

DUNGAN & MITCHELL, P.A.

Attorneys at Law

ROBERT E. DUNGAN (NC & GA)
TED F. MITCHELL (NC & SC)
SHANNON LOVINS (NC & TN)

July 19, 2002

Joseph A. Dinkins
Board of Directors
The Ledges Homeowners Association, Inc.
611 Black Walnut Court
Hendersonville, NC 28792-9206

Re: Restrictive Covenants of The Ledges of Hidden Hills

Dear Mr. Dinkins:

As requested, I have reviewed The Ledges Homeowners Association, Inc.'s Restrictive Covenants and Bylaws. Below I have indicated several areas that I suggested be revised and/or reviewed by the Board. I used an outline format according to the different Articles in order to simplify matters and also to complete my review within the allotted one hour. Finally, in light of your comment about the "legalese" of the North Carolina Planned Community Act, I have included a short description of the Act and its benefits. After you have reviewed my letter and the Act, please contact me so we can discuss the procedure for revising the Restrictive Covenants and Bylaws, as well as any other of The Ledges Homeowners Association, Inc.'s concerns (hereinafter referred to as the "Association").

The North Carolina Planned Community Act

Effective January 1, 1999, the North Carolina Planned Community Act ("the Act") looks to bring much of the same order, protection and cohesiveness to planned communities that the North Carolina Condominium Act (effective October 1, 1996) brought to condominium owners' associations. A complete discussion of the Act would require more than few pages, however, I will attempt to discuss several overriding topics planned communities may want to review in considering whether to adopt the Act. The Act is divided into three articles:

Article 1 discusses the applicability of the Act to existing and pre-existing planned communities, definitions for the Act, and other "background" information such as the applicability of zoning ordinances, regulations and building codes.

Article 2 contains the statutory guidance for creation of a planned community, the construction of the declaration, bylaws, and amendments, the creation of master associations, the merger and/or consolidation of planned communities, and finally termination of the planned community.

Article 3 covers a vast spectrum for the management of the planned community: requirements for organization, powers, duties of executive board members and officers, upkeep and maintenance, guidelines on meetings, quorums, voting and proxies, liens and even tort and contract liability.

Adoption of the Act

The Planned Community Act was drafted to apply to all planned communities within North Carolina created after January 1, 1999. However, any planned community created prior to the Act's effective date can adopt the entire Act by affirmative vote or written agreement signed by lot owners or lots to which at least 67% of the votes in the association are allocated or any smaller majority the association's declaration happens to specify. Under Section (32), a majority of members could adopt the Act by amended your Declaration. Nevertheless, as discussed below, some provisions of the Act apply whether or not it is formally adopted.

Variations from the Act

While some associations may feel reluctant to adopt the Act because you do not agree with a few of its provisions. While there are many central statutory provisions that cannot be varied by the Association's declaration or bylaws, there are also numerous sections throughout the Act which may be altered to your specific wants and needs. The following are examples of sections that may be manipulated to fit the Association's particular needs: the size requirement of developments that may come under the Act, the size and distribution of awards under the eminent domain laws, the terms for amendments of a declaration, the authority of the executive board members and officers, procedures for fines and suspension of privileges or services, the requirements for meetings and quorums, and rules for assessments for common expenses.

Organization and Powers

The Act, specifically Article 3, helps an association become more organized and have the ability to run more smoothly. For instance, it contains requirements for the organization of the association, the powers of the association, the powers and duties of the executive board members and officers, and requirements for the association's bylaws. When you consider that home and property owner associations operate as small governments and are often managed and run by volunteers with varied experiences and capabilities, the Act's guidelines are very beneficial. As such, the specific powers granted by the Act may be its most important provisions and warrant repeating. Subject to the provisions of the articles of incorporation and/or declaration, an association's powers under N.C.G.S. § 47F-3-102 of the Act are as follows:

- (1) Adopt and amend bylaws and rules and regulations;

