

**Key Member Concern Regarding Applicable Laws  
and Administration of the RCPOA By-laws**

**December 8<sup>th</sup>, 2018 RCPOA Qrtly Board of Directors Meeting**

The following assertions have been derived from a thorough review of the primary governing documents or RCPOA by the RCPOA President and reviewed and unanimously approved by the RCPOA Board. The presented assertions and understandings of the RCPOA documents and history of filed amendments with Gilmer County is in response to five key concerns expressed by the Members of the RCPOA. The objective of this document is to present RCPOA Members with an unbiased, experience contract/agreements review for bringing about resolution of Membership concerns and agreement for forging a path forward for managing and operating the RCPOA Non-profit Corporation and RCPOA in accordance with a fuller understanding of its governing documents and GA Law. A Special Meeting of the Members will be called in March for presentation of this material and to field questions and answers. Between now and the Special Meeting of the Members in March, it is request of all Members to review this document and prepare your questions in writing and submit your questions to the RCPOA for collection and response preparation. I am excited to be working with Board Members, Committee Chairpersons, and Members to usher in a new era of: trust, transparency, unity and collaboration among the Members of the RCPOA; our community. Folks, I make mistakes like everyone, so this is a team effort in reviewing and commenting on my assertions and understanding; especially since I am the new guy. I Look forward to hearing from you and presenting the information herein at the Special Meeting of the Members in March.

Well Wishes,

*Edward J. McDonald*

President  
POA

**1. Member expressed concern over applicability of GA POA Act of 1994 and other laws to RCPOA By-laws and Declaration of Covenants, Conditions and Restrictions.**

A. Historical governing documents establishing Rodgers Creek Property Owners Association:

1. **Declaration of Covenants, Conditions and Restrictions for Rodgers Creek** were established and filed by Palmetto Mortgage Co. Inc. on September 1, 1988 in the Clerks' Office – Superior Court, Gilmer County in accordance with GA Laws.
2. **Rodger's Creek Property Owners Association Inc. (RCPOA)** was established on January 16, 1990 in accordance with GA State Law as a Non-Profit Corporation according to the Articles of Incorporation for the purpose of administering, maintaining, and operating Rodger's Creek subdivision consistent with the Declaration of Covenants, Conditions and Restrictions of record; to engage in any lawful business or activities related thereto; and to engage in any lawful act or

activity for which corporations may be organized under the Georgia Non-Profit Corporation Code.

3. **By-laws of Rodgers Creek Property Owners Association Inc.** – is a component document of the filing and establishment of Rodger’s Creek Property Owners Association Inc.; January 16, 1990.

B. In regard to Member concerns pertaining to the Applicability of the GA POA Act and GA Laws:

**Plain Speak:**

Article VI, Section 3, of RCPOA By-laws says that Georgia Law comes before (prevail over) all RCPOA documents, including By-laws, when any requirements, wording, or even the absence of wording does not meet with current Georgia law. There are two Georgia Laws that RCPOA documents need to always be check against and to ensure the RCPOA Board and all Members consider when doing RCPOA business, those two documents are:

1. Georgia Code for Non-Profit Corporations
2. Georgia Property Owners Association Act

A good thing RCPOA governing documents, to include the By-laws, are pretty much in agreement with the GA POA Act, just not as detailed. It is the details that the RC POA Board and all Members can reference to ensure the RCPOA meet GA Law in conducting the affairs of the RCPOA. An example of using the GA PAO Act is in referring to the detailed Definition of Terms/Words; helpful when trying to understand what some of the words mean according to GA Law.

**Legal Speak:**

Support for the application of Georgia Property Owners Association Act and the Georgia Code for Non-Profit Corporations:

1. Rodger’s Creek Property Owners Association Inc. was established prior to the GA POA Act of 1994 and was not submitted under the GA POA Act. However, under Code Section 44-3-235, *“Applicability of Law”*, the Code Section identifies that the Act becomes applicable to an association (RCPOA) should the declaration state or be amended in accordance with Code Section 44-3-22 that the GA POA Act apply.
2. GA POA Act Code Section 44-3-222 states that *“Any declaration or amendment intending to bring or avail a development of the benefits and provisions of this article shall state an affirmative election to be so governed.”* It is asserted by Article VI, Section 3 provides sufficient declaration to bring and avail RCPOA to the benefits and provisions of the GA POA Act; see paragraph 3. for expanded support of this assertion.
3. The Members and author of the By-laws when Rodger’s Creek Owners Association was incorporated into what is now Rodger’s Creek Property Owners Association Inc. had the forethought to ensure that the laws of Georgia would prevail over RCPOA. Article VI, Section 3, *“Conflicts”* clearly states the relevance of Georgia Law: *“The Declaration in incorporated herein by this reference, If there are conflicts between the provisions of the Georgia Law, the Declaration, the Articles of Incorporation, and the By-laws, the provisions of Georgia Law (first in importance), the Declaration, the Articles of Incorporation, and the By-laws (in that order) shall prevail.”* This inclusion in the adopted By-laws of RCPOA mandates that should there be

