

March 5, 2010

VIA EMAIL AND U.S. MAIL

Mrs. Eva Steward
PO Box 357
Skyland, NC 28776
Email: eva@bestquestrealty.com

Re: Conveyance of Common Areas

Dear Mrs. Steward:

This opinion letter is provided in response to your request that we evaluate the applicability of the North Carolina Planned Community Act (the "PCA"), N.C. Gen. Stat. §47F-1-101 *et seq.* to The Views of Asheville (the "Views"). We are supplying this opinion to enable you to determine specifically whether its provisions controlling the transfer of common areas, found at N.C. Gen. Stat. §47F-3-112¹ apply to the transfer to you and Mr. Steward of certain common area real property located within the Views and owned by The Views of Asheville Homeowners Association (the "VHOA"). We assert that N.C. Gen. Stat. §47F-3-112 **does not apply** to the transfer of common elements within the Views because the entire PCA **does not** apply to the Views. Rather, limited provisions of the PCA apply as will be explained below.

The "Declaration of Covenants, Conditions, and Restrictions for the Pinnacle Phase 3" (the "Original Declaration") was registered in Buncombe County on May 11, 1998, before the January 1, 1999 effective date of the PCA. The Original Declaration states that the "Developer wishes to develop such real property into a well planned residential community." Original Declaration at 1. The Original Declaration also provides that "[e]ach owner of a lot in the subdivision shall automatically become [a] member of the Homeowners Association when established ... By acceptance of a deed for a lot in the Subdivision the grantee(s) agrees to membership in the Homeowners Association" Original Declaration, ¶25.

The VHOA was incorporated on March 19, 2002, after the effective date of the PCA and all lot owners automatically became members of the VHOA upon its incorporation. The VHOA was incorporated to "provide for the management, maintenance and administration of the Subdivision known as The Views of Asheville (the "Subdivision"), and the ownership of its common elements, all as more particularly described in the Declaration ("Declaration") thereof."

¹ For subdivisions covered by the PCA, "[p]ortions of the common elements may be conveyed or subject to a security interest by the [home owners] association if persons entitled to cast at least eighty percent (80%) of the votes in the association, ... agree in writing to that action ..." N.C. Gen. Stat. §47F-3-112.

McGUIRE, WOOD & BISSETTE, P.A.

MRS. EVA STEWARD

MARCH 5, 2010

PAGE 2

“Articles of Incorporation of The Views of Asheville Homeowners Association, Inc.” ¶2(a). It is of no consequence, however, for purposes of determining when the Views, as a planned community, was “created” under the PCA that the incorporation of the VHOA occurred after the effective date of the PCA. The Views community was “created” when the developer registered the Original Declaration and subjected the lots within the Views to the common scheme of development.

In *Reidy v. Whitehart Assoc. Inc.*, the court of appeals held that the PCA applied to a subdivision where plaintiffs acquired property prior to the incorporation of the homeowners’ association. Although the homeowners’ association was not incorporated before the first lot in the planned community was conveyed and was not incorporated until after the effective date of the PCA, the court concluded that certain provisions, but not all, of the PCA applied. *Reidy v. Whitehart Ass’n, Inc.*, 185 N.C. App. 76, 81, 648 S.E. 2d 265 (2007). Although, N.C. Gen. Stat. §47F-3-101 states in part that “[a] lot owners’ association shall be incorporated no later than the date the first lot in the planned community is conveyed ...,” this provision does not apply to pre-1 January 1999 communities. *Id.* Only certain provisions of the PCA apply to planned communities created prior to January 1, 1999.

N.C. Gen. Stat. §47F-1-102 lists those sections of the PCA that are applicable to planned communities created prior to January 1, 1999 and it does not include G.S. §47F-3-101 or most notably §47F-3-112. N.C. Gen. Stat. §47F-1-102 states in part:

G.S. 47F-3-102(a) through (6) and (11) through (17) (Powers of owners’ association), G.S. 47F-3-103(f) (Executive board members and officers), G.S. 47F-3-107(a), (b), and (c) (Upkeep of planned community; responsibility and assessments for damages), G.S. 47F-3-107.1 (Procedures for fines and suspension of planned community privileges and services), G.S. 47F-3-108 (Meetings), G.S. 47F-3-115 (Assessments for common expenses), G.S. 47F-3-116 (Lien for assessments), G.S. 47F-3-118 (Association records) and G.S. 47F-3-121 (American and State flags and political sign displays) apply to all planned communities created in this State before January 1, 1999, unless the articles of information or the declaration expressly provides to the contrary, and G.S. 47F-3-120 (Declaration limits on attorneys’ fees) applies to all planned communities created in this State before January 1, 199947F-1-103 (Definitions) also applied to all planned communities created in this State before January 1, 1999, to the extent necessary in construing any of the preceding sections.

N.C. Gen. Stat. §47F-1-102.

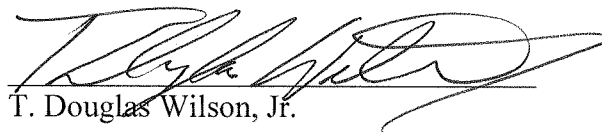
Under the definition section of the PCA, “declaration” is defined as “any instruments, however denominated, that **create** a planned community and any amendments to those instruments.” N.C. Gen. Stat. §47F-1-103(10). “Planned Community” is defined as “real estate with respect to which any person, by virtue of that person’s ownership of a lot, is expressly obligated by a declaration to pay ... other expenses to maintain, improve, or benefit other lots or real estate described in the declaration” N.C. Gen. Stat. §47F-1-103(23). Comparing these definitions to the provisions in Section 25 of the Views Original Declaration it becomes obvious that the Views meets the statutory definition of a planned community because “property owners in [the subdivision] by virtue of their ownership of a lot, are obligated to pay monies ... for the maintenance of certain real estate that is described in the declaration, other than their own lots.” *Wise v. Harrington Grove Cmty Ass’n, Inc.*, 357 N.C. 396, 399, 584 S.E. 2d 731 (2003). It is also equally apparent that the Views, however, is a pre-1 January 1999 planned community and thus, only those provisions listed in N.C. Gen. Stat. §47F-1-102 apply. Since N.C. Gen. Stat. §47F-3-112 is not one of the provisions of the PCA that applies to the Views, eighty percent (80%) of all the votes in the association are not needed for the VHOA to convey the common elements to the Stewards.

The “Bylaws of the Views of Asheville Homeowners Association, Inc.” (the “Bylaws”) provide that “decisions and resolution of the Association shall require approval by a Majority of Owners.” Bylaws, Art. III, Section 1. “Majority of Owners” is defined as “the affirmative vote of the Owners having the right to cast more than fifty percent of the votes” Bylaws, Art. II, Section 3.

We therefore conclude that if the VHOA wants to convey the common elements to you and Mr. Steward, it need only obtain approval from a majority of the owners and not from eighty percent (80%). Please have the VHOA contact us if they wish to discuss this any further or if we can be of any assistance in explaining this statute to any members of the VHOA.

Sincerely,

McGUIRE, WOOD & BISSETTE, P.A.



T. Douglas Wilson, Jr.

TDWjr/rrm