- (2) Adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from lot owners;
- (3) Hire and discharge managing agents and other employees, agents, and independent contractors;
- (4) Institute, defend, or intervene in litigation or administrative proceedings on matters affecting the planned community;
- (5) Make contracts and incur liabilities;
- (6) Regulate the use, maintenance, repair, replacement, and modification of common elements;
- (7) Cause additional improvements to be made as a part of the common elements;
- (8) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, (with greater requirements for common elements);
- (9) Grant easements, leases, etc. through or over the common elements;
- (10) Impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements other than the limited common elements and for services provided to lot owners;
- (11) Impose reasonable charges for late payment of assessments and suspend privileges or services (except rights of access to lots) after 30 days;
- (12) Impose reasonable fines or suspend privileges or services provided by the association (except rights of access to lots) for reasonable periods for violations of the declaration, bylaws, and rules and regulations of the association;
- (13) Impose charges in connection with the preparation/recording of documents;
- (14) Provide for the indemnification of and maintain liability insurance for its officers, executive board, directors, employees, and agents;
- (15) Assign its right to future income, including the right to receive common expense assessments;
- (16) Exercise all other powers that may be exercised in this State by legal entities of the same type as the association; and
- (17) Exercise any other powers necessary and proper for the governance and operation of the association.

The purpose of the Act was to provide members with the authority and guidelines for the proper management of planned communities. The powers listed above reflect this purpose. The Act provides the power to effect change and improvements in communities where a few members were able to exercise de facto veto power.

Collection of Association Assessments

Unknown to many persons, including attorneys, several sections, including N.C.G.S. §§ 47F-3-115 and 116 currently apply to planned communities formed prior to January 1, 1999 without formal adoption. These sections cover the collection of assessments and the placing of liens for nonpayment of assessments. When these statutory provisions are used to authorize and enforce assessments, the potential problems associated with "covenants running with the land" and special rules applicable to affirmative covenants are avoided. The benefit of these sections should be obvious to associations which must resort to collection of past due assessments: (1) authority to impose and enforce the collection assessments for common expenses is statutorily given, (2) any past due assessment bears interest at a rate up to 18% (a rate that in the past has been challenged as being usurious), (3) upon filing with the clerk of court, the past due assessments become a lien upon the property which may be foreclosed upon, and (4) the association can collect its reasonable attorneys' fees for the collection and not be limited to 15% of the past due amount.

Where a lien is filed for past due assessments, a "judgment, decree, or order in any action under this section shall include costs and reasonable attorneys' fees for the prevailing party." This provision is significant. In the past, the cost of attorneys' fees kept many associations from seeking collection either because attorneys could not afford to take the cases on a contingency or because collection agency would charge more than the association would recover. When the past due assessments total only several thousand or several hundred dollars, this benefit becomes more obvious. Furthermore, if the Act is adopted, an association can seek payment of its reasonable attorneys' fees under N.C.G.S. 47F-3-120 in all actions to enforce the provisions of the articles of incorporation, the declaration, bylaws and rules and regulations.

Restrictive Covenants of The Ledges of Hidden Hills

First, I would better organize the Declaration in order that it can be more easily organized and understood for all current and future property owners. While this procedure does not affect the legality of the Declaration, it does help with its understanding and enforcement. The following is an example of portion of the assessment provision of a declaration I recently drafted:

Section 11.1 Purpose of Assessments. The assessments for common expenses as described in Section 47F-3-115 of the North Carolina Planned Community Act and as otherwise provided for in the Documents shall be used for the general purposes of promoting the recreation, health, safety, welfare, common benefit, and enjoyment of the Owners and occupants of Lots in the

Planned Community as may be more specifically authorized from time to time by the Board.

Section 11.2 Apportionment of Common Expenses. Except as set forth in this Article, common expenses shall be assessed against all Lots in accordance with the allocated interests in the common expenses as set forth in this Declaration.

Section 11.3 Common Expenses Attributable to Fewer than All Lots.

(a) If a common expense is caused by the misconduct of a Lot Owner, the Association may assess that expense exclusively against that Lot Owner's Lot.

