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August 10, 2011

Kinderton Village Homeowners Master Association
c/o Mr. Bruce Welch
380 Norwood Street
Advance, NC 27006

FOR PROFESSIONAL SERVICES RENDERED:

In connection with telephone conversations with Todd Kiger, Bruce Welch
and Trent Adams, Review of two sets of questions concerning the operation
of the Homeowner's Association and drafting a memo of answers for each
question \$ 1,350.00

Please identify client number on check: 995725.00000

MEMO

FROM THE DESK OF:

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TO: Mr. Bruce Welch
Kinderton Village Residential Homeowners Master Association

DATE: August 10, 2011

Dear Mr. Welch,

I was initially contacted by Mr. Todd Kiger who indicated that the Board had some questions about the Kinderton homeowner documentation and he wanted to know if I could provide the Board with answers to those questions. I explained to him that I represent the developer, Adams Egloff Avant Properties, LLC, and therefore there could be a conflict of interest in my also trying to represent the Board of Directors of the Master Association or the sub-associations in Kinderton. He indicated that he had gotten my name from Trent Adams who is one of the members of the LLC. Following my conversation with Mr. Kiger, I spoke with Trent and he had no problem with me answering any questions the Board had to the best of my ability.

In response to the questions concerning the governing documents which you dropped off on August 5, 2011, I am providing the answers as I understand them and from what I understood was intended by my client and as I read the documents today. Certainly, one's intentions do not always get expressed as clearly as they should when reduced to the written word, but I believe the intentions are adequately expressed in the documents.

You have actually provided me with two sets of questions which I will answer separately. Both sets of questions are labeled "Kinderton Village Home Owners Association", but one has the name of "Bob Gildea" at the top and contains an organizational chart. The other set of questions has the name "Dick Heriot" at the top. To make it easier for the Board to follow my answers I will repeat the question and then provide the separate answer.

Bob Gildea Questions

1. The KV master bylaws outline a process where the “Board of Directors” is elected at the annual meeting. The KV master covenants outline a process where the “Board of Directors” is appointed by the sub-associations. Which one is correct?

Answer: In reviewing the Declaration for Kinderton Village Residential Homeowners Master Association (recorded in Book 354, Page 354, Davie County Registry), I do not see “a process where the ‘Board of Directors’ is appointed by the sub-associations.” The only reference I see to “appointed” is on Page 4, in Section 5 of the definition of “Board of Directors.” It states that it will be the persons “elected or appointed” to act collectively as the Directors. The reference to the word “appointed” refers to the Declarant’s right to appoint the Board of Directors during the Declarant’s control of the Master Association and as provided in Section 4 of the Master Association By-Laws, such as when there is a vacancy on the Board of Directors and the vacancy is temporarily filled by the remaining Directors as provided in Section 4.B.3.

Therefore, the establishment of the Board of Directors for the Master Association is governed by the By-Laws of the Master Association. The By-Laws state that the Directors not entitled to be selected by the Declarant will be elected by the plurality of the votes at an Annual Meeting of the Members of the Master Association.

