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March 24, 2009

BY E-MAIL

Lakeland Estates Property Owners Association, Inc.
c/o Mr. Wayne G. Stone, President
26140 Greenbriar Court
Lake Barrington, IL 60084

RE: Governing Documents (Possible Revisions)

Dear Wayne:

Pursuant to your direction, I have reviewed the Association's governing documents with an eye toward suggesting possible revisions to update the documents and to bring them into compliance with current law and practice. To fully address the situation of the governing documents, it also was necessary to review file materials relative to litigation in which the Association has been involved on the topic. Specifically, I reviewed the following:

1. "Original Documents".

   A. 1957 Plat of Subdivision (recorded April 8, 1957 as Document No. 946079) ["Plat"]

   B. Declaration of Easements (dated September 18, 1957, Book 1571 - Page 499) and Declaration of Easements (dated September 18, 1957, Book 1571 - Page 501) [collectively, "Easements"]

   C. Indenture (dated August 22, 1962, Book 1963 - Page 498) ["Deed Restrictions"]

2. "Amendments".

   A. 1980 Revised Deed Restrictions (recorded February 13, 1980 as Document No. 2048269) ["1980 Amendment"]

   B. Amendment to 1980 Revised Deed Restrictions (recorded January 7, 2000 as Document No. 4476177) ["2000 Amendment"]

C. Bylaws of Lakeland Estates Property Owners Association (undated) ["By-Laws"]

3. "Litigation".

A. Lakeland Property Owners Association v. Larson (82 SC 192 / Appellate Court No. 83-388)

B. Tarkowski v. Lakeland Property Owners Association, Inc. (98 MR 348 / Appellate Court No. 2-99-0745

I provide the following comments, observations and suggestions for the Board's consideration.

PRELIMINARY CONSIDERATIONS

The Original Documents form the basis of the Association. In a manner typical of the time period for this development, the Original Documents established covenants and obligations affecting the underlying real estate. Those who purchased the lots and their successors were bound by those covenants and obligations by operation of law whether or not they were aware of the existence of those documents. The Deed Restrictions contain very little language relative to changing the covenants. What language there is indicates that the covenants shall remain in force "until January 1, 1980, at which time said covenants shall automatically extend for successive period of ten years, unless by a vote of the majority of the ten owners of the lots in said subdivision it is agreed to change the said covenants in whole or in part". Approved by majority vote, the 1980 Amendment was recorded. Further changes were made by majority vote approving the 2000 Amendment which was recorded.

The Deed Restrictions do not create a "homeowners association" to administer the covenants. Such an organization appears to have evolved from self-administration by the lot owners through an unincorporated organization (named "Lakeland Property Owner's Association, Inc." in Articles of Incorporation paperwork found in the file which is undated and bears no indication of having been submitted to the Illinois Secretary of State to complete the incorporation despite the mention of that organization in the 1980 Amendment) to the not-for-profit corporation known as "Lakeland Estates Property Owners Association, Inc." incorporated in 1998. It appears that the By-Laws were put in place sometime following that incorporation.

Changes made by the 1980 Amendment were challenged by Robert Larson in his defense of the Association's claim for payment of dues. In a decision handed down on February 1, 1984, the Illinois Appellate Court upheld the judgment of the Circuit Court by which the Association's claim to collect dues was denied. The Circuit

Court had ruled that the majority of the lot owners did not have the authority to impose covenants (such as the obligation to pay dues) upon lot owners "new and different" from those set forth in the Deed Restrictions. The Appellate Court concurred on the basis that the language about dues inserted by the 1980 Amendment went beyond the authority to amend set forth in the Deed Restrictions since that authority was limited to changing "existing covenants, not the adding of new covenants which have no relation to existing ones". *It should be noted that a later Illinois case from 1992 sets forth a differing opinion about the topic. Also, a 2003 Colorado case rejected the position taken by the Larson court but that decision is not binding on Illinois courts. Only further litigation would indicate how the courts would view such matters today.*

The Tarkowski case pursued some similar challenges to the Association's authority. It was dismissed on technical grounds, however, so I will not dwell on it here.

To my knowledge, there have been no other challenges (successful or not) to the Association's operations or the governing documents. Nonetheless, as a result of the Larson case, I understand that the obligation to pay dues has been applied prospectively from the recording of the amendment with the Association seeking payment of dues from those who were lot owners prior to that decision only on a voluntary basis.

This background is important to keep in mind as the Association looks to amend its governing documents. The extent to which suggested changes are pursued should be evaluated in the specific light of the Larson decision and with an eye toward the possible need to address in court any changes made which are not explicitly to "existing covenants" but which may add "new covenants which have no relation to existing ones". To be successful in that effort, the more modern viewpoint would have to prevail.

