



July 11, 2023

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Bear Creek Lakes Civic Association
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Of Counsel

Daniel A. Czaplicki
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Re: Short Term Rental – Proposed Restrictions

Dear Board of Directors:

I am counsel for Bear Creek Lakes for All, a community organization, and its individual members ("BCL for All"). BCL for All is composed of various lot owners within the Bear Creek Lakes subdivision. The group is opposed to the unlawful potential restrictions discussed at the June 2023 Bear Creek Lakes Civic Association ("BCLA") board meeting as it relates to short term rentals ("STRs").

As a basic legal proposition, unless restricted in the original granting deed, the right to rent or lease one's own real estate is inherent to a fee simple title. The right to rent or lease is within the bundle of rights conveyed by a fee simple deed. Therefore, the right to rent or lease is a property right. In fact each deed conveyed out by the original grantor, the predecessor to BCLA, specifically and expressly conveys the right to rent to each owner. No restriction within any deed of a BCLA lot restricts any lot owner's right to rent. *Nicoletti v. Allegheny County Airport Auth.*, 841 A.2d 156, 161, fn.11 (Pa. Commw. Ct. 2004).

I urge you to read the original deeds and understand that the original grantor conveyed the right to rent. The original grantor did not restrict the right to rent, but now, BLCA is attempting to do so. Respectfully, BCLA lacks the authority to restrict STRs, and, even if it

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had the authority to do so, all lot owners must participate, not merely those that appear at a meeting. Consider the following:

First, BCLA is not a planned community, as defined by statute, with the power to restrict STRs. Notably, the original grantor did not record a declaration or covenant binding all of the land conveyed out by the grantor. Instead, there is a hodgepodge of individual restrictions that vary somewhat from lot to lot, section to section, phase to phase. Although it is *convenient* to call BCLA a planned community, be assured, at law, BCLA is not, and has not conducted itself as a planned community.

Second, BCLA has no authority to regulate STRs, with, or without a bylaw change or other amendment. BCLA, at best, is entitled to promulgate restrictions and regulations for "bathing, fishing and boating" at Bear Creek Lake. It is notable that none of the deeds to any of the lots make any lot subject to an association, by-law or regulation of any kind (other than for "bathing, fishing and boating"). It is well beyond "bathing, fishing and boating" for the board of essentially a lake club to be empowered to restrict the real property rights of surrounding lots.

Third, even if BCLA has the authority to regulate STRs, which it does not, it cannot do so without unanimous consent of the lot owners affected by the regulation. Further, even if BCLA would be found to be a planned community with the authority to regulate more than "bathing, fishing and boating," and if the Uniform Planned Community Act ("UPCA") were deemed applicable, BCLA would still require 67% of the lot owners to approve of any STR restrictions, if not the 100% approval of the lot owners. See 68 Pa.C.S. § 5219(a)(1)(i), relating to the 67% requirement. There is a real and legal difference between amending a declaration, an individual lot restriction, and a bylaw. A bylaw change may not restrict a lot owner's property rights unless there is 100% approval. See *Schaad v. Hotel Easton Co.*, 369 Pa. 486, 87 A.2d 227 (1952); see also *Weona Camp, Inc. v. Gladis*, 457 A.2d 153, 154 (Pa. Commw. 1983) ("It is clear that the property rights of the members may not be affected without their unanimous consent.").

Fourth, to be clear, the voting percentages are of all lot owners, not merely those lot owners that attend the noticed meeting, or who choose to vote. BCLA may not implement a change affecting the property rights of lot owners without at least 67% of all lot owners voting in favor, if not 100%.

I remind the Board that you are fiduciaries of BCLA's members and of the remedies found in 15 Pa.C.S. § 5793(a), 68 Pa.C.S. § 5114, and 68 Pa.C.S. § 5412, which include judicial relief, punitive damages and an award of attorney fees.

A lesson I have learned long ago is that sometimes if one asks enough lawyers for an answer, sooner or later you will get the answer you want to hear, whether it is right or wrong. I would respectfully suggest that BCLA's power and authority, manner and method, of making any regulation of STRs be very carefully considered by each of you. BCLA stands at a precipice.

As I am sure you have been advised, the Carbon County Court of Common Pleas has addressed very similar matters. In *Dawson v. Holiday Pocono Civic Ass'n*, 36 Pa. D. & C.5th 449 (Carbon Co. 2014), President Judge Nanovic stated:

In general, an owner of property is entitled to use his property in any way he desires, "provided he does not (1) violate any provision of the Federal or State Constitutions; or (2) create a nuisance; or (3) violate any covenant, restriction or easement; or (4) violate any laws of zoning or police regulations which are constitutional." *Parker v. Hough*, 420 Pa. 7, 215 A.2d 667, 669 (Pa. 1966) (emphasis in original) (citation omitted). When, however, a restriction or covenant limits the use of real estate, the limitation is narrowly construed in favor of the owner and may, over time, dissipate and be lost. Holiday Pocono is a private **community** held together by a common set of

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restrictive covenants which bind some, but do not nullify all, rights of ownership. The Development is located in the Poconos with many of the homes being second homes used as vacation properties by their owners. Common sense dictates that the right to lease these homes, especially on a short-term basis, is important. To relinquish this right by covenant requires an express clear statement that the right does not exist. To do so either in an **association's bylaws** or the rules and regulations of its board of directors requires the express consent of all affected owners.

The case of *Weona Camp, Inc.*, cited above, also arising from Carbon County, requires unanimous consent when property rights are altered, even by a bylaw amendment. Here, BCLA is attempting to alter real property rights of lot owners, not merely member rights.

Any push to restrict STRs must be turned aside. Should BCLA elect to restrict STRs, then, every one of the issues raised above, and perhaps more, will be opened for examination and litigation.

Kindly, be guided accordingly.

Very truly yours,

DRAFT

Eric B. Smith

EBS/plp

cc: Thomas S. Nanovic, Esquire
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