anything in RCPOA By-Laws that conflict (or absent from) with GA POA Act (Georgia Law), then the GA POA Act takes precedence.

4. The Articles of incorporation clearly state that that the RCPOA was incorporate under the laws of GA as a Non-Profit Corporation and therefore subjects RCPOA to the GA Code for Non-Profit Corporations Title 14, Chapter 3. Moreover, Article VI, Section 3 of the RCPOA places GA Law in a prevailing position ensuring that current GA Law (Title 14, Chpt 3) is applicable to RCPOA Inc.

C. Conclusion: Due to the inclusion of Article VI, Section 3, which places Georgia Law in a prevailing position over all RCPOA's governing documents to include the By-laws, submits the RCPOA and its By-laws and Declarations to the most current versions of the GA POA Act (Title 44, Chapter 3) and GA Code for Non-Profit Corporations (Title 14, Chapter 3). However, all Articles and Sections of RCPOA's By-laws and Declarations that have been established and do not conflict with any GA Laws, to include those laws stated herein, remain in full force and effect. Where there is an absence of content in the RCPOA governing documents, then GA Law shall prevail.

## **2. Validity of the Current Board as selected by the Members and the procedure by which the selection was made.**

### **Plain Speak:**

The voting process/procedure for the positions of Board of Directors, Article III of the RCPOA By-Laws, was not correctly done. The current Board of Directors, though selected by ballots, were not selected in accordance with the RCPOA By-laws. This means that the current selected Board of Directors are not valid. The correction is to return the authority of the Board of Directors to the previous Board of Directors or their selected replacement(s) as allowed by the By-Laws; until a new vote for the Board of Director positions by the Members can be accomplished.

The RCPOA By-laws instruct that the Association hold elections of the Board of Directors at an Annual Meeting of the Members and those Members who cannot make the meeting may vote by submitting a proxy ballot prior to the Annual Meeting of the Members. As an association, we did not follow the instruction of the by-Laws. The plan is to start doing things the proper way going forward.

1. Form a Nominating Committee as defined by the By-Laws in advance of the Annual Meeting of the Members to identify persons interested in serving on the Board of Directors.
2. The Nominating Committee will generate and distribute Proxy Ballots and submit them to all Members 15 Days Prior to the Annual Meeting.
3. At the Annual Meeting of the Members all interested candidates will be given equal floor time to introduce themselves and rally for votes.
4. Upon completion of all candidates' presentations, a vote of the present members will be taken by submitted paper ballot.
5. The votes will be tallied and reported at the meeting.
6. The Proxy Ballot votes will then be opened, tallied and reported at meeting.
7. The nominated candidates for Board of Director Positions will be identified and recorded in the meeting minutes.

**Legal Speak:**

Article III, Section 4, "Election and Term of Office" states that directors **shall** be chosen by the Members at the Annual Meeting of the Members... The term "shall" is a term that unequivocally requires something to occur as described following the word "shall." Article III, Section 4, was not adhered to in the last Annual Meeting of the Members, therefore, it is asserted that the current selection of the Board of Directors is invalid.

Article II, Section 9, "Proxies", allows for Member not planning on being present at a meeting of Members where voting is to take place to submit a Proxy Ballot identifying their voting choices to the Association Secretary prior to the meeting. *A Proxy Ballot must include the Members signature and date.* The voting ballots submitted did not include the minimum requirements of a signature and date, nor were they submitted prior to the Annual Meeting of the Members to vote for the Board of Directors. Due to the fact that the voting ballots did not meet the requirements of the By-Laws they are invalid. Due to the selection of Board of Directors and Officer being invalid, the previous Board of Directors and Officers are restored until a new vote of the Members can be taken.

Article III, Section 5, "Removal of Directors, and Vacancies" states "In the event of death, disability, or *resignation of a director*, a vacancy may be declared by the Board and it may appoint a successor.

