

June 20, 2003

Dave Kramer
853 Society Court
Woodstock, GA 30188

Rod Smith
1042 Whittier Road
Grosse Point, MI 48230

Jim Blair
4335 Old Salem Road
Englewood, OH 45322

Larry Pearson
217 Vista Avenue
Vandalia, OH 45377

Rick and Brenda Hayward
205 East Fifth Avenue
Covington, LA 70433

Re: *Lone Mountain Shores ("LMS") Clarification of Covenants/Bylaws - Residential Rentals*

Dear Board Members:

I am writing this letter at the request of Rick and Brenda Hayward, Secretary(ies) of the Lone Mountain Shore Owners' Association ("LMSOA"), concerning a controversy which has arisen under the LMSOA Covenants and Bylaws, concerning the practice of certain homeowners in LMS advertising their homes on the Internet for continuous rental. Based on the inquiry, I am writing the following opinion letter.

Questions Presented

1. Whether the practice of certain homeowners in LMS of advertising their homes in the development on the Internet for continuous rental constitutes a prohibited "commercial use" within the meaning of the bylaws and restrictive covenants?
2. Whether the practice of certain homeowners of advertising their homes in the development on the Internet for continuous rental is otherwise violative of the restrictive covenants and/or bylaws?
3. Assuming that the practice of certain homeowners of advertising their homes in the development for continuous rental is not violative of the covenants and/or bylaws, can LMSOA impose a limitation as to the amount of time for which a home is rented?

Short Answers

1. With respect to Question No. 1, it is my opinion that the practice of certain homeowners in LMS of advertising their homes on the Internet for continuous rental does not constitute a “commercial use” within the meaning of the bylaws and restrictive covenants.

2. With respect to Question No. 2, the practice on the part of certain homeowners in LMS of advertising their homes on the Internet for constant rental may under certain circumstances be a violation of the restrictive covenants and/or bylaws, but that the restrictive covenants and bylaws are somewhat ambiguous on this point.

3. With respect to Question No. 3, the LMSOA can impose a reasonable restriction on the amount of time which a homeowner is allowed to rent out his property, but that such a change would have to be implemented through a change in the covenants and bylaws, pursuant to the provisions of those documents which allow for such changes.

Documents Reviewed

This opinion is based upon my review of the following documents:

- C the Declarations of Covenants, Conditions, Restrictions and Easements for Lone Mountain Shores, located at Book 1059, Page 733 of the Register of Deeds for Claiborne County, Tennessee;
- C the Amended Declaration of Covenants, Conditions, Restrictions and Easements for Lone Mountain Shores, located at Book 1003, Page 123, and Book 1059, Page 749, of the Claiborne County Register of Deeds;
- C the Declaration of Covenants, Conditions, Restrictions and Easements for Lone Mountain Shores, located at Book 1005, Page 633, and Book 1059, Page 751, of the Claiborne County Register of Deeds;
- C the Declaration of Covenants, Conditions, Restrictions and Easements for Lone Mountain Shores, located at Book 1024, Page 500, and Book 1059, Page 755, of the Claiborne County Register of Deeds;
- C the Amended Declaration of Covenants, Conditions, Restrictions and Easements for Lone Mountain Shores, located at Book 1024, Page 609, and Book 1059, Page 758, of the Claiborne County Register of Deeds;
- C the Phase IV Declaration of Covenants, Conditions, Restrictions and Easement for Lone Mountain Shores, located at Book 1027, Page 617, and Book 1059, Page 761, of the Claiborne County Register of Deeds; and

C the Declaration of Covenants, Conditions, Restrictions and Easements for Tennessee Lone Mountain Shores Corp. To Include Property Owned by TN Emmons, L.L.C. as Part of the Subdivision Known as Lone Mountain Shores Subdivision, located at Book 1059, Page 728, of the Claiborne County Register of Deeds.

Relevant Provisions of the Declarations of the Declaration of Covenants and Bylaws

Article VI, Section 6.03 (Residential Use Only) of the Declaration of Covenants, Conditions, Restrictions and Easements for Lone Mountain Shores (“Declarations”), located at Book 1059, Page 733, of the Claiborne County Register of Deeds states that:

The lots shall be used for residential purposes only, and no commercial use shall be permitted. This restriction shall not be construed to prevent rental of any dwelling for private residential purposes or to prevent an individual lot owner from conducting home occupations in the dwelling, which occupation is subordinate to the primary residential use and occupies not greater than twenty (20%) percent of the dwelling’s floor area or employs not more than two (2) persons. (emphasis added).

Additionally, Section 6.09 of the Declarations (Rental) states as follows:

As stated in Section 6.04 residences may be rented and all tenants are awarded owners’ privileges and are required to abide by all covenants and restrictions.

