McGuire, Wood & Bissette, P.A.
ATTORNEYS AT LAW

March 5, 2015

William Uhle
President, Board of Directors
The Views of Asheville HOA
95 Distant View Drive
Asheville, NC 28803

Re: Amending the Restrictive Covenants of The Views of Asheville Homeowners Association

Dear Mr. Uhle:

Thank you for requesting the services of McGuire, Wood & Bissette, P.A. to assist you with your association's needs. You have requested this firm to review the governing documents for your association, The Views of Asheville Homeowners Association ("The Views"), and opine as to if, and under what circumstances, The Views may amend its restrictive covenants. To reach our conclusion, we reviewed the following documents: the Declaration of Covenant, Conditions, and Restrictions for the Pinnacle Phase 3 and the Supplementary Declaration to the Pinnacle Phase 3, along with the attached Bylaws of The Views of Asheville Homeowners Association, Inc. (collectively, the "Covenants"). We also reviewed the articles of incorporation. We were not instructed to conduct a title search to determine whether any additional amendments to the Covenants have been made. As such, our review was limited only to the above-mentioned documents.

As you are already aware, no provision exists in the Covenants explicitly answering whether, and under what circumstances, The Views may amend the Covenants. However, one provision in the Covenants contains language which has been interpreted by some to apply to amending the Covenants. Paragraph 33 of the Covenants, entitled "Term," states:

> These covenants are to run with the land shall be binding on all parties and all persons claiming under them until the 31st day of December, 2020, at which time these covenants shall be automatically extended for successive periods of ten (10) years unless by a vote of those persons then owning a majority of the lots in the Subdivision it is agreed to change these covenants in whole or in part.

I am of the opinion that the language in this provision does not apply to amending the Covenants. Rather, I believe this provision applies only to that which it is entitled—the Term of the Covenants. I interpret the above-quoted language as meaning that these covenants will automatically extend unless at that time the homeowners vote to change the Covenants. I see no

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such language in this specific provision of the Covenants generally preventing The Views from amending the Covenants prior to that happening. This language applies to one particular situation; to apply it to the general amending procedure would be an entirely too broad interpretation.

Additionally, paragraph 36 of the Covenants, entitled "Liberal Construction," states "[t]he provisions of this Declaration shall be construed liberally to effectuate its purpose of creating a Subdivision of fee simple ownership of lots and buildings for residential purposes in a well planned community for the benefit of all lot owners." The developer of The Views intended liberal construction of the Covenants to effectuate the purpose behind the Covenants—to create a "well planned community for the benefit of all lot owners." Interpreting Paragraph 33, "Term," which, at best, is ambiguous in a broadly restrictively manner which would eliminate homeowners' ability to amend the Covenants as needed is directly contrary to how the Covenants themselves intend to be interpreted. Such interpretation would not promote the concept of creating a "well planned community for the benefit of all lot owners."

My opinion is that The Views' Covenants are amendable pursuant to the provisions of the North Carolina Planned Community Act (the "Act"). The Act applies to all planned communities created within North Carolina on or after January 1, 1999. Notwithstanding, certain provisions of the Act apply to planned communities with more than twenty lots, regardless of its age, unless the articles of incorporation or the declaration expressly provides to the contrary. *See* N.C. Gen. Stat. § 47F-1-102(c). For a declaration or the articles of incorporation to provide expressly to the contrary and thus nullify the Act's applicability, the declaration or articles of incorporation would need to state plainly and unambiguously that the Act or certain provisions of the Act do not apply to a specific planned community. No such provision exists in either the Views' Covenants or articles of incorporation. Therefore, while the Views was created prior to 1999, it has more than twenty lots, so certain enumerated provisions of the Act are applicable to it including N.C. Gen. Stat. § 47F-2-117, which is entitled "Amendment of Declaration." N.C. Gen. Stat. § 47F-2-117 states in its entirety:

> (a) Except in cases of amendments that may be executed by a declarant under the terms of the declaration or by certain lot owners under G.S. 47F-2-118(b), the declaration may be amended only by affirmative vote or written agreement signed by lot owners of lots to which at least sixty-seven percent (67%) of the votes in the association are allocated, or any larger majority the declaration specifies or by the declarant if necessary for the exercise of any development right. The declaration may specify a smaller number only if all of the lots are restricted exclusively to nonresidential use.
>
> (b) No action to challenge the validity of an amendment adopted pursuant to this section may be brought more than one year after the amendment is recorded.

> (c) Every amendment to the declaration shall be recorded in every county in which any portion of the planned community is located and is effective only upon recordation.
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> (d) Any amendment passed pursuant to the provisions of this section or the procedures provided for in the declaration are presumed valid and enforceable.
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> (e) Amendments to the declaration required by this Chapter to be recorded by the association shall be prepared, executed, recorded, and certified in accordance with G.S. 47-41.

Many specific provisions contained within the Act have language limiting the Act's applicability where a planned community's declaration speaks directly to a particular issue. For example, in N.C. Gen. Stat. § 47F-2-107.1 entitled "Procedure for Fines and Suspension of Planned Community Privileges or Services," the opening sentence states "[u]nless a specific procedure for the imposition of fines . . . is provided for in the declaration . . . ." Similar limiting language is not present N.C. Gen. Stat. § 47F-2-117. Therefore, N.C. Gen. Stat. § 47F-2-117 is a provision of general applicability and is applicable to all planned communities subject to the Act. Because the Views' Covenants do not contain a higher vote threshold for the amending purposes, the Covenants may be amended by a vote of sixty-seven percent (67%) of the votes in the association. In no event may the covenants be amended by a vote of less than sixty-seven percent (67%) unless new legislation amends the requirements of N.C. Gen. Stat. § 47F-2-117.

In conclusion, it is my opinion that the language contained in the paragraph entitled "Term" does not apply to amending the Covenants. Such an interpretation would be directly contrary to liberally construing the Covenants. Rather, it is my opinion that because the Views' Covenants and articles of incorporation lack explicit language stating that the amending provision of Act does not apply, The Views may amend its Covenants according to the terms of the Act with an affirmative vote supported by sixty-seven percent (67%) of the votes in the association.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

McGUIRE, WOOD & BISSETTE, P.A.

Alston F. Ludwig

AFL/sgw