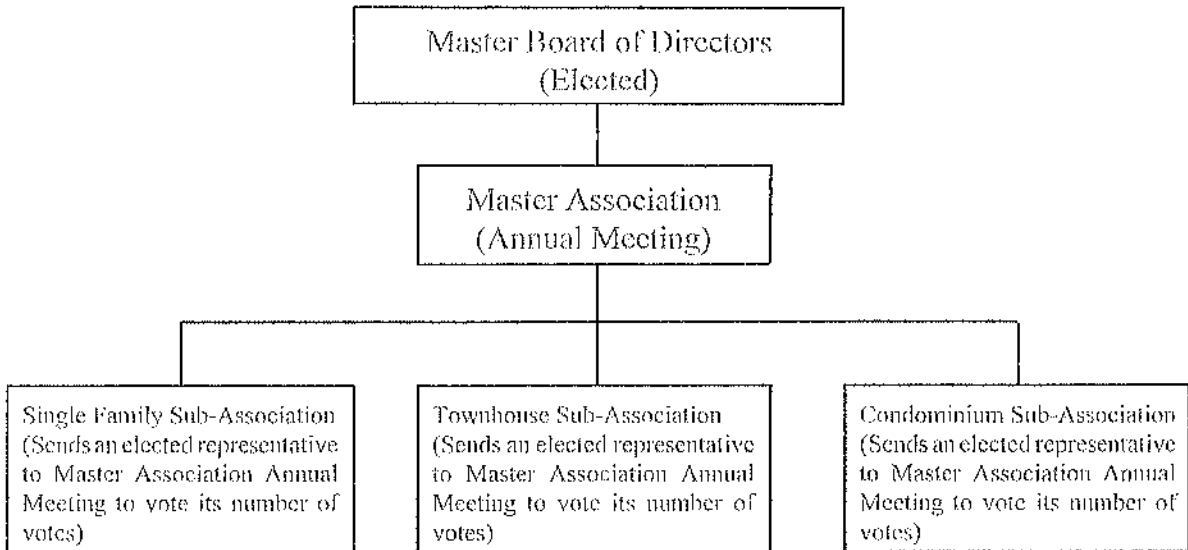
The Members of the Master Association are the sub-associations defined in the Master Declaration, such as Single Family Sub-Association, the Condominium Sub-Association, and the Townhouse Sub-Association. Therefore, the annual meeting would be open to all persons living in Kinderton, but voting on the Directors would be by three individuals authorized to represent each Sub-Association. The number of votes that each Sub-Association representative would cast would equal the number of units in that Sub-Association, that is, the number of single family homes in the Single Family Sub-Association, the number of townhouses in the Townhouse Sub-Association, and the number of condominium units in the Condominium Sub-Association.

There is no provision in either the Declaration or the By-Laws for the Board of Directors of the Master Association to be appointed by the sub-associations; the Directors must be elected by the Members.

2. Does either of these organizational charts correctly depict how Kinderton Village Should be governed?

Answer: Option 1 comes the closest to depicting the organizational chart of the Kinderton Village Master Association. I would change the chart to show that the Master Board of Directors is elected by its Members, and of course the Members are the Sub-Associations voting through their designated representative, as stated above.

The following is my suggestion of how the Master Association flow chart should look:



3. If it is option 2, how would the duties of the “Board of Directors” and the “Master Board of Directors” differ? If the answer to question 2 is option 1, please skip this question.

Answer: Not applicable

4. If it is option 2, how do the governing documents insure each sub-association is represented on the “Board of Directors”? If the answer to question 2 is option 1, please skip this question.

Answer: Not applicable; while not applicable, it should be noted that there is no guarantee that each sub-association will be represented on the Master Board of Directors.

5. Assuming the Declarant is responsible for the Architectural Review Committee (the ARC). (see paragraph (g), Section 1 of Article VI). He chooses to delegate the daily

ARC duties to the Master Board (see Section 5 Delegation and Assignability, Article IX).

Answer: I am assuming that the question here is, if the Declarant still owns a lot in Kinderton Village and therefore, as stated in the Declaration, the Declarant can continue control of the ARC, but if the Declarant chooses to let the Master Association elect the members of the ARC, what restrictions would be on the Master Board in running the ARC. Obviously, so long as the Declarant owns a lot anywhere in Kinderton Village, the Declarant will remain in control of the ARC. This is usually the standard operating procedure for a declarant since the declarant, who is in the business of developing subdivisions, selling lots and/or building houses, cannot afford to have an ARC controlled by residents that may have some axe to grind with the declarant/developer and grind that axe by making the ARC approval process cumbersome or impossible to meet.

If however, the Declarant in this case decided to no longer control the ARC, Paragraph (g) is clear that the Declarant would notify the Master Board of Directors that it no longer wants to control or be responsible for the ARC, then the Board of Directors would either call a Special Meeting of the Master Association to elect the members of the ARC or wait for the Annual Meeting of the Master Association to elect the members of the ARC.

At the Master Association meeting, the members could elect an entirely separate group from the Board of Directors to be the ARC, or the Master Association members could elect the Directors to also function as the ARC. Whoever then constitutes the ARC would have to run the ARC under the guidelines of Article VI.