Section 6.03 of the Declarations was amended in the Amended Declaration of Covenants, Restrictions and Easements for Lone Mountain Shores (“Amended Declarations”), located at Book 1003, Page 123, and Book 1059, Page 749 of the Claiborne County Register of Deeds as follows:

Section 6.03 Residential Use Only. The lots shall be used for single family residential purposes only, and no commercial use shall be permitted. This restriction shall not be construed to prevent rental of any dwelling for private residential purposes or to prevent an individual lot owner from conducting home occupations in the dwelling, which occupation is subordinate to the primary residential use and occupies not greater than twenty (20%) percent of the dwelling’s floor area or employs not more than two (2) persons. (emphasis added).

Article XIV of the Declarations states at Section 2 (Amendment) as follows:

These covenants, the articles, or bylaws may be materially amended only by a unanimous vote of the Board and the affirmative vote of fifty-five (55%) percent of the Owners voting by absentee ballot. Any amendment must be recorded in the Registrar's office of Claiborne County, Tennessee.

Article XII (Principles of Interpretation) of the Declarations at Section 12.08 (Conflict Between Documents) states that:

In the case of conflict between these covenants and the articles of [*sic* - or] the bylaws, to be created by the Association, these covenants shall control. In case of conflict between these covenants and the architectural guidelines, the architectural guidelines shall control.

Article 4, Section 4 of the Bylaws essentially tracks Article XI, Section 6.03 of the Declarations, but has not been amended to reflect the revised Section 6.03 of the Amended Declarations. Article 4, Section 10 of the Bylaws tracks Article XI, Section 6.09 of the Declarations concerning the right of owners to rent residences, and awarding all tenants with owner's privileges and the duty to abide by all covenants and restrictions. Article 14 of the Bylaws at Section 2 tracks Article XIV, Section 2 of the Declarations concerning the method by which the Declarations and Bylaws are to be amended.

Thus, by amendment to the Declarations, the Declarations have changed from authorizing lots to be used for private residential purposes only, to authorizing the use of the lots for single family residential purposes only.

Summary of Relevant Law

It is well established law in the State of Tennessee that a person owning a body of land may sell portions thereof and make restrictions as to its use for the benefit of himself as well as those to whom he sells. Benton v. Bush, 690 S.W.2d 691 (Tenn. Ct. App. 1982). However, since restrictive covenants are in derogation of the right of the unrestricted use of ones real property, they are strictly construed. Id. Notwithstanding the law's unfavorable regard toward restrictive covenants and its strict construction of them, such restrictions, like other contracts, will be enforced according to the clearly expressed intention of the parties. Id.

Because restrictive covenants hinder the otherwise free use and enjoyment of property, they are to be strictly construed, with all doubts resolved in favor of the free use of ones property. Land Developers, Inc. v. Maxwell, 537 S.W.2d 904. Nonetheless, the words of a restrictive covenant should be given a fair and reasonable meaning in order to effectuate the covenant's purposes. McDonald v. Chaffin, 529 S.W.2d 54 (Tenn. Ct. App. 1975). When a restrictive covenant's terms are capable of more than one construction, Tennessee courts shall adopt the construction that advances the unrestricted use of the property. Maples Homeowners' Ass'n, Inc. v. T & R Nashville Ltd. Partnership, 993 S.W.2d 36, 39 (Tenn. Ct. App. 1998). Again, Tennessee courts shall also resolve ambiguities in the restrictions against the party who drafted them, and shall

resolve all doubts concerning a covenant's applicability against applying the covenant. Maples Homeowners' Ass'n, Inc., 933 S.W.2d at 39, citing Land Developers, Inc., *supra.*, and Richards v. Abbottsford Homeowners' Ass'n, 809 S.W.2d 193, 195 (Tenn. Ct. App. 1990).

The analysis which a Tennessee court undertakes when asked to enforce restrictive covenant is as follows:

The court is required to give a fair and reasonable meaning to restrictive covenants in order to determine the parties' intentions and once the intention of the parties is ascertained, the covenant will be enforced, provided it serves a legitimate purpose and does not constitute a nuisance per se.

General Bancshares, Inc. v. Volunteer Bank and Trust, 44 S.W.3d 536, 540 (Tenn. Ct. App. 2000) citing Hillis v. Powers, 875 S.W.2d 273, 275 (Tenn. Ct. App. 1993).

In Parks v. Richardson, 567 S.W.2d 465, 468 (Tenn. Ct. App. 1977), the Tennessee Court of Appeals for the Middle Section stated that the use of a restrictive covenant restricting a property for "residential" use "does not prohibit construction of multi-unit residential buildings such as apartments, condominiums, and duplexes." The Court of Appeals rejected an argument that modern apartment buildings, for example, are primarily commercial in character and so were not within the meaning of the word "residential". Id.