(b) Fees, charges, late charges, fines, all collection costs, including reasonable attorney's fees actually incurred and interest charged against a Lot Owner pursuant to the Planned Community Act, the Declaration, Bylaws and Rules and Regulations are enforceable as common expense assessments.

Second, all of the paragraphs that cover architectural standards should be reviewed to ensure that the 1988 restrictions---such as lot size and minimum building square footage---do not need to be revisited. I can give you needed language for such standards, however, the Board needs to decide on what standards should apply.

Third, I would suggest deleting all language regarding the developer. Where applicable, the Association would take the its place.

Section (5), second paragraph should be deleted. Such language could cause problems such as potential violations of set back requirements. If the purpose was to allow property owners of more than one lot to pay only one assessment, then I can revise this paragraph accordingly.

Section (7) may be revised to provide for the Architectural Review Board (usually around 3 people). Even though most of the lots in the community have been developed, such a committee would address any architectural violations and would field any questions from the members. Final decisions on fines or variance would be left to the Board.

Section (31) should be reviewed to ensure that the description of the covered property is correct.

Section (33) should be revised according to the Planned Community Act, specifically, N.C. Gen. Stat. §§ 47F-3-107.1, 47F-3-115, and 47F-3-116.

In addition to any concerns the Board of Directors may have, the following are some sections that I believe the Board may want to consider adding to the Restrictive Covenants:

- (1) Submission to the North Carolina Planned Community Act.

- (2) Language regarding the leasing and/or time-sharing.
- (3) Rules and regulations to be created by the Board of Directors.
- (4) More comprehensive sections regarding both assessment collection and fining powers of the Association.
- (5) Clearer amendment language.

Bylaws of The Ledges Homeowners Association, Inc.

Article 1.2 should be revised according to N.C.G.S. § 47F-3-102 of the Planned Community Act regarding the powers of the Association in order to allow for future (or current) needs.

Article 3.1, 3.2 revised for obvious reasons.

Article 4.10 should probably be amended to read sixty-seven percent (67%). It has been my experience that 67% of members should approve amendments, special assessments, etc. (See Section (36) of Restrictive Covenants.)

Article 5.2 should be amended to reduce the number of Directors to five. Again, this is a policy issue and not a legal one, however, for your community size, five directors is plenty.

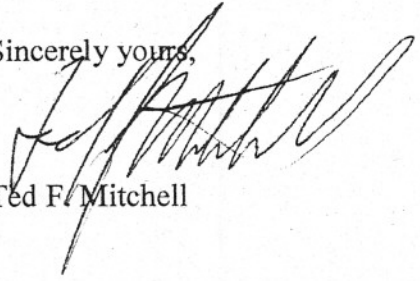
Article 5.7 should be revised to eliminate any compensation to Directors. While the Association may want to compensate a Board member, be aware that under the N.C. Nonprofit Corporation Act, N.C. Gen. Stat. § 55A-8-60, officers and directors have immunity from civil liability for monetary damages for actions taken in good faith and within the scope of their official duties. However, this liability can be waived under certain circumstances, including where the officers or directors are compensated beyond reimbursement for expenses.

Also, I suggest that the Association add a section to the Bylaws providing for the Indemnification of officers and directors. It is a simple fix for a potentially harmful situation. Such a section would begin as follows, "The Association shall indemnify every officer and director against any and all expenses, including legal fees, reasonably incurred by or imposed upon such officer or director in connection with any action, suit, or other proceeding....."

Finally, the "Assessment Amendment" referred to at the end of the Bylaws may not be effective in my opinion. Language regarding assessments and an association's lien rights should be set forth in the restrictive covenants and recorded with the Henderson County Register of Deeds Office. This is one of the reasons why I believe that any items that could be construed as restrictive covenants should not be placed in the Bylaws, but instead be set forth with the other restrictive covenants and filed.

I hope this summary helps in your review of the Association's documents. Again, I will wait to hear from you so that we can discuss the procedures for revising the Restrictive Covenants and Bylaws. I look forward to hearing from you and working with you in the future.

Sincerely yours,



Ted F. Mitchell