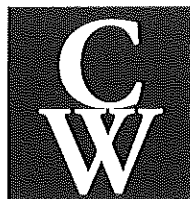


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May 31, 2011

Board of Directors,  
The Village at Innsbrook Homeowners Association  
c/o Peggy Roisch, President  
4522 Village Run Drive  
Glen Allen, Virginia 23060  
Via Regular Mail and Email: [PROisch@KSPHLLC.com](mailto:PROisch@KSPHLLC.com)

Attorney-Client Privileged and  
Confidential Communication

Re: Amendment Authority in Recorded Covenants

Dear Members of the Board:

I am writing, as directed by Peggy Roisch, to provide you with our opinion on whether The Village at Innsbrook Homeowners Association ("Association") has the authority to amend the Declarations of The Village of Innsbrook (collectively referred to hereinafter as "Declarations"), including The Village at Innsbrook, Section A Declaration of Restrictions, dated July 1, 1985 and recorded on July 30, 1985 in the Clerk's Office of the Circuit Court of the County of Henrico, Virginia ("Clerk's Office"), in Deed Book 1964, page 646, et. seq., as amended, ("Declaration A"), The Village at Innsbrook, Section B Declaration of Restrictions, dated November 1, 1986 and recorded on January 9, 1987 in the Clerk's Office, in Deed Book 2046, page 848, et. seq., as amended ("Declaration B"), and The Village at Innsbrook, Section G Declaration of Restrictions, dated May 20, 1989 and recorded on May 22, 1989 in the Clerk's Office, in Deed Book 2189, page 1315, et. seq. ("Declaration G"). We also note that Declaration A is applicable to Sections C, D and E as a result of the First Amendment To Declaration of Restrictions dated July 22, 1988 and recorded in the Clerk's Office on September 1, 1988 in Deed Book 2150, Page 1780 and applicable to Section F by virtue of the Second Amendment to Declaration of Restrictions dated September 27, 1990 and recorded in the Clerk's Office on October 19, 1990 in Deed Book 2265, Page 759.

In order to address whether the Association has the ability to amend the Declarations we must look to the Declarations and the Virginia Property Owners' Association Act ("Act"). Paragraph 14 of Declaration A, Declaration B and Declaration G are identical, except where indicated, and provides as follows:

*Any one or more of the covenants or restrictions imposed by paragraphs 1 through 13 above may be waived or modified, in whole or in part, as to the entire subdivision or any part thereof, by written instrument signed by Innsbrook ("Association" in Declaration B, and "Declarant" in Declaration G) and recorded where these restrictions are recorded.*

These provisions grant "Innsbrook", "Association" and "Declarant" respectively with the unilateral ability to waive or modify the Declarations by recordation of a written instrument. In that such authority was only granted to the Association with respect to Declaration B, absent an assignment of rights with respect to these provisions from "Innsbrook" and "Declarant" to the Association, the analysis of this provision as it pertains to the Association is with respect to Declaration B only.

For several reasons we do not believe that Paragraph 14 of Declaration B provides the Association with the authority to fully amend the Declaration. First, the authority is granted to the Association with no reference to a vote of the Lot Owners. As a general rule of thumb, particularly in light of the Association also being a Virginia nonstock corporation, all powers granted to the Association that are not expressly reserved to a vote of the members may be authorized by the Board of Directors ("Board"). It is extremely rare, if not completely absent, in the community association world for the authority to amend covenants to rest with the Board rather than at least a majority of the Owners of lots subject to the applicable covenants.

Second, granting the Board with the implied authority to amend the Declaration in Paragraph 14 is in conflict with the requirement of at least a majority of Owners to cause the cessation of the covenants pursuant to Paragraph 19 of Declarations A and G and Paragraph 21 of Declaration B (the "Provision", which we address more fully below). We note a case out of Florida, Bonner v. Mirror Lake Homeowners Association, Inc., where there was a provision for the Association to amend the Declaration without a vote of the membership and a provision to amend where a vote of the membership was required and the court held that the provision requiring a vote of the membership was controlling. 611 So.2nd 10 (Dist. Ct. of Appeal, Fla. 1992). Third, Paragraph 14 does not expressly contain the right to "amend" and is more limiting by using the words "waive" or "modify". In that covenants in the Commonwealth are generally not favored, will generally be afforded their plain meaning, and with ambiguities being resolved with interpretations favoring the freer use of property, it is likely that a Virginia court would not interpret Paragraph 14 to include full amendment powers with respect to Paragraphs 1 through 13. For these reasons, it is our opinion that Paragraph 14 cannot be interpreted as an amendment provision for the entire Declaration.

