanding the foregoing, the Declarant may, at any time, voluntarily surrender its right as a Class B Member and appoint members of the Board of Directors before the occurrence of those events of termination set forth in the Articles of Incorporation.

At such time as Declarant's Class B Membership rights to appoint the members of the Board of Directors expires or is surrendered, the terms of the directors appointed by Declarant shall thereupon immediately terminate and the vacancies thereby created shall be filled by the members of the Association upon a meeting called for that purpose to serve until the next annual meeting of members. At the end of such period where Declarant's Class B Membership rights have terminated or upon surrender of those rights and if all Lots have not been transferred by Declarant, the Declarant for all purposes shall be deemed a Lot Owner and shall be entitled to vote in such elections as any other Lot Owner. During the time when it has the right to designate Directors, the Declarant shall have the right in its sole discretion to replace any Director or Directors it appointed and to designate their successors.

Section 4. Election of Directors. Except for the appointed directors provided for in Section 3 of this Article V, while Declarant is a Class B Member, and as otherwise provided in Section 5 of this Article, the directors shall be elected at the annual meeting of the Association; and those candidates who receive the highest number of votes shall be elected.

Section 5. Removal. Any elected director may be removed from office, with or without cause, by the affirmative vote of sixty-seven (67%) percent of the voting interests of Lot Owners present and entitled to vote at a special meeting called for that purpose. If any directors are so removed, new directors may be elected at the same meeting.

Section 6. Vacancies. An elective vacancy occurring in the Board of Directors, including directorships not filled by the voting members, may be filled by a majority of the remaining directors, though less than a quorum, or by the sole remaining director.

Section 7. Compensation. The Board of Directors shall receive reimbursement for expenses, but shall not receive compensation for their services unless expressly allowed by the Association upon the affirmative vote of its members.

Section 8. Executive Committees. The Board of Directors may, by resolution adopted by a majority of the number of directors fixed by these By-Laws, designate two (2) or more directors to constitute an executive committee, which committee, to the extent provided in such resolution, shall have and may exercise all of the authority of the Board of Directors in the management of the Property.

Section 9. Powers. The Board of Directors shall have the powers necessary for the administration of the affairs of the Association as specified by law, the Declaration or these By-Laws, and may do all such acts and things, except such act as by law, by

shall be limited to such proportions of the total liability thereunder as his voting interest in the Common Properties bears to the interest of all of the Lot Owners. Every agreement made by the Board or by the manager on behalf of the Association shall provide that the members of the Board of Directors, or the manager, as the case may be, are acting only as agents for the Association, and shall have no personal liability thereunder (except as Lot Owners), and that each Lot Owner's liability thereunder shall be limited to such proportion of the total liability thereunder as its voting interest in the Association bears to the voting interest of all Lot Owners.

## ARTICLE VI

## MEETINGS OF DIRECTORS

Section 1. Regular Meetings. A regular meeting of the Board shall be held immediately after and at the same place as the annual meeting or substitute meeting of the Association. The Board may provide by adoption of an appropriate resolution for the time and place within the County in which the Property is located, for other regular meetings of the Board.

Section 2. Special Meetings. Special meetings of the Board may be called by or at the request of the President, or by any two (2) Directors. Such meetings may be held at any place within the County in which the Property is located.

Section 3. Notice of Meetings. Regular meetings of the Board of Directors may be held without notice. The person or

persons calling a special meeting of the Board shall give actual notice, oral or written, to all Directors of the time, place and purpose of such meeting at least two (2) days prior thereto.

Attendance by a Director at a meeting shall constitute a waiver of notice of such meeting except where a Director attends the meeting for the express purpose of objecting to the transaction of any business because the meeting was not lawfully called.

Section 4. Waiver of Notice. Any member of the Board of Directors may give written waiver of notice at any time of any meeting of the Board, and such waiver shall be deemed equivalent to the giving of such notice. If all of the members of the Board are present at any meeting thereof, no notice shall be required and any business may be transacted at such meeting.

Section 5. Quorum. A majority of the number of Directors fixed by these By-Laws shall be required for and shall constitute a quorum for the transaction of business at any meeting of the Board of Directors.

Section 6. Manner of Acting. Except as otherwise provided in this Article VI, the act of the majority of the Directors present at a meeting at which a quorum is present shall be the act of the Board of Directors.

A vote of a majority of the number of Directors fixed by the By-Laws shall be required to adopt a resolution constituting an executive committee.