Beyond that, the ARC approval or denial of requests will have to be consistent with the style and character of Kinderton as it exists, and the ARC should not do anything that is arbitrary, capricious or punitive. We recently looked into a situation where an ARC in upscale community turned down the plans of our client, but in our client's opinion and in our initial review and conversation with our client's architect, the plans appear to be very consistent with the other houses in the subdivision in style, looks, location, size, etc. Our client thinks that one of the ARC members "has it in for him" for some reason. His future neighbors on either side of his lot are very pleased with his plans and told him they know of no opposition other than the one ARC member. We have advised our client that we think he has a good case that the ARC is being arbitrary and if he wants to pursue it we will certainly file a lawsuit to that effect. We do not yet know whether it will come to that, but my guess is the

membership is not going to be happy with the legal expenses involved unless there is some really strong reason not to approve the plans. A long story to emphasize that it will be important for the ARC to be careful in making its decisions and to be able to justify its decisions in approving or disapproving plans or requests.

6. **Can a sub-association make rules that differ from the master association covenants and only pertain to an individual sub-association?**

Answer: A Sub-Association cannot make any changes that would violate the Master Association covenants. There are certainly things that apply differently to the different Sub-Associations, and that's why we had to set up the Sub-Associations. A Single Family Association has very different rules and regulations than a Condominium Association, but clearly, the Master Association rules and regulations will control Kinderton Village. If it is a minor deviation or exception, the Master Board of Directors could probably deal with that issue. If it is a major change, the Master Association Declaration would have to be amended. See Article IX for the rules for amending the Declaration.

7. **Is there any wording in the following paragraph that allows an owner of a lot to park his own motor home in the driveway, in the open not in the garage with the doors closed, at anytime?**

Answer: No. I think it is clear that all of the vehicles and vessels listed in subparagraph (y) of Section 2, Article VI, including the catch all "other recreational vehicles," cannot be parked on any lot unless it is in a closed garage. The exceptions to being enclosed are the owner's or owner invitee's "passenger automobiles and pickup trucks," so long as these exceptions do not contain any commercial printing or signs. With the approval of the Master Board of Directors (and there is no obligation that they have to approve it), the Master Board of Directors could grant permission for visitors to temporarily park any of the prohibited vehicles overnight on driveways or streets for a period not to exceed seven days.

I think this paragraph is very clear that an owner cannot park his own motor home or RV in the open driveway.

Dick Heriot Questions

1. **There is no written document in the files indicating that the Declarant has turned the Association over to KV property owners; however, such action has been verbally**

conveyed to the property owners by the Declarant. Property owners have formed and elected Directors/Officers, held meetings and conducted business since 2009. Do these actions substitute for a written document?

Answer: Written document is not required to indicate that the Declarant has turned control of the Master Association over to the property owners. "Control" is simply a matter of counting the number of votes cast and how many votes the Declarant is entitled to, that is, one vote per lot or three votes per lot. Homeowner association documents are typically set up giving a declarant three votes for each lot until the declarant has sold 75% of the lots or until some outside date, specified in the document, has passed. In the case of the Master Association, the Declarant's "control" comes from the right to vote in the Sub-Associations. (See Article 3, Section 2, (b) of the Declaration). In the case of the Single Family Sub-Association, the outside date that the Declarant has three votes for each lot is September 1, 2006, the date for the Townhouse Sub-Association is November 1, 2008, and the date for the Condominium Sub-Association is _____ (I did not prepare the condo documentation and there is not a definite date given. The "date" where the Declarant in the condo documents is set as so many years from the sale of the first condo unit. I do not have that information). The Declarant's control of the Master Association passed on the happening in each of the Sub-Associations at either the time that it no longer owns 75% of the lots or the outside date.

Therefore, "control" could have pass completely unnoticed except for the number of votes cast at the Master Association meetings.

If the 2009 elections were properly held, that is, notice of the annual meeting was given and votes of each Sub-Association Member reflected the correct allocation of votes then certainly the elected Directors and other action at the meetings would be proper and binding on the Master Association.

2. When the Declarant turns over control of the Association to the property owners, does this mean that the Declarant turns over control of the Architectural Review Committee (ARC) to the property owners?

