



December 15, 2022

Via Email to [chris@mcintoshlawfirm.com](mailto:chris@mcintoshlawfirm.com)

And Via U.S. Mail to:

Christopher P. Gelwicks

The McIntosh Law Firm

P.O. Box 2270

Davidson, NC 28036

**Re: Kinderton Village Residential Homeowners Master Association**

Dear Christopher:

I hope this letter finds you well. The Board of Directors of the Kinderton Village Residential Homeowners Master Association has requested that I respond to your letter of November 28, 2022. The remaining members of the master board do not intend to resign (nor would they agree to not again seek election), but do hope that *all* the boards can find ways to work more collaboratively for the betterment of the *entire* community. Hopefully, that can start with our clearing up any confusion concerning the issues raised in your letter.

As an initial matter, though, and without intending to be antagonistic, I am not fully comfortable that you do, in fact, represent the Single-Family Homeowner's Association. To be clear, I am not in the habit of challenging a fellow attorney's statement of representation. However, in this case, I feel I would be remiss to not seek further clarification. Once the Master Board received your letter, some of its members approached some members of the Single-Family Board to discuss it. Those members included the Single-Family Board's Vice President, Diane Pfundstein, (who is also the wife of Mark Pfundstein, the Master Association President), its Treasurer, Paul Dixon, and its Secretary, Kathy Sears. They informed our members that the Single-Family Board never voted to retain an attorney in this matter, had not approved your letter, and had not even discussed the matter before your letter was sent. Obviously, it makes no sense that the Single-Family Board could have authorized the expense of retaining an attorney when neither the Vice President, Treasurer, nor Secretary had any awareness of the matter. It seems

questionable, then, whether you were retained by the Single-Family Board or just certain of its members acting *ultra vires*.

In any event, while the Board and I were somewhat unclear on what your actual allegations were, it did seem clear that they were based on misinformation you may have been provided. Specifically:

- Contrary to your assertion, while certain members of the Single-Family Association have voiced their *personal* concerns, the Single-Family Association has never done so. Prior to your letter, the Master Board has received no correspondence from the Single-Family Association on these issues. Further, the Single-Family Association representative, who is invited to every meeting of the Master Board, has never raised any of these alleged concerns of “the Association.” It appears that—as has been an ongoing problem—one or two members of the Single-Family Association Board feel they have the right and power to speak, unilaterally, for the entire Single-Family Association. Obviously, that is incorrect.
- The Master Board has never claimed that a sub-association representative can be selected by a Master Board member, nor even by the full Master Board. Furthermore, this has simply never happened. Each sub-association has the absolute power to select its own representative. The Master Board has no power to do so. The Single-Family Association has the power to change its representative as long as it does so consistent with its own governing documents.
- Similarly, the Master Board has never claimed that vacancies on the Master Board can be filled by one Master Board member, *nor* has that happened. Here, I am presuming that you are referring to the process of filling the vacancy created by Mr. Aker’s resignation. As was explained to Mr. Warren at the time, that vacancy was filled by a majority vote (in fact, unanimous vote) of *all members* of the Master Board. There is simply no basis in fact to allege otherwise.

Most significantly, we (i.e., the Master Board and I), strongly disagree with your assertion that the Single-Family Association, “has been denied their right to representative vote on all Master Board action at all meetings as required by the Master Association Bylaws” because neither the Master Association’s Articles of Incorporation, Declarations, or Bylaws give the sub-association representatives any rights to vote *as members of the executive board*. Rather, the sub-association representatives represent the *members* of the *sub-associations* and vote only as *members* of the Master Association. This is shown by the actual language of the “representative” provisions in the Master Association’s Declaration and Bylaws, the location of those provisions in those controlling

documents, and by the language of Chapter 47F of the North Carolina General Statutes (i.e., the North Carolina Planned Community Act).

As you are aware, the Planned Community Act (as well as basic corporation law) creates substantial distinctions between the individuals who make up the association (i.e., the members) and the association's "executive board." The members and directors are distinct from each other with different roles and authority. For example, the executive board is the body with authority to act on behalf of the association. (*See* G.S. §§ 47F-1-103(13), 47F-3-103(a)). The members, on the other hand, have only a limited direct role in the actions of the association. The distinction is also clearly seen in the associations' governing documents. (*See, e.g.*, Master Association Declarations, Art. I, Sec. 5 ("Board of Directors" or "Board") and Art. I, Sec. 17 ("Members")).