Section 7. Organization. Each meeting of the Board of Directors shall be presided over by the President and in the

absence of the President, by the Vice President, and in the absence of the Vice President, by any person selected to preside by vote of the majority of the Directors present. The Secretary, or in his absence, an Assistant Secretary, or in the absence of both the Secretary and the Assistant Secretary, any person designated by the presiding officer of the meeting, shall act as Secretary of the meeting.

Section 8. Informal Action of Directors. Any action taken by a majority of the Directors without a meeting shall constitute Board action if written consent to the action in question is signed by all the Directors and filed with the minutes of the proceedings of the Board, whether done before or after the action is taken.

Section 9. Minutes. The Board, and all committees to which the Board shall have delegated any of its authority, shall keep minutes of all the proceedings of the Board and the committees.

Section 10. Fidelity Bonds. The Board of Directors shall require any officer or employee of the Association handling or responsible for Association funds to be covered by an adequate fidelity bond. The premiums on such bond shall constitute a common expense.

## ARTICLE VII

## OFFICERS

Section 1. Designation. The principal officers of the Association shall be a President, a Secretary, a Treasurer and such

Until all of the Lots of the Declarant referred to in Article I, Section 1, hereof have been sold, neither the Lot Owners nor the Board shall interfere with the sale of additional Lots. Declarant may make such use of the unsold Lots and the Common Properties as may facilitate such completion and sale including, but not limited to, the rental of the same, showing of the Lots and the display of signs and maintenance of a sales office.

Section 9. Rules of Conduct. Rules and Regulations concerning the use of the Common Properties may be promulgated and amended by the Board. Copies of such Rules and Regulations shall be furnished by the Board to each Lot Owner, and all amendments and new Rules and Regulations shall be furnished to Lot Owners prior to the time that amendment or new rule or regulation becomes effective.

Section 10. Utility Charges. All charges for utilities used in connection with the maintenance and use of the Common Properties shall be a common expense.

## ARTICLE IX

## POWERS AND DUTIES OF THE BOARD OF DIRECTORS

Section 1. Powers. The Board of Directors shall have the power to:

(a) Enforce the provisions of the Declaration of Covenants, Restrictions and Easements of Magens Bay Subdivision;

(b) Suspend the voting rights of a member during any period in which such member shall be in default of any assessment

levied by the Association. Such rights may also be suspended by notice and hearing for a period not to exceed sixty (60) days for infractions of published Rules and Regulations;

(c) Exercise for the Association all powers, duties and authority vested in or delegated to the Association and not reserved to the membership by other provisions of these By-Laws, the Articles of Incorporation, or the Declaration;

(d) Declare the office of a member of the Board of Directors to be vacant in the event such member shall be absent from three (3) consecutive regular meetings of the Board of Directors; and

(e) Employ a manager, an independent contractor, or such other employees as the Board may deem necessary and to prescribe their duties.

Section 2. Duties. It shall be the duty of the Board of Directors to:

(a) Administer, operate, maintain and repair the Common Properties.

(b) Enter upon any Lot and perform any repairs, maintenance or construction for which the Association is responsible at reasonable times and hours and with as little inconvenience to the Lot Owner as practicable. The Association shall repair any damages to the Lot caused by such repair, maintenance or construction, and all costs incurred in performing these duties shall be a common expense of the Property, unless the Board shall determine that the repairs, maintenance or construction

(m) Pay all taxes, charges and assessments which are or may become liens against any part of the Common Properties, and assess the same against the members and their respective Lots.

(n) To enforce by legal means or proceedings the provisions of the Articles of Incorporation, By-Laws, the Declaration and the Rules and Regulations promulgated hereunder.

(o) To review and to approve architectural changes, alterations or modification of Lots and the improvements thereon.

(p) To establish fines and penalties for late payment of assessments and for violations of the Declaration, By-Laws and the Rules and Regulations and to provide for the suspension of voting rights of any member, or its Lot occupants, as well as the right to use any amenities or recreational facilities, during any period in which such member shall be in default in the payment of any assessment levied by the Association and to suspend such voting rights and other privileges for a period not to exceed sixty [60] days after notice and hearing for other infractions.

(q) To impose reasonable charges for services especially provided to one or more Lot Owners which charges or costs should not otherwise be a common expense.

(r) To institute, defend or intervene on behalf of the Association in litigation or administrative procedures affecting the Property.

(s) To cause additional improvements to be made to the Common Properties.

(t) To grant easements, leases, licenses, and concessions through or over the Common Properties.

(u) Exercise the powers granted to the Board in good faith and do and perform such other duties necessary and appropriate to the proper administration, operation and maintenance of the Association as provided by law, the Declaration and these By-Laws.