Answer: No "Control" of the Master Association and control of the Architectural Review Committee (ARC) are two different things. The "control" of the Master Association is explained above, and Article 6, Section 1 (g) states that so long as the Declarant owns a lot in Kinderton Village or until such time as the Declarant notifies the Board of Directors "in writing" to have the Master Association elect members of the ARC, "... the Declarant shall serve as the

Committee (the ARC), and shall exercise the authority to approve plans and other matters set forth in this Article.”

This is standard procedure for a declarant/developer so that it will always control the ARC. If the declarant/developer were to lose control of the ARC while still owning 25% of the lots, or possibly more if the outside date has passed, the declarant/developer would have to worry about getting plans approved for those remaining lots.

3. How long does the Declarant exercise control over the ARC?

Answer: See 2 above.

4. Is the ARC appointed by the Directors of the Master Board or elected by the Members of the Master Board?

Answer: Article VI, Section 1, (g) states in part, “After Declarant divest itself of all Lots within the Property, or so notifies the Master Association, the Committee (the ARC) shall be elected by a majority of the votes of the Members, cast in person or by proxy at a meeting duly called for this purpose.”

5. Given that the Master Association is made up of all sub-associations and individual property owners are not individual members of the Master Association, how is a quorum determined for the Master Association Annual Meeting

Answer: Section 2 entitled “Membership, Voting, Quorum, Proxies, subparagraph (B) of the Master Association By-Laws, states, “The presence, in person or by proxy, of the members entitled to cast twenty-five percent (25%)” of the votes of the entire membership shall constitute a quorum at all meetings of the Association.” Therefore, establishing quorum is simply establishing how many votes are present at a Master Association meeting.

6. After the Declarant no longer owns 25% of the residential lots in KV and the number of Directors have been increased (say 4 or 5); how are these Directors elected? Does each Sub-Association Representative vote according to the directions he/she is given by his/her sub-association or are the Directors elected by a majority votes of all KV property owners?

Answer: Part 1 of Question. Section 4 “Board of Directors” of the By-Laws of the Master Association states that the initial Board of Directors will be 3 persons selected by the Declarant, but once the Declarant no longer “controls” the

Master Association, the number of Directors “may be increased” as directed by the Members at an Annual or Special Meeting.

Section 4.B.4 states how the Board of Directors should be elected. Once the Members “control” the Master Association, they should elect Directors to a staggered term for purposes of continuity. Sub-paragraph 4 further states that at the first Annual Meeting where three Directors are to be elected, the Members will elect one Director for one year, one Director for two years and one Director for three years, such that there will be one new director elected each year and two remaining directors who have some experience under their belts. If the membership decides to elect five Directors, for example, one Director would be elected for a term of one year, two Directors for a term of two years and two Directors for a term of three years. In the following year, new Directors would be elected to fill the expiring terms.

At the time the Kinderton documents were drafted, it was anticipated that most of the work required to look after Kinderton, once the Declarant was out of the picture, would be done at the Sub-Association levels, and therefore the by-laws of each Sub-Association requires that the number of Directors to be increase to five at the time the Declarant loses “control” of the Sub-Association. It was thought, maybe incorrectly, that the Master Association would not be as busy and there was no requirement that it increase the number of Directors, but the Master Association was given the opportunity to increase the number if it so desired.

Part 2 of Question. I would assume that the Sub-Association representative would be given voting directions which would probably include making nominations for the Master Board of Directors and who to vote for. Therefore, the representatives of each Sub-Association could show up and nominate any number of persons for the board, and then hold a vote. If the representatives of the Sub-Associations feel like they need further directions, they could always continue the Master Association meeting and take the list of nominations back to their Sub-Association and get further direction as to who to vote for.

There are any number of ways for obtaining the nominations of the Directors, such as publicizing that nominations will be accepted from any individual members in Kinderton for a certain period of time by the Board of Directors and then have the Board of Directors publish that list of “volunteers.” The Sub-Associations can then direct their representatives who to vote for. The Board of Directors could issue a proposed slate of nominees but allow the representatives to make further nominations at the Annual Meeting and then

vote. Whatever the process is, the Board of Directors will probably want to make a recommendation to the membership at an annual meeting, and then have the membership vote on that procedure.

