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MEMORANDUM

August 28, 2009

TO: Gayle Ramsey

RE: Potential Purchase of Long Meadow and related Parcels

FACTS: For purposes of this Memorandum the "stated facts" are those you provided Legal Research Center, Inc., including those stated in (1) the 14-page document entitled "The Proposed Acquisition of the Long Meadow and Other Parcels Within Straus Park"; (2) the August 15, 2009, six-page Memo from Alton Loftis; (3) the August 13, 2009, two-page letter from IPM (by Peter Randazzo) to the Straus Park Master Association ("SPMA") Board; and (4) the 43-page document consisting of the "Declaration of Covenants of Straus Park" ("Declaration") and the "Bylaws of Straus Park Master Association, Inc."

In summary, the most salient facts are that in Spring 2009, William McKee, principal of Straus Park Development Company (SPDC) informed Lloyd Fisher, President of the Board of SPMA, that SPDC intended to sell Long Meadow and other real estate parcels (collectively "Long Meadow parcels") within Straus Park. The Board believes the properties would be valuable to SPMA and its members and that it would be detrimental to their interests if these properties were purchased by others. Most of the Board believes it would be in SPMA's best interest to acquire the property but questions have been raised about the Board's authority to purchase this real estate and its authority to finance and assess its owner-members for the purchase price.

Additional facts and details are noted in the discussion sections below, where appropriate.

ISSUES: In connection with the potential purchase, payment for and financing of the Long Meadow parcels:

1. What is Board members' personal liability, if any?

2. What is the Board's authority in to levy an assessment?

3. What is the Board's authority to use reserve funds?

4. What are the Board's rights and duties regarding unanticipated capital expenditures?

5. What is the impact of Board members' recusal on voting requirements?

6. Does the Board have authority to acquire the property without membership approval?

7. What are the pertinent financing issues?

DISCUSSION

I. WHEN CONSTRUING THE DECLARATION AND BYLAWS, PRINCIPLES OF CONTRACT CONSTRUCTION APPLY.

Ordinary principles of contract construction apply to declarations and bylaws. In *Dunbarton Pointe at Greystone Village Condominium Owners Ass'n v. Parliament Pointe Homeowners Ass'n*, No. COA 06-330, 2007 WL 2472076 (N.C. Ct. App. Sept. 4, 2007) (unpublished), the court summarized those rules as they relate to covenants:

> We note: "Because covenants originate in contract, the primary purpose of a court when interpreting a covenant is to give effect to the original intent of the parties," "When a contract is ambiguous, parol evidence is admissible to show and make certain the intention behind the contract." Therefore, the original intent of the developer in drafting particular covenants is relevant in interpreting those covenants. Further, in construing provisions in a covenant, the court must examine the entire document or documents in order to ascertain the intent of the parties.

Id. at *4 (citations omitted). Additionally, "any ambiguous terms in the covenant must be interpreted according to what they meant at the time the servitudes attached to the individual lots" and "[i]n addition to examining the covenants themselves, intent may be gleaned from the actions undertaken by the developers, both prior to and subsequent to execution of the

covenants." *Claremont Prop. Owners Ass'n v. Gilboy*, 142 N.C. App. 282, 288, 289, 542 S.E.2d 324 (2001).

The North Carolina Supreme Court has described a homeowners association's bylaws as likewise contractual in nature:

> Such bylaws are "administrative provisions" adopted for the "internal governance" of the Association. Black's Law Dictionary 193 (7th ed. 1999). . . . "The bylaws [of a nonprofit corporation] may contain any provision for "regulating and managing the affairs of the corporation," but no bylaw may be "inconsistent with the law." N.C.G.S. § 55A-2-06 (2005). . . . [I]n a community that is not subject to the North Carolina Planned Community Act, the powers of a homeowners' association are contractual and limited to those powers granted to it by the declaration. Therefore, to be consistent with law, an association's by-laws must necessarily also be consistent with the declarations.