The Board has extensive powers and duties. (*See, e.g.*, Master Association Bylaws, Section 4.J). However, those powers are not unlimited. Most significantly, the *members* elect the *directors*. Beyond that, the *members* (i.e., rather than the directors) must vote to elect to apply the PCA to a pre-1999 association (G.S. § 47F-1-102(d)), amend the declaration (G.S. § 47F-2-117(a)), terminate or merge the association (G.S. §§ 47F-2-118(a), G.S. § 47F-2-121), or convey or encumber common elements (G.S. § 47F-3-112(a)). On the other hand, the executive board (as opposed to the members) has sole authority to elect the officers of the association (G.S. § 47F-3-103(e)), allow payment of obligations in installments (G.S. § 47F-3-103(i)), determine fines and suspensions of privileges (G.S. § 47F-3-107.1), and enforce liens (G.S. § 47F-3-116(f)).

Because their roles are different and they vote on different things, they have different meetings with different voting and quorum requirements. This is clearly recognized by the Planned Community Act. For example, G.S. §§ 47F-3-108(a) and 47F-3-109(a) concerns conduct and quorums for annual and special meetings of the association, whereas G.S. §§ 47F-3-108(b) and 47F-3-109(b) address those issues for meetings of the executive board.

This distinction is also set out and provided for by the associations' governing documents. For example, the Master Association Declarations make clear that the "Members" (Art. I, Sec. 17) are the individual sub-associations, while the "Board" (Art. I, Sec. 5) is comprised of "those persons elected or appointed to act collectively as the directors of the Master Association."

This distinction, and the distinctive roles of the members versus directors, is given substantially more significant development in the Master Association Bylaws. Sections 2 and 3 deal exclusively with *members* and meetings of the association/members. In contrast, Section 4 contains the provisions relating to the board of *directors*. As in any corporation, there is, of course, no legitimate argument that the members are allowed to vote on every corporation matter or that they are automatically on the Board of Directors merely by reason of their status as members.

As a fundamental matter, it should be clear that the only people who get to vote at meetings of the Board are the directors. An assertion that a representative has the inherent right to vote on Board actions is, therefore, an assertion that the representative is also a director as a result of his/her representative status. But there are a myriad of reasons why a plain reading of the Master Association Bylaws shows that the sub-association representatives act only as the *members* of the association and not as directors. While it would not be productive to go into all of them, two especially stand out.

First, and conclusively, is the location of the “representative” provisions. In both the Master Association Declaration and the Master Association Bylaws, the *single provision* relating to sub-association representatives is contained in the article or section regarding *members* and *not* directors. In the Declaration, the provision is a *sub-section* of the section regarding the *members’* voting rights. (*See* Declarations, Art. III, Sec. 2(c)). Its clear purpose and effect is to establish the actual means by which the members vote *when they are voting as members*. That is, rather than require all the individual homeowners of each sub-association to have to personally vote (either in person or by proxy), it is provided that they shall vote through one representative.

Similarly, the Bylaws also make it clear that the representative’s only role is to cast the votes of the sub-association’s *membership*. Just as in the Declarations, there is only one “representative” provision in the Bylaws. And just as in the Declarations, it is located in the section dealing with the *members’* voting rights. (*See* Bylaws, Section 2.E). Specifically, it relates to “who will represent the sub-association” and “cast the votes of the sub-association” at “*the Annual Meeting of the Association*.”

There is simply no language in Section 2—or any other Section of the Bylaws—that would in any way suggest that the sub-association representative is a member of the Board of Directors. Conceptually, that would not even make sense. For example, the sub-association representative provisions in the Declarations and Bylaws are uniform for *all sub-associations*. That is, they don’t apply only to the Single-Family sub-association, they apply to all the sub-associations equally. If the Single-Family representative is automatically a director, then *all* the sub-association representatives are.

Clearly, that can’t be the case. The Bylaws provide that the directors will be elected by the members. Further, (as has always benefited the Single-Family owners), the members’ votes are weighted. If your proffered premise were correct, then every sub-association would have a right to put a member on the Board. However, the reality is that most—or all—of the directors usually come exclusively from the Single-Family association.