SUGGESTED CHANGES

In today's marketplace, a development like Lakeland Estates would be established by means of a Planned Unit Development ordinance approved by the municipality (City, Village or County) with a companion Declaration of Covenants, Conditions, Easements and Restrictions ("CCR's") outlining the applicable covenants and governance structure for a homeowners' association to administer the development. Funding obligations, the scope of the association's authority and responsibility and amendment provisions would be included. Certain portions of the Illinois Condominium Property Act ("Act") would apply to the development even though it was not created as a condominium property because the legislature has established that Sections 18.5(c)–(h) of the Act dealing with topics such as meetings, finances and records are to apply to "common interest communities" which, by definition set

forth in the Illinois Code of Civil Procedure, would include a development created after 1985 like Lakeland Estates where ownership of a lot requires payment of assessments to fund certain common expenses "described in a declaration which is administered by an association".

In the absence of broad, clearly-described amendment authority, a basic premise of real estate law about covenants establishes that new covenants cannot be imposed without the consent of each party to be bound by the covenants. In a modern document, the question about how to amend the covenants would be a simple one to answer based on clear language of the CCR's allowing for amendments and setting forth the required procedures and percentage approval needed to do so. Changes made pursuant to that amendment procedure would be binding on all owners whether or not they voted in favor or against or abstained from voting on the proposed amendment. Once adopted properly and recorded, the amendment would be effective as to all owners. Unfortunately, though the statement about amendments to the Deed Restrictions "in whole or in part" by majority vote of the lot owners seems quite straightforward, the Larson decision and those underlying principles of real estate law place stumbling blocks in the way of changes which go beyond the explicit language of the originally-stated covenants.

Making changes to the Deed Restrictions is not a simple matter at Lakeland Estates. Nonetheless, I suggest that the following topics be considered for amendments in light of the upcoming 2010 amendment opportunity:

1. Over the years during which I have represented the Association, issues involving membership and absentee voting, responsibility for water erosion repairs and the violation of building restrictions have arisen among other topics. There has not always been clear guidance from the governing documents when searching for an answer to questions based in those circumstances. It would be helpful for the governing documents to be amended to address those topics more squarely.

2. It would be beneficial for the Association to be considered a "common interest community". Such a designation provides certain protections and rights for owners relative to Association meetings, finances, records and resale procedures among other administrative matters. It also empowers the Association to use the additional and very effective method of obtaining a temporary possession order and eviction for collection of assessments and other charges due from the owners. One of the prerequisites for the Board voting to have the eviction portions of the Illinois Code of Civil Procedure to apply to the Association is that the owners must be authorized to attend meetings of the Board of Directors "in the same manner as provided for condominiums under the [Illinois] Condominium Property Act". The

authorization of Article 7, Section 7.4 of the By-Laws would have to be modified to accomplish that. The other requirements of Section 18.5(c)-(h) of the Act mentioned above would have to be inserted before the Association could be considered a common interest community to which the eviction statute applies. Even if the Association ultimately cannot qualify as a "common interest community" because it is not established pursuant to a "declaration" but by the Deed Restrictions, including the concepts gleaned from those sections of the Act would modernize the document and update the Association's operations. *If these changes can be made to the By-Laws, the Board could opt to proceed in this direction. I would be pleased to assist the Board in that process. If the common interest community designation is not or cannot be adopted, the remedy of eviction is not available. What, then, is available would be the less specific reference to judicial proceedings "at law or in equity" now set forth in Paragraph 24 of the 1980 Amendment. The fact that the eviction action takes several months less time to complete the eviction process also is a prime benefit. A "small claims" lawsuit to collect unpaid assessments could be pursued, though that would be an action against only the property owner as a personal claim. A judgment entered as a result of such a claim could be satisfied only by voluntary payment or enforcement efforts such as a wage or asset garnishment.*

3. The By-Laws require some attention. Please note the following:

   A. Article 2, Section 2.2 should remain only if the developer actually conveyed "real property dedicated to the use of the property owners" to the Association. *This raises a collateral issue as to the ownership of those parcels for future consideration. File materials indicate that they had been conveyed by recorded deed in 1973 to "Lakeland Property Owners' Association, Inc." – yet another variable of the corporate name.*

   B. Article 3, Sections 3.1.1 and 3.1.2 should be combined and modified to identify one membership per lot. The approval called for in Article 3, Section 3.2 by the "Corporation" of the Board-suggested budget should be reconsidered. Rather than calling for owner approval of the budget, current industry standards for budget approval vest that authority in the Board [particularly since the obligation to administer the Association is imposed on the Board members] with owners being granted an oversight procedure by which a majority of the entire membership could act following and within a specified number of days after Board approval of the budget seeking to override that Board action if opposed by the owners. [Sections 3.2 and 3.3 should be relocated into Article 14.] The concept of "certificate of agency" established by Section 3.6 of that article appears to be archaic and unnecessary. The

restriction to one of the stated relatives or "recognized member of the household at Lakeland Estates of such individual" as those authorized to serve as proxy holder should be reconsidered.