Armstrong v. Ledges Homeowners Ass'n, 360 N.C. 547, 553, 633 S.E.2d 78 (2006).

Several court of appeals decisions have held that assessment provisions in restrictive covenants must satisfy a three-pronged test to be valid. The provision must (1) contain a "sufficient standard by which to measure . . . liability for assessments;" (2) "identify with particularity the property to be maintained," and (3) "provide guidance to a reviewing court as to which facilities and properties the . . . association . . . chooses to maintain." *Allen v. Sea Gate Ass'n,* 119 N.C. App. 761, 764, 460 S.E.2d 197 (1995). The earliest cases in which the court held that an assessment provision was unenforceable because it was too vague under that test include *Beech Mountain Property Owners' Ass'n v. Seifart*, 48 N.C. App. 286, 269 S.E.2d 178 (1980), and *Snug Harbor Property Owners Ass'n v. Curran,* 55 N.C. App. 199, 284 S.E.2d 752 (1981). However, the test applied by *Allen*, *Seifert*, *Snug Harbor*, and their progeny, applies only to assessments levied for maintenance of physical property. *See Willow Bend Homeowners Ass'n v. Robinson*, --- N.C. App. ---, 665 S.E.2d 570 (2008).

In the instant case the assessment is for a non-maintenance expenditure, so a court will evaluate the covenants here "according to the general standard that covenants imposing affirmative obligations on the grantee must contain 'some ascertainable standard . . . by which the court can objectively determine both that the amount of the assessment and the purpose for which it is levied fall within the contemplation of the covenant.'" *Id.* at 575 (quoting *Seifert*, 48 N.C. App. at 295).

II. DIRECTOR LIABILITY

The broad immunity bestowed upon the Directors pursuant to Article VI of the Bylaws should protect them against any individual liability to the owners in connection with the proposed purchase of Long Meadow. Article VI provides that the Directors "shall not be liable to Owners for any mistake of judgment, negligence, or otherwise, except for their own individual willful misconduct or bad faith." Neither "willful misconduct" nor "bad faith" is defined in the Bylaws. They have, however, been judicially construed.

"Willful" has been defined by the courts on a number of occasions. *See, e.g.*, *Brewer v. Harris*, 279 N.C. 288, 296, 182 S.E.2d 345, 350 (1971) ("An act is done willfully when it is done purposely and deliberately in violation of law, or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason." (internal citations and quotations omitted)); *Sawyer v. Food Lion, Inc.*, 144 N.C. App. 398, 403, 549 S.E.2d 867, 870 (2001) ("Willful conduct is done with deliberate purpose."). "Willful misconduct" was defined in *In re Stuhl*, 292 N.C. 379, 389, 233 S.E.2d 562 (1977), in the context of judicial disciplinary proceedings in a manner that should be equally applicable for purposes of Article VI:

> Willful misconduct in office denotes "improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally, in bad faith. It is more than a mere error

> of judgment or an act of negligence. While the term would encompass conduct involving moral turpitude, dishonesty, or corruption, these elements need not necessarily be present."

Id., 292 N.C. at 389 (quoting *In re Edens*, 290 N.C. 299, 226 S.E.2d 5 (1976))

Regarding the term "bad faith," it has been observed that—

> [b]ad faith cannot be defined with mathematical precision. . . . Certainly, it implies a false motive or a false purpose, and hence it is a species of fraudulent conduct. Technically, there is, of course, a legal distinction between bad faith and fraud, but for all practical purposes bad faith usually hunts in the fraud pack.

Nat'l Mortgage Corp. v. Am. Title Ins. Co., 41 N.C. App. 613, 619, 255 S.E.2d 622 (1979) (quoting *Bundy v. Credit Co.*, 202 N.C. 604, 607, 163 S.E. 676 (1932)), *rev'd on other grounds*, 299 N.C. 369, 261 S.E.2d 844 (1980). *See also Lovell v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 416, 421, 424 S.E.2d 181, 185 ("[B]ad faith means not based on honest disagreement or innocent mistake."), *aff'd*, 334 N.C. 682, 435 S.E.2d 71 (1993).