Conflating representatives with directors would also, for example, render the different quorum provisions of the Bylaws nonsensical. For example, Section 2.B provides that “[t]he presence, in person or by proxy, of the Members entitled to cast twenty-five percent (25%) of the votes of the entire membership shall constitute a quorum at all *meetings of the Association*.” In contrast, Section 3.G provides that “[a] quorum at a *Directors’ meeting* shall consist of the Directors entitled to cast a majority of the votes of the entire Board.” If “meetings of the Association” and “meetings of the Board” were the same, then the quorum requirements would have to be the same.

Unfortunately, this is not a new issue. In fact, as you may be aware, in 2011, the Master Association Board and the Single-Family Association Board sought clarification on this and other issues from Donald VonCannon. Mr. VonCannon was the attorney who drafted all the governing documents on behalf of the original declarant. He first identified his potential conflict of interest based on his representation of the declarant. He then answered a series of questions posed by the directors. One of those questions was directly on point, to wit:

7. Once the Directors of the Master Association are elected, what are their functions versus the functions of the Sub-Association Representative appointed to cast the Sub-Association's desired vote on Master Association matters?

Answer: In both the Master Association and the Sub-Association, and pretty much any homeowner association in North Carolina, the directors are the ones who run the association. but of course, they have to answer to the membership at either the Annual Meeting or at a Special Meeting called for by the members as provided in the Bylaws, in Section 4 "Board of Directors." Section J states, "That all of the powers and duties shall be exercised by the Board of Directors, including ...", and without limiting the Board or Directors powers, list a number of specific duties. The Sub-Association representative has nothing further to do except show up at Special meetings or Annual Meetings and vote. If a member or members of a Sub-Association are unhappy about something the Master Board of Directors is doing, then the Sub-Association would direct its Sub-Association representative to the Master Association Meeting to bring that issue up, or if it is an immediate problem, the Sub-Association would have to follow the By-Laws and call a Special Meeting as provided for in Section 3.B.

(August 10, 2011 Letter from Don VonCannon (a copy of which is attached), pg. 9). Despite Mr. VonCannon’s representation of the declarant, the Boards relied on his advice because he, more than anyone, as drafter knew the intent of the documents. His analysis remains pertinent, accurate, and convincing today.

Clearly, then, contrary to your assertion, the Master Association Bylaws do not give the sub-association representatives any right to “vote on all Master Board action.” The Single-Family Association has (and has always had) the exclusive right to unilaterally designate its own representative. That person must represent the Single-Family Association at the Annual Meeting. By long custom of the Master Board (which this Master Board has honored), the representative is also invited—and welcomed to attend—every public meeting of the Master Board. However, the representatives’ right to vote is limited to casting votes at meetings of the members, and does not allow them to vote on actions of the Board. I hope that, on review, you will agree, and that you will clarify this matter for the Single-Family Board.

In any event, the next question would be “Where do we go from here”?

- Obviously, the governing documents as drafted have caused, and are continuing to cause confusion that is harmful to the entire Kinderton community. We therefore propose that *all the Kinderton boards of directors* meet. They should figure out two things: (1) how the documents say the organization is to work and (2) how they think it actually should work in order to promote the best interests of the *whole* community. Based on the boards’ review and discussions, the boards should then *jointly* work to propose amendments to the governing documents.

Further, since this affects all the members of the community, it would probably be helpful for the joint boards to hold a general informational/discussion meeting of all the owners (vice the members) to inform them and get their input.

On the other hand, individual board members posting inaccurate and inflammatory items on social media only hurts the community, and the Master Board would hope that would cease while these proposed more productive steps are taken.

- As we understand it, neither the members nor the full Board of the Single-Family Association have voted to authorize the Single-Family Association to call a special meeting or to call for the resignation or removal of all members of the Master Association Board. Accordingly, this threat seems to be improper bullying.
- In any event, I believe that a recall motion would be counterproductive to the best interests of the community. The Single-Family Association will soon have the opportunity to elect three new directors without the need to resort to the drastic measure of a recall. The Master Association will have its annual meeting early next year. At that Annual Meeting, the Members will elect replacements for three directors; specifically, Michael Bailess (who was unanimously elected by the Master Board to fill the vacancy created by Mr. Akers’ resignation); Thomas

Christopher Gelwicks

December 15, 2022

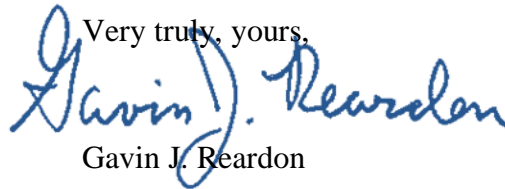
Pg. 7

---

Lofton, Jr. (whose regular term is expiring); and Tina Smith-Goins (who was hounded by your individual clients into resigning). As a result, at this coming Annual Meeting, the Single-Family Association will have to ability to unilaterally elect a majority of the Master Association Board of Directors. On the other hand, a recall motion would only increase division and acrimony without serving any actual useful or necessary purpose.