Finally, Tennessee courts will uphold a covenant running with the land, (as the LMSOA Covenants run) "if the Assignees had actual notice, or if the restrictions appear in the chain of title." Hillis v. Powers, 875 S.W.2d at 274, citing Land Developers v. Maxwell, 575 S.W.2d 904 (Tenn. 1976).

Finally, while certainly not controlling, the Knox County Zoning Code (which should not be significantly different from the Claiborne County Zoning Code) defines the word "family" as follows:

one or more persons related by blood, marriage, or adoption, or a group of persons not exceed five persons not all related by blood or marriage, occupying the premises and living as a single non-profit housekeeping unit as distinguished from a group occupying a boarding or lodging house, hotel, club, or similar dwelling for group use.

Metropolitan Planning Commission Zoning Ordinance for Knox County, Tennessee and the City of Knoxville, Tennessee, Definition Section, at Page 2.1-7. This definition of

“family” is generally consistent with Tennessee law and also consistent with the requirements of the Federal Fair Housing Act, which defines “family” rather expansively.

Detailed Opinions

Based upon the foregoing, I am providing the following opinions.

1. Pursuant to Article XII, Section 12.08 of the Declarations, and Article XV of the Bylaws, the Declarations control over the bylaws. Thus, the Amended Declaration definition of residential use located at Deed Book 1059, Page 733 of the Claiborne County Register of Deeds is controlling.

2. In the context of the Declarations restrictive covenants, “commercial” purposes means a commercial business which is not a residence, and thus prohibited uses of a residence located in the development would include, for example, a restaurant, a professional building, an inn, a boarding house, a bed and breakfast, or for that matter any kind of multi-family dwelling, such as a duplex, triplex, apartment building, townhouses, lodging houses, a clubhouse, or a similar dwelling for group use. Simply renting ones property is not, however, commercial use.

3. Renting of one home for single family residential purposes is clearly permissible, and there is no requirement that an owner occupy the premises. An owner could purchase a property, never live there, and lease it out (perhaps continuously), provided the tenants are using the property for single family residential purposes.

4. Home offices are permitted, in essence if they do not seriously detract from the residential character of the dwelling. Thus, for example, I could practice law out of my home office, provided I lived in the residence, but I could not turn my home into a law firm, employing multiple attorneys and staff.

5. The “serial” renting for relatively short periods of time of dwellings to a family or to groups of unrelated persons, where no one is using the property as a single, “non-profit housekeeping unit”, is probably impermissible, but this is somewhat ambiguous based upon the “strength” of the repeated insertion of rental provisions in the covenants, and also the fact that Lone Mountain Shores is essentially a vacation or resort community, located on the lake where for most if not all residents, their home is not their primary dwelling, and where it is a commonplace practice in today’s economy to rent out homes in a vacation community.

6. Because the serial renting of dwellings to families or small groups of unrelated persons, for example, a group of “guys on a weekend fishing trip”, is arguably permissible under the covenants, in my opinion the covenants should be amended to more particularly detail this situation. Since the current practice seems to be to allow this type of renting, a defense to prohibit the enforcement of the covenants as written may arise over time, based on the equitable defenses of estoppel and/or laches, where homeowners have engaged in this practice for a period of time, perhaps even purchased their property

with the understanding that they would be able to do so, and where the homeowners' association has acquiesced in this conduct.

7. The fact that certain homeowners may have personally understood from the realtor when they purchased the property, that some of the property could be rented, where as others did not understand this, or were not told, is largely irrelevant, as any purchaser will be held to have either actual or constructive notice of the restrictive covenants based upon the presence of the Declarations in the chain of title, the relevant documents being easily accessible initially through the Register of Deeds Office and now through the Association's website.

8. The Association could adopt reasonable restrictions on the rental use of property pursuant to the method in the declarations and bylaws, both of which allow the declarations and bylaws to be amended upon (1) the unanimous vote of the Board of Directors, and (2) the approval of the amendment subsequent to the unanimous vote of the Board by fifty-five (55%) percent of the property owners, pursuant to Article XIV, Section 2, of the Declarations.

9. Tennessee courts will enforce restrictive covenants where they are reasonable and unambiguous, and exist for the mutual benefit of all property owners. However, since Tennessee law favors the free use of ones land, restrictive covenants which are ambiguous will be construed against the restriction, and in favor of the free use of ones property. The Association if it has a concern about, for example, the serial rental of property, could adopt a less ambiguous, more definite rule governing the situation. Both the declarations and the bylaws would need to be amended.

10. Finally, although not strictly a legal opinion, I would note that there is a concern that the prevention of easy rental of ones property might make the property less desirable to own, as it is doubtful that the properties could be leased in accordance with longer term, non-serial rentals.

If you have any questions concerning the foregoing opinion, please do not hesitate to contact me.

Sincerely,

BECKER, FLEISHMAN, BROWN & KNIGHT, P.C.

Samuel W. Brown