Since none of the actions taken by the individual Board members in pursuing the purchase of the Long Meadow property would constitute willful misconduct or bad faith as those terms have been construed by the North Carolina courts, they arguably cannot be liable to any Owner.

With respect to potential liability of the Directors to third parties arising out of a contract to purchase Long Meadow, Article VI provides:

> The Owners shall indemnify and hold harmless each of . . . the Directors . . . against all contractual liability to others arising out of contracts made by . . . the Directors on behalf of the Master Association . . . , unless any such contract shall have been made in bad faith or contrary to the provisions of the Declaration or of these bylaws . . . . *It is intended that . . . the Directors . . . shall have no personal liability with respect to any contract made by them on behalf of Straus Park . . . .*

(Bylaws, art. VI (emphasis added).)

On its face, the quoted language is inconsistent in that it expresses the intent that the Directors shall not be personally liable on *any contract* made by them on behalf of Straus Park, and simultaneously states that they can be personally liable (i.e., the owners need not indemnify and hold harmless each Director), if sued by third parties when a contract has been made in bad faith or contrary to the provisions of the Declaration or Bylaws. However, this is in essence a non-issue since the *making* of a contract to purchase Long Meadow, or any other property, is so clearly not contrary to the provisions of the Declaration or Bylaws that the Owners would in the event of a contractual dispute with the seller be required to comply with the indemnification and hold-harmless requirement.

III. LEVYING OF ASSESSMENT VS. UNANTICIPATED CAPITAL EXPENDITURE

A dispute exists as to the procedure to be followed in levying assessments to cover the cost of purchasing Long Meadow. Some Owners and the management company, IPM, argue that Section 8.5 of Article VIII of the Covenants applies and that therefore the assessment must be approved by an affirmative vote of 80% of the Owners. The Board's position is that the purchase is an unanticipated capital expenditure and therefore any assessment merely requires approval by the Board, not a vote by the Owners, as provided in Article V of the Bylaws.

A. Article VIII, § 8.5 of the Covenants

Section 8.5 provides:

> 8.5 Extraordinary Assessments. Should the Master Association or an Owner's Association want to assess the Owners for capital improvements or other items not provided for herein, the affirmative vote of eighty percent (80%) of the Owners to be so assessed shall be required to adopt such assessments.

Therefore, if the purchase of Long Meadow is a "capital improvement" or "other item[ ] not provided for [in the Covenants]," then arguably section 8.5 could apply.

There is a strong argument that the purchase is not a "capital improvement." Although no North Carolina authority was located construing the term, the courts in other jurisdictions have considered what constitutes a capital improvement. *See, e.g.*, *Litvak v. 155 Harbor Drive Condo. Ass'n*, 244 Ill. App. 220, 223, 614 N.E.2d 190 (1993) ("Capital improvements are generally defined as 'betterments of a long lasting nature which add to the capital value of the property.'" (quoting *Finn v. McNeil*, 23 Mass. App. Ct. 367, 372-73, 502 N.E.2d 557, 561-62 (1987)); *Balderston v. Balderstron*, 71 Md. App. 390, 400, 526 A.2d 59 (1987) (capital improvements are "expenditures made primarily for significant additions or substantial changes to the property"). *See also* N.Y. Tax Law § 1101(b)(9) (2008) (defining capital improvement as "an addition or alteration to real property which . . . substantially adds to the value of the real property . . . and becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself"). Accordingly, a capital improvement is the improvement of already-owned real property, not the acquisition of the property itself.