Finally, Chris, before too much more paper flies around (and definitely before more allegations), I'd suggest that you and I speak and see if there is any way for us to mutually help all these associations get through this in the most neighborly way possible. I very much look forward to working with you on that.

Very truly, yours,



Gavin J. Reardon

Copy: Kinderton Master Board

# MEMO

FROM THE DESK OF:

**DONALD M. VONCANNON**

**Board Certified Specialist in Real Property  
Law - Residential, Business, Commercial, and  
Industrial Transactions**

**TELEPHONE: (336) 722-2300**

**FACSIMILE: (336) 721-0414**

**E-MAIL: [dvoncannon@allmanspry.com](mailto:dvoncannon@allmanspry.com)**

TO: Mr. Bruce Welch  
Kinderton Village Residential Homeowners Master Association

DATE: August 10, 2011

Dear Mr. Welch,

I was initially contacted by Mr. Todd Kiger who indicated that the Board had some questions about the Kinderton homeowner documentation and he wanted to know if I could provide the Board with answers to those questions. I explained to him that I represent the developer, Adams Egloff Avant Properties, LLC, and therefore there could be a conflict of interest in my also trying to represent the Board of Directors of the Master Association or the sub-associations in Kinderton. He indicated that he had gotten my name from Trent Adams who is one of the members of the LLC. Following my conversation with Mr. Kiger, I spoke with Trent and he had no problem with me answering any questions the Board had to the best of my ability.

In response to the questions concerning the governing documents which you dropped off on August 5, 2011, I am providing the answers as I understand them and from what I understood was intended by my client and as I read the documents today. Certainly, one's intentions do not always get expressed as clearly as they should when reduced to the written word, but I believe the intentions are adequately expressed in the documents.

You have actually provided me with two sets of questions which I will answer separately. Both sets of questions are labeled "Kinderton Village Home Owners Association", but one has the name of "Bob Gildea" at the top and contains an organizational chart. The other set of questions has the name "Dick Heriot" at the top. To make it easier for the Board to follow my answers I will repeat the question and then provide the separate answer.



### Bob Gildea Questions

1. The KV master bylaws outline a process where the "Board of Directors" is elected at the annual meeting. The KV master covenants outline a process where the "Board of Directors" is appointed by the sub-associations. Which one is correct?

**Answer:** In reviewing the Declaration for Kinderton Village Residential Homeowners Master Association (recorded in Book 354, Page 354, Davie County Registry), I do not see "a process where the 'Board of Directors' is appointed by the sub-associations." The only reference I see to "appointed" is on Page 4, in Section 5 of the definition of "Board of Directors." It states that it will be the persons "elected or appointed" to act collectively as the Directors. The reference to the word "appointed" refers to the Declarant's right to appoint the Board of Directors during the Declarant's control of the Master Association and as provided in Section 4 of the Master Association By-Laws, such as when there is a vacancy on the Board of Directors and the vacancy is temporarily filled by the remaining Directors as provided in Section 4.B.3.

Therefore, the establishment of the Board of Directors for the Master Association is governed by the By-Laws of the Master Association. The By-Laws state that the Directors not entitled to be selected by the Declarant will be elected by the plurality of the votes at an Annual Meeting of the Members of the Master Association.

