

Whiteford, Taylor & Preston L.L.P.

Memorandum

TO: Waters Landing Association

FROM: Benjamin J. Andres

DATE: August 2, 2021

RE: AERC Powers and Authority

I. The AERC Generally

The Waters Landing Architectural and Environmental Review Committee (“AERC”) is established pursuant to Article VII of the Association’s Declaration. The AERC is comprised of between 3 and 11 members who are appointed by the Board of Directors (“Board”). The Board has the power to designate the members of the committee, including both appointments and removals, provided that the AERC membership remains generally representative of the neighborhoods and lot types within the Association as a whole. Declaration, Article VII, § 2.

II. Application Review

The primary function of the AERC is to review applications from Lot or Unit Owners to make modifications to properties within the Association. Except for routine maintenance and repairs, owners may not place or alter any “building, fence, wall or other improvements or structures . . . until the complete plans and specifications showing the location, nature, shape, height, material, color, type of construction and any other proposed form of change . . . have been submitted to and approved in writing” by the AERC. Declaration, Article VII, § 1.

This initial review authority is provided solely to the AERC. The Board is given the power to appoint members of the AERC, and to hear appeals of AERC decisions. However, the Board is assigned neither the power nor the duty to review and approve initial applications from Owners. *See* Bylaws, Article V, § 3.

The AERC is required to review every submitted application on an individual basis, and may consider all information submitted in an application. It is permitted to approve applications that do not strictly comply with its published guidelines provided that (1) the application does not violate a restrictive covenant of the Declaration, and (2) the AERC is satisfied that the request is appropriate as to the “safety, harmony of external design, color and location in relation to surrounding structures and

topography and conformity with the design concept for the community.” Declaration, Article VII, § 1. In addition, the AERC is bound by the general legal duty of the Association to act in a non-discriminatory manner. That is, exceptions may be granted on the basis of the application itself, but not based on preferential or discriminatory treatment of the requesting Owner.

III. Rules and Regulations

In addition to reviewing modification applications, the AERC is authorized to adopt and promulgate rules and regulations concerning both the process and the substantive requirements for applications and approvals. Declaration, Article VII, § 7. Rules issued by the AERC may not waive or conflict with any restrictive covenants contained in the Declaration or Bylaws, but may establish additional requirements or considerations. *Id.* The AERC is specifically tasked with drafting and promulgating such rules, although such rules are to be enacted “with the advice and consent of the Board.” *Id.*

By way of example, the governing documents make no mention of a maximum fence height, although fences are specifically listed as modification that the AERC must approve. Accordingly the AERC may adopt and promulgate guidelines for the type and size of fencing that may be installed on various lot types. It may also approve applications that include exceptions to its own published requirements, or, in its own discretion, promulgate modified guidelines establishing new fence criteria.

IV. Conclusion

The AERC may publish guidelines for owners to consider in requesting approval for modifications to their property. These guidelines may not waive or remove any requirements established by the Association’s governing documents, and may be rejected by the Board. The AERC may publish modifications to its own guidelines, and may also grant exceptions to these guidelines without waiving the authority to enforce them in other cases. The AERC is required to review initial applications for any property modification. It may not approve any application that requests a waiver of requirements set forth in the Declaration, but may approve exceptions to its own published guidelines.

The Board shall exercise supervisory authority of the AERC by (1) appointing and removing members of the AERC, (2) rejecting rules promulgated by the AERC, (3) hearing appeals of decisions made by the AERC, which may be brought by any affected owner.