As noted above, section 8.5 also applies to assessments for "other items not provided for herein." Because the purchase of additional real property is not expressly provided for in the Declaration of Covenants, a court could conclude that the purchase assessment falls with section 8.5. However, section 8.2 does state that the "Master Association shall establish the general Assessments" and sets limits on increases in "the regular established Lot Assessments." Further, section 8.1 provides "*[w]ithout intending to limit the uses of the Assessments*, the Assessments shall be used for the Maintenance of Common Areas." Based on this language, it is clear that the

yearly, or general, assessments can be used for purposes other than maintenance. Therefore, "extraordinary assessments" arguably are of a different nature. Although no case law was found defining extraordinary assessments, the plain meaning of "extraordinary" is "going beyond what is usual, regular or customary." Webster's New Collegiate Dictionary 403 (1981). Therefore, it can be argued that an extraordinary assessment is one which is not yearly, but an unusual, additional assessment. *Cf. Twin Lakes Vill. Prop. Ass'n v. Crowley*, 123 Idaho 132, 857 P.2d 611 (1993) (one-time $4000 assessment by homeowners association for purchase of golf course was "extraordinary assessment" as delineated in bylaws).

Additionally, the more specific provision of the Bylaws governing special assessments for "capital expenditures" arguably should control, rather than the more general language of section 8.5 relating to assessments for "other items not provided for herein." *See generally Smith v. Mitchell*, 301 N.C. 58, 269 S.E.2d 608, 614 (1980) (applying rule that "specific controls the general" to construction of a restrictive deed covenant).

B. Article V, § 5 of Bylaws

Article V of the Bylaws is captioned "Fiscal Management of the Association." Section 5 thereunder provides:

> Special Assessments for expenses that are not included in the budget, such as for unanticipated capital expenditures, to dredge the lake, to replace major systems of buildings which have unexpectedly failed and which are Common areas, etc. shall be made only after notice of the need for such is given to the Owners, including a notice of the meeting of the Directors at which the same will be considered. After such notice, and upon approval by at least five of the Directors, the Special Assessment shall become effective, and be due in such manner as the Directors require. . . .

This is the procedure which the Board has adopted for levying the assessment related to the purchase of Long Meadow. That expense arguably falls within the unambiguous language of

section 5. The purchase price is clearly an expense "not included in the budget" and although it need not fall into any of the categories of expenses listed after "such as" as examples of unbudgeted expenses, it is an "unanticipated capital expenditure." There is no dispute that it was "unanticipated;" the Board first learned of the potential offer to sell the Long Meadow property in April 2009. And, the purchase would be a capital expenditure in that it involves a capital acquisition. "Capital" means "assets that add to the long-term net worth of a corporation." *City of Steubenville v. Jefferson County*, 2005 Ohio 6596, No. 05 JE 23, 2005 WL 3370602, at *5 (Ohio Ct. App. Dec. 5, 2005) (quoting Mirriam-Webster's Collegiate Dictionary 168 (10th ed. 2000)). *See also Litvak*, 614 N.E.2d at 224 ("A well recognized distinction found in many declarations exists between (i) maintenance of current facilities through operating expenses and expenditures for repair and replacement and (ii) capital expenditures which involve expansion or putting in better quality facilities than existed previously.").

IPM and some Owners argue that the special assessments governed by section 5 are those that are unanticipated capital expenditures for Common Areas only. That interpretation does not comport with the clear, unambiguous language of the provision however. The series of expenses described after the "such as" (i.e., "for example") language of section 5 are nonexclusive examples of "expenses that are not included in the budget," not examples of "unanticipated capital expenditures." Based on the grammar and punctuation used, the correct reading of the initial language of section 5 would be: "Special Assessments for expenses that are not included in the budget, such as for unanticipated capital expenditures, [such as] to dredge the lake, [such as] to replace major systems of buildings which have un-expectantly failed and which are Common Areas, [such as] etc. . . ." The "Common Areas" language relates to buildings with failed major systems, not to unanticipated capital expenditures. Furthermore, replacement of

major systems in buildings is not necessarily a capital expenditure; indeed in most cases it would not be, because it would merely involve replacing the system, instead of "expansion or putting in better quality facilities than existed previously," i.e. a capital expenditure. *Id.*

Finally, it should be noted that pursuant to section 5, Special Assessments once approved by the Board are "due in such manner as the Directors require." Therefore, the Directors may in their discretion require payment of the assessed amount on a pro rata yearly basis, as they plan to do.