**3. Limitation of the Board of Directors authority without a Vote of Members, specifically concerning making changes, modification, additions or deletions to the By-Laws and/or Declarations of Covenants.**

**Plain Speak:**

There have been a number of Filings with the County Court House of Gilmer, by RCPOA Board of Directors/Officers. The filings with the County of Gilmer have a blend of valid and invalid filings. Without identifying at this point what is valid and what is not valid in the filings, the Board of Directors as well as the nominated RCPOA Officers do not have the authority to: modify, clarify, add to, or delete any language existing in the Declaration, Articles of Inc., or the By-Laws. Only the members can add, subtract, clarify or modify any existing text of the Association governing documents by a majority vote of **all** Members eligible to vote: See Article VI, Section 6 of the By-Laws. The governing documents of RCPOA are:

1. Declaration of Covenants, Conditions and Restrictions for Rodgers Creek (Short Title is Declaration)
2. Certificate of Incorporation "Rodgers Creek Property Owners Association, Inc" a Non-Profit Organization inclusive of the "Articles of Incorporation of Rodgers Creek Property Owners Association, Inc."
3. By-Laws of Rodgers Creek Property Owners Association

There has been some good suggested modifications to the RCPOA governing documents made by previous RCPOA Board Members, however, those suggestions must be put to the vote of the Members to become valid.

**Legal Speak:**

Article VI, Section 6 states that “These By-laws may be amended only by the affirmative vote or written consent or any combination thereto, of Members representing a majority of the total votes of the Association (RCPOA). No amendment may remove, revoke, or modify any right or privilege of Declarant (All Members), without the written consent of Declarant, or assignee of such right or privilege, as applicable.”

The Declaration of Covenants, Conditions and Restrictions for Rodgers Creek are incorporated into the By-Laws as stated in Article VI, Section 3.

The Association Board of Director, nor the Association Officers, have no authority to modify, make amendment to, add or subtract from, or change in any way the RC POA By-laws or Declaration.

My assessments of the Gilmer Court Filings are as follows:

1. Filing of 03-22-2006, “Rules and Regulations of Rodgers Creek POA”
  - a. Item 0306-2: **Valid** in accordance with administrative authority of Board of Directors Article II Section 17 (i) and Section 21
  - b. Item 0306-3: **Valid** in accordance with administrative authority of Board of Directors Article II Section 17 (i) and Section 21
  - c. Item 0306-4: **Invalid** – See Article II, Section 9, requires a majority of all Members eligible to vote to change By-laws or Declaration; Board of Director do not have authority to modify By-laws.
  - d. Item 0306-5: **Invalid** - The RCPOA Bylaws and Declaration places no limitation to the number of votes a Member has, other than the number of lots that Member possesses. All Members receive one vote for each “Lot” owned in accordance with the “Georgia Property Owners’ Association Act”, 44-3-224. Voting Procedures.
  - e. Item 0306-6: **Invalid** - The RCPOA Governing documents place no such restrictions.
  - f. Item 0306-07: **Invalid** – There are no records, nor communicated evidence that the Members of RCPOA voted unanimously to invoke the requirements stated.
  - g. Item 0306-08: **Invalid** - There are no records, nor communicated evidence that the Members of RCPOA voted unanimously to invoke the requirements stated.
  - h. Item 0306-09: **Invalid** - There are no records, nor communicated evidence that the Members of RCPOA voted unanimously to invoke the requirements stated.
  - i. Item 0306-10: **Invalid** - There are no records, nor communicated evidence that the Members of RCPOA voted unanimously to invoke the requirements stated.
  - j. Item 0306-11: **Valid** – See Article IV, Section 1 of the By-Laws
2. Filing of 11-22-2010, “Rules and Regulations of Rodgers Creek POA”
  - a. Item 0306-2: **Valid** in accordance with administrative authority of Board of Directors Article II Section 17 (i) and Section 21
  - b. Item 0306-4: **Invalid** – See Article II, Section 9, requires a majority of all Members eligible to vote to change; Board of Director do not have authority.
  - c. Item 0306-5: **Partially Invalid** - The RCPOA Bylaws and Declaration places no limitation to the number of votes a Member has, other than the number of lots that Member possesses. All Members receive one vote for each “Lot” owned in accordance with the “Georgia Property Owners’ Association Act”, 44-3-224. Voting Procedures. **Partially**