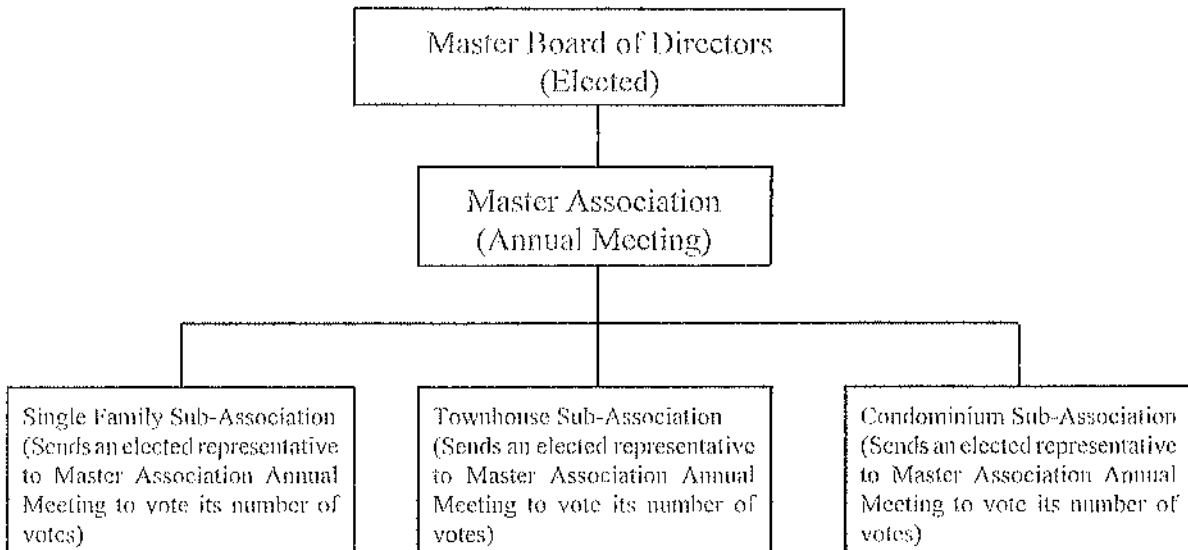
The Members of the Master Association are the sub-associations defined in the Master Declaration, such as Single Family Sub-Association, the Condominium Sub-Association, and the Townhouse Sub-Association. Therefore, the annual meeting would be open to all persons living in Kinderton, but voting on the Directors would be by three individuals authorised to represent each Sub-Association. The number of votes that each Sub-Association representative would cast would equal the number of units in that Sub-Association, that is, the number of single family homes in the Single Family Sub-Association, the number of townhouses in the Townhouse Sub-Association, and the number of condominium units in the Condominium Sub-Association.

There is no provision in either the Declaration or the By-Laws for the Board of Directors of the Master Association to be appointed by the sub-associations; the Directors must be elected by the Members.

2. Does either of these organizational charts correctly depict how Kinderton Village Should be governed?

**Answer:** Option 1 comes the closest to depicting the organizational chart of the Kinderton Village Master Association. I would change the chart to show that the Master Board of Directors is elected by its Members, and of course the Members are the Sub-Associations voting through their designated representative, as stated above.

The following is my suggestion of how the Master Association flow chart should look:



3. If it is option 2, how would the duties of the “Board of Directors” and the “Master Board of Directors” differ? If the answer to question 2 is option 1, please skip this question.

**Answer:** Not applicable

4. If it is option 2, how do the governing documents insure each sub-association is represented on the “Board of Directors”? If the answer to question 2 is option 1, please skip this question.

**Answer:** Not applicable; while not applicable, it should be noted that there is no guarantee that each sub-association will be represented on the Master Board of Directors.

5. Assuming the Declarant is responsible for the Architectural Review Committee (the ARC). (see paragraph (g), Section 1 of Article VI). He chooses to delegate the daily

**ARC duties to the Master Board (see Section 5 Delegation and Assignability, Article IX).**

**Answer:** I am assuming that the question here is, if the Declarant still owns a lot in Kinderton Village and therefore, as stated in the Declaration, the Declarant can continue control of the ARC, but if the Declarant chooses to let the Master Association elect the members of the ARC, what restrictions would be on the Master Board in running the ARC. Obviously, so long as the Declarant owns a lot anywhere in Kinderton Village, the Declarant will remain in control of the ARC. This is usually the standard operating procedure for a declarant since the declarant, who is in the business of developing subdivisions, selling lots and/or building houses, cannot afford to have an ARC controlled by residents that may have some axe to grind with the declarant/developer and grind that axe by making the ARC approval process cumbersome or impossible to meet.

If however, the Declarant in this case decided to no longer control the ARC, Paragraph (g) is clear that the Declarant would notify the Master Board of Directors that it no longer wants to control or be responsible for the ARC, then the Board of Directors would either call a Special Meeting of the Master Association to elect the members of the ARC or wait for the Annual Meeting of the Master Association to elect the members of the ARC.