IV. USE OF RESERVE FUNDS AND FINANCING ISSUES

Article V, section 1 provides that the Master Association may create several types of funds to which its receipts and disbursements may be credited and charged. The Directors propose to use reserve funds to fund a portion of the purchase price of the Long Meadow property. The two reserve funds permitted under Section 1 are described as follows:

> (2) A reserve fund for the purpose of performing periodic, but non-routine maintenance, replacement and repair of or to the Common Areas and *for such other purpose as may from time to time appear to be necessary or appropriate to the Directors*.
>
> (3) A general operating reserve for the purpose of providing a measure of financial stability during periods of special stress, which may be used to meet deficiencies from time to time as a result of delinquent payment of assessments by Owners of Lots in Straus Park, and other contingencies, may be established, from time to time, if so desired by the Board.

(Bylaws, art. V, § 1(a)(2), (3) (emphasis added).) On its face, the language of subdivision (a)(2) grants the Directors broad discretion to use the funds in such an account for any purpose they deem appropriate, not just for non-routine maintenance and repair of Common Areas.

Because the Master Association is a nonprofit corporation and "has all the powers incident thereto as provided in N.C.G.S. 55A" (Bylaws, art. 1, § 2), it may, unless the articles of

incorporation provide otherwise, without limitation:, "purchase . . . or otherwise acquire, and own, hold, improve, use and otherwise deal with, real . . . property, or any legal or equitable interest in property wherever located," and it may "make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds and other obligations, and secure any of its obligations by mortgage or pledge of any of its property, franchise or income." N.C. Gen. Stat. § 55A-3-02(a)(4), (7) (2008). Since neither the covenants nor the Bylaws in anyway prohibit or restrict the power of the Association, acting through its Board, to purchase land, make contracts, borrow money or secure its obligations, the Board's use of the reserve funds to fund the purchase is an action that the Board could in good faith deem "appropriate" and within its sweeping discretion under article V, section 1(a)(2).

Moreover, since there are no restrictions in any of the relevant documents on the Board's powers to incur liabilities or borrow money, those powers may also be exercised by the Directors to obtain a loan to fund, in whole or in part, the purchase of Long Meadow.

V. THE RECUSAL OF TWO DIRECTORS IS PROBLEMATIC.

SPMA is considering funding the purchase of Long Meadow and related parcels through the "Special Assessment" mechanism provided in the SPMA Bylaws, which provides:

> Special assessments for expenses that are not included in the budget, such as for unanticipated capital expenditures, . . . shall be made only after notice of the need for such is given to the Owners, including notice of the meeting of the Directors at which the same will be considered. After such notice, *and upon approval by at least five of the Directors,* the Special Assessment shall become effective, and be due in such manner as the Directors require.

(Bylaws, art. V, § 5 (emphasis added).)

Under present circumstances, obtaining approval of the requisite five Directors will be difficult for at least two reasons. First, although the Bylaws provide for a Board of Directors

consisting of seven individuals (*id.*, art. III § 1), we are informed that currently there are only six. Second, at present, two of the six Directors have recused themselves from voting on this matter. Thus, there are only four voting members, and as the situation now stands, obtaining the votes of five is a mathematical impossibility.