C. The need for Article 4, Section 4.2 by which the municipal (Village, County and State) ordinances relating to Building, Public Health and Safety are adopted "by reference" is unclear. Those ordinances are enforceable by the municipalities and not by the Association.

D. Election procedures should be consolidated. Though the procedure now in place does not appear to violate applicable law, it would be more typical for the lot owners to elect the directors and for the directors to appoint the officers to serve from time to time than for the manner set forth in Article 5, Section 5.3 and Article 8, Section 8.4 to be followed.

E. I am unaware of any requirement to submit the approved budget to the Illinois Secretary of State as set forth in Article 6, Section 6.4.

F. The notice provisions of Article 7, Section 7.3 should be clarified. The closed meeting provisions of Section 7.5 of that article will have to be modified to comply with "open meetings" requirements. Closed sessions are allowed for discussion of specified topics (personnel, litigation, covenant violation, *etc.*) but all voting by the Board must take place at an open portion of a duly-convened meeting.

G. The introductory language of Article 9, Section 9.1 should make it clear that the committees act only in an advisory capacity and are not authorized to make decisions or act so as to bind the Association.

H. The quorum requirements of Article 11 should be changed and repositioned within the respective article applicable to that type of meeting. The quorum for lot owners' meetings should be a specific number or percentage of lot owners' with no special requirement for Board members to be included in that quantity. Ten percent is the minimum quorum allowed by corporate law though that number presents a very low threshold for conducting Association business. Section 11.2 should be made more flexible by requiring a majority of Board members in office as quorum for Board meetings rather than "four" directors. With a fixed number as now is stated, the Board could not function if faced with four vacancies.

I. The use of absentee ballots as anticipated by Article 12, Section 12.3 is not necessary particularly in light of the possibility to use a proxy for

representation at a meeting. *Combining the use of absentee ballots and proxies can prove to be confusing and cumbersome. Current procedures pertaining to condominiums allow for absentee ballots though under such procedures proxies are not allowed.* The vote total requirements set forth in Section 12.4 of that article should be divided between the various topics. The reference about "officers and at-large" members should be changed to "Board members" if the procedures for appointing officers is changed (see above). The two-thirds requirement for By-Law amendments already is included in Article 17.

J. The specific reference to Section 64 of the "General not for Profit Corporation Act" now is inaccurate and is unnecessary. If the filing of the corporate annual report is to be a duty of the Treasurer, that task should be listed in Article 6, Section 6.4.

K. It is unwieldy to allow the owners to act on all budget line items and to bind the Board members to a budget that the majority of Board members may not believe best serves the Association's interests or allows them to fulfill their duties for administration of the Association.

L. The use of the term "nuisance" in Article 15, Section 15.3 may prove to be difficult to enforce because of the subjective nature of that term.

M. More specific notice provisions should be included pertaining to owners' meetings and Board meetings, respectively.

FINAL OBSERVATIONS

There are a number of landmines waiting to explode within the context of amending the Association's governing documents. First and foremost, any proposed amendments would have to garner approval from a majority of the lot owners to authorize recording of the amendment and causing them to become effective. There may be political aspects to be considered when it comes to crafting the language of a single proposed amendment document so as not to jeopardize approval. Alternatively, a ballot style approval process similar to the 2000 effort might be best.

It is not clear that the By-Laws are to be included in the documents which can be imposed or amended. There were no By-Laws included in the Original Documents. Section 102.25 of the Illinois General Not For Profit Corporations Act requires the initial by-laws to be adopted by the Board. Paragraph 29 of the 1980 Amendment by which the Association's By-Laws, rules and Board actions were made "binding upon all lot owners" is a provision that has not yet been challenged or tested in court though it covers a topic which was not included in the original Deed

Restrictions. Depending on the scope of changes to be proposed, a challenge might be expected. In fact, the entire amendment process could provide the impetus for an uprising depending on the politics of the community.

Any amendment could be challenged either affirmatively or as a defensive maneuver if and when the Association pursues enforcement of the modified terms. The Association may be in a stronger position to prevail against a challenge if the amendments were to be approved by a super-majority of the lot owners such as upward of 75%. This may be difficult since it appears from what I have seen in file materials that there may be as many as 19 of the 95 lot owners (20%) who consider themselves exempt from the changes made by the 1980 Amendment. The Association should be aware that it ultimately may be necessary for the Association to seek a judicial determination to establish the validity of any provisions put in place by future amendments.

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If you or the other Board members should have any questions, please do not hesitate to contact me. Please let me know if the Board members would want to discuss these matters in more detail. An invoice for this activity is being mailed to you. Thank you for your attention to these matters.

Until I hear differently, I will take no further action on this project.

Sincerely,

Law Office of Charles T. VanderVennet, P.C.

/s/ Charles T. VanderVennet

CTV:tw