At the Master Association meeting, the members could elect an entirely separate group from the Board of Directors to be the ARC, or the Master Association members could elect the Directors to also function as the ARC. Whoever then constitutes the ARC would have to run the ARC under the guidelines of Article VI.

Beyond that, the ARC approval or denial of requests will have to be consistent with the style and character of Kinderton as it exists, and the ARC should not do anything that is arbitrary, capricious or punitive. We recently looked into a situation where an ARC in upscale community turned down the plans of our client, but in our client's opinion and in our initial review and conversation with our client's architect, the plans appear to be very consistent with the other houses in the subdivision in style, looks, location, size, etc. Our client thinks that one of the ARC members "has it in for him" for some reason. His future neighbors on either side of his lot are very pleased with his plans and told him they know of no opposition other than the one ARC member. We have advised our client that we think he has a good case that the ARC is being arbitrary and if he wants to pursue it we will certainly file a lawsuit to that effect. We do not yet know whether it will come to that, but my guess is the

membership is not going to be happy with the legal expenses involved unless there is some really strong reason not to approve the plans. A long story to emphasize that it will be important for the ARC to be careful in making its decisions and to be able to justify its decisions in approving or disapproving plans or requests.

6. **Can a sub-association make rules that differ from the master association covenants and only pertain to an individual sub-association?**

**Answer:** A Sub-Association cannot make any changes that would violate the Master Association covenants. There are certainly things that apply differently to the different Sub-Associations, and that's why we had to set up the Sub-Associations. A Single Family Association has very different rules and regulations than a Condominium Association, but clearly, the Master Association rules and regulations will control Kinderton Village. If it is a minor deviation or exception, the Master Board of Directors could probably deal with that issue. If it is a major change, the Master Association Declaration would have to be amended. See Article IX for the rules for amending the Declaration.

7. **Is there any wording in the following paragraph that allows an owner of a lot to park his own motor home in the driveway, in the open not in the garage with the doors closed, at anytime?**

**Answer:** No. I think it is clear that all of the vehicles and vessels listed in subparagraph (y) of Section 2, Article VI, including the catch all "other recreational vehicles," cannot be parked on any lot unless it is in a closed garage. The exceptions to being enclosed are the owner's or owner invitee's "passenger automobiles and pickup trucks," so long as these exceptions do not contain any commercial printing or signs. With the approval of the Master Board of Directors (and there is no obligation that they have to approve it), the Master Board of Directors could grant permission for visitors to temporarily park any of the prohibited vehicles overnight on driveways or streets for a period not to exceed seven days.

I think this paragraph is very clear that an owner cannot park his own motor home or RV in the open driveway.

#### **Dick Heriot Questions**

1. **There is no written document in the files indicating that the Declarant has turned the Association over to KV property owners; however, such action has been verbally**

conveyed to the property owners by the Declarant. Property owners have formed and elected Directors/Officers, held meetings and conducted business since 2009. Do these actions substitute for a written document?

**Answer:** Written document is not required to indicate that the Declarant has turned control of the Master Association over to the property owners. "Control" is simply a matter of counting the number of votes cast and how many votes the Declarant is entitled to, that is, one vote per lot or three votes per lot. Homeowner association documents are typically set up giving a declarant three votes for each lot until the declarant has sold 75% of the lots or until some outside date, specified in the document, has passed. In the case of the Master Association, the Declarant's "control" comes from the right to vote in the Sub-Associations. (See Article 3, Section 2, (b) of the Declaration). In the case of the Single Family Sub-Association, the outside date that the Declarant has three votes for each lot is September 1, 2006, the date for the Townhouse Sub-Association is November 1, 2008, and the date for the Condominium Sub-Association is \_\_\_\_\_ (I did not prepare the condo documentation and there is not a definite date given. The "date" where the Declarant in the condo documents is set as so many years from the sale of the first condo unit. I do not have that information). The Declarant's control of the Master Association passed on the happening in each of the Sub-Associations at either the time that it no longer owns 75% of the lots or the outside date.

Therefore, "control" could have pass completely unnoticed except for the number of votes cast at the Master Association meetings.