Research was undertaken to determine whether, under analogous circumstances a court held that some lesser number of votes would suffice. For example, arguably, the intent of those drafting the Bylaws was to require that approval of a "special assessment" be possible only with a five-sevenths (five affirmative votes where there are seven directors) majority. So, the argument is that if three out of four votes were in favor, that would be sufficient since 3/4 is a slightly greater majority than 5/7. Unfortunately, although research was undertaken both within and beyond North Carolina, no cases were located that addressed this or a similar issue.

Without favorable precedent it will be difficult to succeed with such an argument. For one thing, the position flies in the face of the plain language of the Bylaw. The Bylaw does *not* say a special assessment requires a 5/7 majority vote; instead, it provides that a Special Assessment will become effective only "upon approval by at least five of the Directors." The North Carolina courts are reluctant to re-make legal documents when, as here, the language is relatively clear and straightforward. *See Weyerhauser Co. v. Carolina Power & Light Co*., 257 N.C. 717, 127 S.E.2d 539, 541 (1962); *Bald Island Utils. Inc. v. Village of Bald Head Island*, 165 N.C. App.701, 599 S.E.2d 98, 100 (2004). Although speaking of a contract, not bylaws, the words of the court in *Weyerhauser* may be applicable here:

> When the language of a contract is clear and unambiguous, effect must be given to its terms and a court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties elected to omit. It is the province of the courts to construe and not make contracts for the parties.

127 S.E.2d at 541.

In short, the search for favorable precedent on this issue was unsuccessful and, therefore, there is substantial risk of violating the plain language of article V, section 5 if the Board attempts to levy a Special Assessment without "approval by at least five of the Directors."

There are several potential solutions. First, according to the Declaration and Bylaws, the Declarant is entitled to appoint two Directors. (Decl. § 7.3; Bylaws, art. III, § 7.) We are informed he has appointed just one. He could now make the second appointment and if the new Director and the other four non-recused Directors approved the Special Assessment, there would be the requisite five votes.

Second, if one of the recused Directors is one of the Declarant's appointments he could resign and be replaced by another who has no reason to recuse himself. (Bylaws, art. III, § 8.) Again, in combination with the four non-recused Directors there would be five votes.

Third, the Board could amend the Bylaws to eliminate or modify the five vote requirement for Special Assessments. Owner-member approval is unnecessary if five Directors are in favor of the amendment and the Declarant assents. (*Id.*, art. VII, § 1.) Although, again, it is necessary to secure five votes, one or both of the recused Directors may not feel the need to recuse themselves on the amendment matter, an issue that does not so directly involve the real estate purchase.

VI. THE BOARD MAY ACQUIRE REAL PROPERTY WITHOUT A VOTE OF THE FULL MEMBERSHIP OF SPMA.

SPMA is a non-profit corporation, organized (or to be organized) under the Non-Profit Corporation Act, N.C. Gen. Stat. §§ 55A-1-01 to -17-05. (*See* Bylaws, art. I, § 2; Decl. §§ 1.21, 7.1.) The Bylaws, attached to the Declaration as Exhibit A, expressly provide that the

organization shall have "all powers" incident to its status as a non-profit corporation, "as provided in N.C.G.S. 55A." (Bylaws, art. I, § 2.)

Chapter 55A mandates that, with respect to non-profit organizations created pursuant to its terms, *"[a]ll* corporate powers *shall be* exercised by and under the authority of, and the affairs of the corporation managed under the direction of, its board of directors, except as otherwise provided in its articles of incorporation."[1] N.C. Gen. Stat. § 55A-8-01(b) (emphasis added). It is significant for instant purposes that among the powers the statute expressly grants to non-profit corporations is the power "*to purchase* . . . or otherwise acquire, and own, hold, improve, use, and otherwise deal with, *real* . . . *property* . . . wherever located." *Id.* § 55A-3-02(a)(4) (emphasis added). To similar effect is the North Carolina Planned Community Act which specifically grants master associations like SPMA the same authority to acquire real estate. *See* N.C. Gen. Stat. §§ 47F-2-120, -3-102(8). Neither the Non-Profit Corporation Act nor the Planned Community Act require a board to submit land acquisitions to their members for approval.