## ARTICLE X

## OPERATION PRIOR TO INITIAL MEETING OF BOARD

Prior to the first meeting of the initial Board of Directors, all functions of the Association and of the Board of Directors as herein set forth shall be performed and carried out by the Declarant through its officers and agents.

## ARTICLE XI

## RECORDS, BOOKS AND AUDITS

The books, records, and papers of the Association shall be subject to inspection by any member at all times, during reasonable business hours. The Declaration, the Articles of Incorporation and the By-Laws of the Association shall be available for inspection by any member at the principal officer of the Association, where copies may be purchased at a reasonable cost.

The Board of Directors or the manager shall keep detailed records of actions of the Board and the manager, minutes of the meetings of the Association, and financial records and books or

CONTENTS OF ADDENDUM

Harrison v. Lands End of
Emerald Isle Ass'n, Inc.,
2009 N.C. App. LEXIS 2675
(N.C. Ct. App. April 6, 2009)

Analysis
As of: Apr 12, 2012

**EDWIN T. HARRISON and wife, ROSE MARIE HARRISON, Plaintiffs, v. LANDS END OF EMERALD ISLE ASSOCIATION, INC., WILLIAM KEADEY and wife, PENELOPE KEADEY, individually, and BUZZY REDDING and wife, KAY REDDING, et al., Defendants.**

**NO. COA09-215**

**COURT OF APPEALS OF NORTH CAROLINA**

*2009 N.C. App. LEXIS 2675*

**September 3, 2009, Heard in the Court of Appeals**
**April 6, 2009, Filed**

**NOTICE:**

PURSUANT TO RULE 32(b), NORTH CAROLINA RULES OF APPELLATE PROCEDURE, THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE TWENTY-ONE DAY REHEARING PERIOD. THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

**SUBSEQUENT HISTORY:** Reported at *Harrison v. Lands End of Emerald Isle, 692 S.E.2d 487, 2010 N.C. App. LEXIS 601 (N.C. Ct. App., Apr. 6, 2010)*

**PRIOR HISTORY:** [*1]
Carteret County. No. 05 CVS 1154.

**DISPOSITION:** AFFIRMED.

**COUNSEL:** Harvell and Collins, P.A., by Wesley A. Collins, for Plaintiffs.

Wheatly, Wheatly, Weeks & Lupton, P.A., by Claud R. Wheatly, III, for Defendants William Keadey and wife, Penelope Keadey.

**JUDGES:** STEPHENS, Judge. Judges HUNTER, JR. and BEASLEY concur.

**OPINION BY:** STEPHENS

**OPINION**

Appeal by Plaintiffs from order entered 21 August 2007 by Judge Russell J. Lanier, Jr. in Carteret County Superior Court. Heard in the Court of Appeals 3 September 2009.

STEPHENS, Judge.

*I. Procedural History*

Edwin T. Harrison and wife, Rose Marie Harrison ("Plaintiffs"), filed a civil complaint in Carteret County Superior Court on 18 October 2005 alleging, *inter alia,* breach of restrictive covenants by Buzzy Redding and wife, Kay Redding (collectively, "the Reddings"), and William Keadey and wife, Penelope Keadey (collectively, "the Keadeys"). The Keadeys filed an answer on 5 January 2006 and a motion for summary judgment on 6 August 2007. On 21 August 2007, the trial court granted the Keadeys' motion for summary judgment. [1]

1 The order granting summary judgment did not explain the trial court's rationale for doing so.

On 24 September 2008, Plaintiffs entered into a "Final Judgment" with all defendants [*2] named in the complaint except the Keadeys, resolving all matters

raised by the action except those involving the Keadeys. From the order granting summary judgment as to the Keadeys, Plaintiffs appeal.

*II. Facts*

Plaintiffs own Lot 164 in Lands End Subdivision ("Lands End"), a gated ocean-front community in Carteret County consisting of approximately 200 lots. The Reddings own Lot 165 and the Keadeys own Lot 166. Lands End has Second Amended and Restated Protective Covenants, Lands End and Lands End West ("Restrictive Covenants") recorded in Book 940, Page 485 of the Carteret County Registry, which govern the use and maintenance of the property in Lands End.

Article 13, Section Z. of the Restrictive Covenants provides in relevant part:

> The owner of each Lot shall maintain his lot and all structures thereon in a clean and sightly condition, and shall cause such lot to be mowed, all structures to be painted and cared for so as to maintain a compatible aesthetic appearance with other well-maintained lots and structures. Failure to comply may result in declaring such property a "continuing nuisance" until such time as the condition is rectified. . . .

Pursuant to Article 10, the Restrictive Covenants [*3] "may be enforced by any individual Owner[.]"