7. **Once the Directors of the Master Association are elected, what are their functions versus the functions of the Sub-Association Representative appointed to cast the Sub-Association's desired vote on Master Association matters?**

Answer: In both the Master Association and the Sub-Association, and pretty much any homeowner association in North Carolina, the directors are the ones who run the association. but of course, they have to answer to the membership at either the Annual Meeting or at a Special Meeting called for by the members as provided in the By-Laws, in Section 4 "Board of Directors." Section J states, "That all of the powers and duties shall be exercised by the Board of Directors, including ...", and without limiting the Board of Directors powers, list a number of specific duties. The Sub-Association representative has nothing further to do except show up at Special meetings or Annual Meetings and vote. If a member or members of a Sub-Association are unhappy about something the Master Board of Directors is doing, then the Sub-Association would direct its Sub-Association representative to the Master Association Meeting to bring that issue up, or if it is an immediate problem, the Sub-Association would have to follow the By-Laws and call a Special Meeting as provided for in Section 3.B.

8. **Can the Single Family Sub-Association adopt a regulation (rule) saying that basketball goals, swing sets and other playground equipment are not allowed on Single Family lots?**

Answer: Before answering the question, it is important to note that Article VI of the Declaration of both the Single Family and Townhouse Sub-Associations in Section 2 clearly state that any conflict between the restrictive covenants of the Master Association and the Sub-Association shall be resolved in favor of the Master Declaration. Therefore, anything a Sub-Association wants to allow or prevent on its Sub-Association lots must first be checked to see if there is any question that the activity might conflict with the Master Association Declaration and in particular the Use Restrictions set forth in Section 2 of Article VI of the Master Declaration.

In addition, the Sub-Association should also look at whether the rule or regulation that it is about to adopt might require the approval of the ARC. By design, the ARC is given extensive authority in order to protect homeowners from what a neighbor might do on its property. Section 1 of Article VI

requires the approval of plans prior to initial construction, but goes on to state that no subsequent alterations or modifications which will result in “an exterior, structural change to the dwelling, outbuilding, or significant changes to the landscaping may be undertaken on any of the lots without the prior review and expressed written approval of the Committee (the ARC).

Having said all of that, it would stand to reason, that if a Sub-Association wanted to make the Use Restrictions more restrictive than the Use Restrictions set out in the Master Association, such as limiting playground equipment, that should be permissible for the Single Family Sub-Association to adopt such a regulation or rule. But to be enforceable, the Single Family Declaration would have to be amended and recorded in the Davie County Register of Deed’s Office. Any future purchaser of a lot would have to have record notice of this restriction on the use of their property before they purchase it, for it to be enforceable on them. Article 9, Section 2 of the Declaration sets out the procedure for amending the Declaration.

Even if the Single Family Sub-Association goes through the proper procedures for amending the Declaration, the amendment would only be enforceable prospectively, that is, enforceable against future buyer’s of single family lots in Kinderton. I do not think that the Single Family Sub-Association can retroactively take away the rights of property owners to have these items, since at the time that the current owner purchased their lot and house, it was permitted to have these items. In effect, any existing playground equipment, etc., would be grandfathered.

9. **How do we handle a situation where the property owners of a sub-association do not show sufficient interest to attend meetings, elect directors or appoint a representative to vote on Master Association matters? Does the Master Board just assume control without representation from that sub-association?**

Answer: If individual members of a Sub-Association do not get involved in the Master Association, that is simply their loss, and they will be bound by whatever a majority of the votes at the meeting of the Master Association directs or elects. This is often a problem with homeowner associations, and therefore you will see that quorums at Annual or Special Meetings of the associations are very low. The quorum for Master Association, the Single Family Sub-Association, and the Townhouse Sub-Association is only 25% of the members entitled to cast votes.

As we use to say in the Marine Corps, every problem is a lack leadership and a leadership opportunity. It sometimes requires the existing directors or

individual members to get out and beat the bushes to get enough people to attend meetings so business can be conducted. You can also meet the quorum requirements by obtaining proxy votes.

There is no provision for the Master Board of Director assuming control without representation from its constituent members.

Don

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