There is nothing remarkable about these statutory grants of authority to the Board to acquire real property without the need for shareholder or member approval. In fact, it is well established, generally, that the board of directors is usually the entity within a corporate organization that has the authority to convey and acquire real property. *See Tuttle v. Junior Bldg. Corp.*, 228 N.C. 507, 46 S.E.2d 313, 316 (1948) ("a corporation may sell, transfer, and covey its real estate only when authorized to do so by its board of directors."); *Frank H. Buck Co. v.*

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[1] We have not been provided with SPMA's articles of incorporation and assume, for purposes of this Memorandum, that they do not limit the Board's authority to acquire real property. We have reviewed the Declaration, however, and find nothing within it that requires the Board to submit a purchase of real property to a vote by the owner-members for approval. This, however, does not speak to whether the Board has authority, without owner-member approval, to finance the purchase through assessments or otherwise. The latter subject is addressed elsewhere.

Tuxedo Land Co., 109 Cal. App. 453, 293 P. 122, 125 (1930) (no need for shareholder approval or ratification of board's purchase of real property); *In re Beaver Knitting Mills* 154 F. 320, 321 (2d Cir. 1907) (no need for shareholder ratification or approval of board's assumption of mortgage on real property purchased). *See* 2 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 517 (2006).

The Declaration and SPMA Bylaws contain nothing that would negate or diminish this statutory grant of power to the Board to acquire real property. On the contrary, the Declaration explicitly provides that "[t]he Master Association shall be managed and operated as set forth in the Bylaws" (Decl. § 7.4), and the Bylaws, in turn, expressly directs that the SPMA Board exercise *all* the organization's powers; by contrast, no significant powers are granted to the owner-members. For example, the SPMA Bylaws provide:

- "The affairs of the Master Association *shall* be governed by a Board of Directors . . . ." (Bylaws, art. III, § 1 (emphasis added).)

- "The Directors shall have the powers and duties necessary for the administration of the affairs of the Master Association, and may do *all* such acts as are not by law prohibited." (*Id.*, art. III, § 12 (emphasis added).)

- By contrast, the "Rights of the Owners" are enumerated at article II, section 1. Although Owners are granted limited rights to attend certain Director's meetings and to address the meetings, *no* right to vote on any matter is included in the Bylaws.

In sum, neither North Carolina statutes (chapters 55A or 47F) nor the Bylaws require or even suggest that the Board's exercise of the power to acquire real property is restricted in any

way; certainly, neither requires a vote of approval from the organization's membership before property may be acquired. Nonetheless, some have suggested that because "Article III § 12 of the Bylaws does not explicitly give the power to acquire land to the Board on its own" this supports the conclusion that the Board must have member approval before acquiring real estate. (*See* Letter of IPM to SPMA Board of 8/13/09, at 1-2.) This contention is specious for at least two reasons.

First, as stated above, the Board's authority to acquire real estate is based on the statutory grants contained in § 55A-08-01(b) ("all" corporate powers shall be exercised by board), § 55A-3-02(a)(4) (among corporate powers is power to acquire real property), and § 47F-3-102(8) (same). Thus, whether article III, section 12 of the Bylaws—or any other provision of the Bylaws, for that matter—"explicitly" grants the board that power as well is simply immaterial; the authority has already been conferred by statute. There is no requirement that such power also be conferred through bylaws.

Second, even assuming article III, section 12 does not contain an "explicit" grant of authority to acquire real estate without owner-member approval, it certainly contains an "implicit" grant of such authority. It provides that the Board "may do all such acts and things as are not by law prohibited." As far as can be determined, no law prohibits the Board's acquisition of real property. Indeed, as just noted, the "law" expressly permits boards to acquire real property on behalf of their organization. In short, article III, section 12 supports the position that the Board has the authority to acquire real property without submitting to a vote of the membership.