The facts that give rise to this civil action involve a parcel of land located primarily on Lots 165 and 166 that is approximately 100 feet long by 50 feet wide (hereinafter, "the area of concern" or "the area"). Prior to construction of the homes on Lots 165 and 166, the area of concern was densely vegetated with live oak trees, wax myrtle trees, and other vegetation, and drained relatively quickly. During construction on Lots 165 and 166, the area was denuded of its native vegetation and a retaining wall approximately four feet tall was built on the western border of the area on Lot 165. Presently, the area is swampy and filled with cattails, and storm water in excess of three feet deep is sometimes retained in the area of concern. Storm water has remained stagnant in the area for as long as ten months before finally evaporating or soaking into the swampy soil.

In their complaint, Plaintiffs alleged that because of the condition of the area of concern, the Keadeys violated the restrictive covenant requiring lot owners to maintain their lots "in a clean and sightly condition . . . so as to maintain a compatible aesthetic appearance with other [*4] well-maintained lots and structures."

*III. Discussion*

At issue is whether the trial court erred in granting summary judgment in favor of the Keadeys because there were genuine issues of material fact as to whether the Keadeys were in violation of the Restrictive Covenants. Plaintiffs contend there were genuine issues of material fact as to whether the Keadeys failed to maintain their lot "in a clean and sightly condition" and failed to maintain their lot in "a compatible aesthetic appearance with other well-maintained lots and structures[,]" as required by the Restrictive Covenants. The Keadeys respond that the covenant on which Plaintiffs rely is void for vagueness and, thus, is unenforceable. We agree with the Keadeys and conclude that the trial court properly granted summary judgment in their favor.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *N.C. Gen. Stat. § 1A-1, Rule 56(c)* (2007). The trial court may not resolve issues of fact and must deny the motion [*5] if there is a genuine issue as to any material fact. *Singleton v. Stewart, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972)*. Furthermore, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975)* (citation and internal quotation marks omitted). The standard of review for summary judgment is *de novo. Builders Mut. Ins. Co. v. North Main Constr., Ltd., 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006)*.

"The word covenant means a binding agreement or compact benefitting both covenanting parties." *Armstrong v. Ledges Homeowners Ass'n, 360 N.C. 547, 554, 633 S.E.2d 78, 84 (2006)*. "Covenants accompanying the purchase of real property are contracts which create private incorporeal rights, meaning non-possessory rights held by the seller, a third-party, or a group of people, to use or limit the use of the purchased property." *Id. at 554, 633 S.E.2d at 85*. "Judicial enforcement of a covenant will occur as it would in an action for enforcement of 'any other valid contractual relationship.'" *Page v. Bald Head Ass'n, 170 N.C. App. 151, 155, 611 S.E.2d 463, 466* (quoting *Sheets v. Dillon, 221 N.C. 426, 431, 20 S.E.2d 344, 347 (1942))*, [*6] *disc. review denied, 359 N.C. 635, 616 S.E.2d 542 (2005)*. Thus, in accordance with general principles of contract law that the terms of a contract must be sufficiently definite for a court to enforce them, *Snug Harbor Prop. Owners Assoc. v. Curran, 55 N.C. App. 199, 203, 284 S.E.2d 752, 755*

*(1981)*, a covenant is void for vagueness where there is no "clear and unambiguous" standard contained in the covenant by which the court can "objectively determine" if a party's conduct conforms to the standard set forth therein. *Beech Mountain Prop. Owners' Assoc. v. Seifart, 48 N.C. App. 286, 295, 269 S.E.2d 178, 182 (1980)*; *see also Lake Gaston Estates Prop. Owners Ass'n v. Cty. of Warren, 186 N.C. App. 606, 652 S.E.2d 671 (2007)*.

At issue in this case is the interpretation and application of the covenant requiring a lot owner to maintain his lot in a "clean and sightly" condition and in a "compatible aesthetic appearance with other well-maintained lots[.]" While our research reveals that it is not uncommon for homeowners' association covenants to contain a "clean and sightly" standard, this standard is nonetheless ambiguous and susceptible to various conflicting interpretations. Likewise, a covenant [*7] requiring a "compatible aesthetic appearance with other well-maintained lots" is subject to individual subjective interpretation based on personal preference. As there is no "ascertainable standard" contained in the covenant by which this Court can "objectively determine" whether the Keadeys' conduct conforms with the covenant, our enforcement of the covenant would be arbitrary. *Id.* Accordingly, we conclude that the covenant at issue is void for vagueness, and hold that the trial court did not err in granting summary judgment in favor of the Keadeys.

AFFIRMED.

Judges HUNTER, JR. and BEASLEY concur.

Report per Rule 30(e).