**Valid** – Administrative instruction for obtaining a ballot (Proxy) and submitting it to the Secretary.

- d. Item 0306-6: **Valid** - Removed
  - e. Item 0306-7: **Valid** - Removed
  - f. Item 0306-08: **Invalid** - There are no records, nor communicated evidence that the Members of RCPOA voted unanimously to invoke the requirements stated.
  - g. Item 0306-09: **Invalid** - There are no records, nor communicated evidence that the Members of RCPOA voted unanimously to invoke the requirements stated.
  - h. Item 0306-10: **Valid** - Removed
  - i. Item 0306-11: **Valid** – See Article IV, Section 1 of the By-Laws
3. Filing of 08/26/2013, “Rodgers Creek POA Inc.”
    - a. Item #0306-6: **Invalid** - based upon no clear communication within any of the Governing Documents or the GA POA Act. However, further legal review of case law and other applicable GA Law is prudent for establishing eligibility to serve on the Board of Directors. Board of Director do not have authority to impose this addition to By-Laws.
    - b. Item #0306-7: **Invalid** - based upon no clear communication within any of the Governing Documents or the GA POA Act. Board of Director do not have authority to impose this addition to By-Laws.
    - c. Item #0306-8: **Invalid** - There are no records, nor communicated evidence that the Members of RCPOA voted unanimously to invoke the requirements stated.
    - d. Item #0306-9: **Invalid** - There are no records, nor communicated evidence that the Members of RCPOA voted unanimously to invoke the requirements stated. Board of Director do not have authority to impose this addition to By-Laws.
  4. Filing 09-09-2014, “No Title” Subject: Amendments to replace and supersede the amendments filed on 08-26-2013. **All listed Amendments are INVALID** as the Board of Directors did not have the authority to make such amendments; See Article II, Section 9, requires a majority of all Members eligible to vote to change By-laws or Declaration.
  5. Filing 08-29-2018, “Rules and Regulations of Rodgers Creek POA”
    - a. Item 0306-6: **Invalid** - See Article II, Section 9, requires a majority of all Members eligible to vote to change By-laws or Declaration; Board of Director do not have authority to modify By-laws.

#### 4. Term of Service for RC Board of Directors

##### Plain Speak:

The RCPOA Board of Directors asserted modification of Article III, Section 4, “Election and Term of Office” of the By-Laws, extending the Term of Office from 1 Year to 3 Years is invalid. Only a majority vote of all eligible RCPOA Members (Declarant) may modify the By-Laws.

##### Legal Speak:

The RCPOA Board of Directors asserted modification of Article III, Section 4, “Election and Term of Office” of the By-Laws, as filed with Gilmer County on 08/26/2013 as Item #0306-9, extending the Term of Office for the Board of Directors from 1 Year to 3 Years is unsupported, unenforceable, and therefore invalid as currently evidenced.

Article VI, Section 6, "Amendment" of the RCPOA By-Laws provides clear instruction that only a majority of **all** RCPOA eligible voting Members may modify the RCPOA governing documents, namely the By-Laws. There has been no evidence of either the number of signed and dated Member Ballots pertaining to this vote, nor is there any sworn and signed statement by the then presiding President or Secretary confirming that a specific number of signed and dated ballots, meeting the majority of Member votes requirements, was accomplished. (Reference GA POA Act)

## **5. Number of Positions Composing the Board of Directors**

### **Plain Speak:**

The By-laws allow the Members to vote-in between 3-5 Directors to serve on the Board of Directors managing the concerns of the Non-Profit Corporation and RCPOA. Members may nominate as many candidates to compete for the 3-5 Board Positions as desired. However, RCPOA Officers (President, Secretary, Treasurer, Vice President) are selected by and from among the elected Board of Directors and not the Members.

### **Legal Speak:**

Article III describes the numbers, powers, and meetings of the Board of Directors. A definition of what Board of Directors may also be found under O.C.G.A. §14-3-140 Definitions for GA Non-Profit Organizations.

Article III, Section 2, "Number of Directors" of the By-Laws instructs that the number of Directors shall not be less than three (3) and not more than five (5) as provided by majority vote of the Members. This section clearly identifies that the Members determine the number Directors (3-5) to seat the Board of Directors.

Article IV, Section 2, "Election, Term of Office, and Vacancies" describes how, when and by whom the Officers (President, Vice President, Secretary, Treasurer, et al) will be selected. The cited section clear states that, "The officers of the Association shall be elected annually by the Board of Directors ...". Members of the Association do not elect the Offices of the RCPOA.