Turning to Paragraph 19 of Declarations A and G and Paragraph 21 of Declaration B (the "Provision"), we note that it arguably provides authority for the Association, by a vote of the majority of the Lot Owners, to amend the Declarations, and it provides as follows:

*These restrictions shall run with the land and be binding upon any and all succeeding land owners, their personal representatives, estates, heirs, devisees, assigns or successors in interest or any other parties having or taking an interest in or to the Property, or any part thereof, so long as the Property or any part of it is zoned for single family residential use, or its equivalent permitting as principal uses those set forth herein, for a period of twenty-five (25) years from the date of recordation, and shall automatically be extended for successive periods of ten (10) years, unless otherwise provided in a written instrument executed by the owners of a majority of the lots in the subdivision, unless a release, waiver or breach of any one or more of the restrictions contained herein, or any part thereof, is required or agreed to by the Board of Supervisors of Henrico County, or other governmental authority having jurisdiction over the Property. (emphasis added).*

A liberal interpretation of the Provision would grant the Lot Owners the ability to amend the Declarations by executing a writing and obtaining the approval of said writing by a majority of Lot Owners. As mentioned, however, the Commonwealth strictly and narrowly interprets restrictive covenants based on their plain meaning and, with respect to the Provision, the owners involvement through the execution of a written instrument is related to only one express action, which is to end the automatic renewal of the restrictions. The Provision does not contain any express authority for the Lot Owners to be able to amend, change, alter or modify the restrictions. Consequently, it is our opinion that Provision is not an amendment provision in the Declaration.

As a result, we believe that it would be reasonable, for the reasons stated, for the Board to conclude that the Declaration is silent with respect to how it may be amended. If the Board is of the opinion that the Provision provides authority only to *revoke* the Declarations but no authority to *amend* the Declarations then Section 55-515.1(D) of the Virginia Property Owners' Association Act ("Act") could be utilized to grant the Association the ability to amend the Declarations. Section 55-515.1(D) of the Act provides as follows,

*A declaration may be amended by a two-thirds vote of the owners. This subsection may be applied to any association subject to a declaration recorded prior to July 1, 1999, if the declaration is silent on how it may be amended or upon the amendment of that declaration in accordance with its requirements.*

Please note that there is the possibility that the validity of Section 55-515.1(D) of the Act may be vulnerable to a potential challenge on the grounds that it interferes with a constitutional right, namely the freedom of parties to contract. Specifically, the potential conflict is with Article I, Section 11 of the Virginia Constitution, which provides, in pertinent part, that: "the General Assembly shall not pass any law impairing the obligation of contracts". The rationale being, these restrictions existed before the General Assembly adopted Section 55-515(D) of the

Act {which was sometime in the last decade} and, therefore, the contractual right of all Lot Owners subject to the Declaration to have restrictions that cannot be amended without the approval of all Lot Owners cannot be infringed upon by the General Assembly. We are not aware of any Virginia case law ruling on this argument in this context, but we believe the concern to be sound and something to which the Board should be aware.

We are aware of an Advisory Opinion by the Office of the Attorney General of the Commonwealth of Virginia that concludes that when the declaration of an association subject to the Act is silent as to the procedure for amendment of said declaration the association may amend its declaration by a two-thirds vote of the owners<sup>1</sup>. Advisory Opinions are not binding law, but this one serves as the legitimate basis upon which the Association could proceed with the utilization of Section 55-515.1(D) of the Act. Accordingly, in light of the absence of any amendment provision in the Declaration, as stated, and the very unlikely possibility of any Declaration amendment garnering the support of 100% of the Lot Owners, using the Act as the basis for amending the Declaration reasonably seems to be the Association's best option. We also note that, pursuant to Section 55-515.1(E) of the Act when any amendment is adopted by the Association, a Lot Owner has only one year after said amendment is made effective to challenge the amendment's validity. Therefore, unless the validity of an amendment is timely challenged by a Lot Owner any potential objections to the amendment are waived.

I hope this information has been helpful, please call me or my Associate, Michael Sottolano, if you have any further questions.

Best Regards,

A handwritten signature in black ink, appearing to read "Andrew G. Elmore", written in a cursive style.

Andrew G. Elmore

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<sup>1</sup> 2006 WL 1977478 (Va. A.G. June 20, 2006).