If the 2009 elections were properly held, that is, notice of the annual meeting was given and votes of each Sub-Association Member reflected the correct allocation of votes then certainly the elected Directors and other action at the meetings would be proper and binding on the Master Association.

2. **When the Declarant turns over control of the Association to the property owners, does this mean that the Declarant turns over control of the Architectural Review Committee (ARC) to the property owners?**

**Answer:** No "Control" of the Master Association and control of the Architectural Review Committee (ARC) are two different things. The "control" of the Master Association is explained above, and Article 6, Section 1 (g) states that so long as the Declarant owns a lot in Kinderton Village or until such time as the Declarant notifies the Board of Directors "in writing" to have the Master Association elect members of the ARC, "... the Declarant shall serve as the

Committee (the ARC), and shall exercise the authority to approve plans and other matters set forth in this Article.”

This is standard procedure for a declarant/developer so that it will always control the ARC. If the declarant/developer were to lose control of the ARC while still owning 25% of the lots, or possibly more if the outside date has passed, the declarant/developer would have to worry about getting plans approved for those remaining lots.

**3. How long does the Declarant exercise control over the ARC?**

**Answer:** See 2 above.

**4. Is the ARC appointed by the Directors of the Master Board or elected by the Members of the Master Board?**

**Answer:** Article VI, Section 1, (g) states in part, “After Declarant divest itself of all Lots within the Property, or so notifies the Master Association, the Committee (the ARC) shall be elected by a majority of the votes of the Members, cast in person or by proxy at a meeting duly called for this purpose.”

**5. Given that the Master Association is made up of all sub-associations and individual property owners are not individual members of the Master Association, how is a quorum determined for the Master Association Annual Meeting**

**Answer:** Section 2 entitled “Membership, Voting, Quorum, Proxies, subparagraph (B) of the Master Association By-Laws, states, “The presence, in person or by proxy, of the members entitled to cast twenty-five percent (25%)” of the votes of the entire membership shall constitute a quorum at all meetings of the Association.” Therefore, establishing quorum is simply establishing how many votes are present at a Master Association meeting.

**6. After the Declarant no longer owns 25% of the residential lots in KV and the number of Directors have been increased (say 4 or 5); how are these Directors elected? Does each Sub-Association Representative vote according to the directions he/she is given by his/her sub-association or are the Directors elected by a majority votes of all KV property owners?**

**Answer:** Part 1 of Question. Section 4 “Board of Directors” of the By-Laws of the Master Association states that the initial Board of Directors will be 3 persons selected by the Declarant, but once the Declarant no longer “controls” the

Master Association, the number of Directors “may be increased” as directed by the Members at an Annual or Special Meeting.

Section 4.B.4 states how the Board of Directors should be elected. Once the Members “control” the Master Association, they should elect Directors to a staggered term for purposes of continuity. Sub-paragraph 4 further states that at the first Annual Meeting where three Directors are to be elected, the Members will elect one Director for one year, one Director for two years and one Director for three years, such that there will be one new director elected each year and two remaining directors who have some experience under their belts. If the membership decides to elect five Directors, for example, one Director would be elected for a term of one year, two Directors for a term of two years and two Directors for a term of three years. In the following year, new Directors would be elected to fill the expiring terms.

At the time the Kinderton documents were drafted, it was anticipated that most of the work required to look after Kinderton, once the Declarant was out of the picture, would be done at the Sub-Association levels, and therefore the by-laws of each Sub-Association requires that the number of Directors to be increase to five at the time the Declarant loses “control” of the Sub-Association. It was thought, maybe incorrectly, that the Master Association would not be as busy and there was no requirement that it increase the number of Directors, but the Master Association was given the opportunity to increase the number if it so desired.

Part 2 of Question. I would assume that the Sub-Association representative would be given voting directions which would probably include making nominations for the Master Board of Directors and who to vote for. Therefore, the representatives of each Sub-Association could show up and nominate any number of persons for the board, and then hold a vote. If the representatives of the Sub-Associations feel like they need further directions, they could always continue the Master Association meeting and take the list of nominations back to their Sub-Association and get further direction as to who to vote for.

There are any number of ways for obtaining the nominations of the Directors, such as publicizing that nominations will be accepted from any individual members in Kinderton for a certain period of time by the Board of Directors and then have the Board of Directors publish that list of “volunteers.” The Sub-Associations can then direct their representatives who to vote for. The Board of Directors could issue a proposed slate of nominees but allow the representatives to make further nominations at the Annual Meeting and then

vote. Whatever the process is, the Board of Directors will probably want to make a recommendation to the membership at an annual meeting, and then have the membership vote on that procedure.

7. **Once the Directors of the Master Association are elected, what are their functions versus the functions of the Sub-Association Representative appointed to cast the Sub-Association's desired vote on Master Association matters?**

**Answer:** In both the Master Association and the Sub-Association, and pretty much any homeowner association in North Carolina, the directors are the ones who run the association. but of course, they have to answer to the membership at either the Annual Meeting or at a Special Meeting called for by the members as provided in the By-Laws, in Section 4 "Board of Directors." Section J states, "That all of the powers and duties shall be exercised by the Board of Directors, including ...", and without limiting the Board of Directors powers, list a number of specific duties. The Sub-Association representative has nothing further to do except show up at Special meetings or Annual Meetings and vote. If a member or members of a Sub-Association are unhappy about something the Master Board of Directors is doing, then the Sub-Association would direct its Sub-Association representative to the Master Association Meeting to bring that issue up, or if it is an immediate problem, the Sub-Association would have to follow the By-Laws and call a Special Meeting as provided for in Section 3.B.

8. **Can the Single Family Sub-Association adopt a regulation (rule) saying that basketball goals, swing sets and other playground equipment are not allowed on Single Family lots?**

**Answer:** Before answering the question, it is important to note that Article VI of the Declaration of both the Single Family and Townhouse Sub-Associations in Section 2 clearly state that any conflict between the restrictive covenants of the Master Association and the Sub-Association shall be resolved in favor of the Master Declaration. Therefore, anything a Sub-Association wants to allow or prevent on its Sub-Association lots must first be checked to see if there is any question that the activity might conflict with the Master Association Declaration and in particular the Use Restrictions set forth in Section 2 of Article VI of the Master Declaration.

In addition, the Sub-Association should also look at whether the rule or regulation that it is about to adopt might require the approval of the ARC. By design, the ARC is given extensive authority in order to protect homeowners from what a neighbor might do on its property. Section 1 of Article VI



requires the approval of plans prior to initial construction, but goes on to state that no subsequent alterations or modifications which will result in "an exterior, structural change to the dwelling, outbuilding, or significant changes to the landscaping may be undertaken on any of the lots without the prior review and expressed written approval of the Committee (the ARC).

Having said all of that, it would stand to reason, that if a Sub-Association wanted to make the Use Restrictions more restrictive than the Use Restrictions set out in the Master Association, such as limiting playground equipment, that should be permissible for the Single Family Sub-Association to adopt such a regulation or rule. But to be enforceable, the Single Family Declaration would have to be amended and recorded in the Davie County Register of Deed's Office. Any future purchaser of a lot would have to have record notice of this restriction on the use of their property before they purchase it, for it to be enforceable on them. Article 9, Section 2 of the Declaration sets out the procedure for amending the Declaration.

Even if the Single Family Sub-Association goes through the proper procedures for amending the Declaration, the amendment would only be enforceable prospectively, that is, enforceable against future buyer's of single family lots in Kinderton. I do not think that the Single Family Sub-Association can retroactively take away the rights of property owners to have these items, since at the time that the current owner purchased their lot and house, it was permitted to have these items. In effect, any existing playground equipment, etc., would be grandfathered.

9. **How do we handle a situation where the property owners of a sub-association do not show sufficient interest to attend meetings, elect directors or appoint a representative to vote on Master Association matters? Does the Master Board just assume control without representation from that sub-association?**

**Answer:** If individual members of a Sub-Association do not get involved in the Master Association, that is simply their loss, and they will be bound by whatever a majority of the votes at the meeting of the Master Association directs or elects. This is often a problem with homeowner associations, and therefore you will see that quorums at Annual or Special Meetings of the associations are very low. The quorum for Master Association, the Single Family Sub-Association, and the Townhouse Sub-Association is only 25% of the members entitled to cast votes.

As we use to say in the Marine Corps, every problem is a lack leadership and a leadership opportunity. It sometimes requires the existing directors or

individual members to get out and beat the bushes to get enough people to attend meetings so business can be conducted. You can also meet the quorum requirements by obtaining proxy votes.

There is no provision for the Master Board of Director assuming control without representation from its constituent members.

Don

237352