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November 5, 2014

Via email and mail

John Dellinger, President
Hunter's Glen Home Owners Association
68 E. Turkey Paw Trail
Hendersonville, NC 28739
sequitur@morrisbb.net

Re: Road and Gate Opinion

Dear John:

I have been asked to give an opinion for the Hunter's Glen Home Owners Association ("Association") regarding the following two (2) issues:

- (1) Does the Association have the authority to relocate a gate within the Hunter's Cove section of Hunter's Glen subdivision for placement at the intersection of West Turkey Paw Trail and the private right of way denoted as "Proposed 50 R/W Private" ("Private Road") on Plat recorded in Plat Slide 4859, Henderson County Registry?¹
- (2) Does the Association have any responsibility to improve the Private Road to meet standards for public roads set by the North Carolina Department of Transportation?

The answer to No. 1 is "yes". The answer to No. 2 is "no".

BACKGROUND

The Hunter's Glen subdivision is located in Henderson County, North Carolina and Development began in 1985. Covenants for Hunter's Glen are recorded in Deed Book 667, Page 169 and Deed Book 669, Page 747, both of the Henderson County Registry

¹ If the gate is to be placed in the right of way controlled by the NCDOT, then permission may be necessary from that State agency, which authorization cannot be assumed.

(collectively hereinafter "Original Declaration"). The latter document mentions mandatory membership in the Hunter's Glen Home Owners Association ("Association"). On September 11, 1989, Articles of Incorporation for the Association were filed with the North Carolina Secretary of State's office.

The Articles of Incorporation provide that one of the purposes of the Association is "to protect the interests of the Association and its members from outside interests and adverse conditions that may threaten to harm those interests." Furthermore, the Articles state that the Association "shall have full power and authority to exercise all powers granted corporations under the laws of the State of North Carolina . . . in order to facilitate and promulgate its purposes."

Around January, 1998, the developer of Hunter's Glen recorded a separate set of covenants for "Hunters Cove, a section of Hunter's Glen Subdivision" in Deed Book 944, Page 83, Henderson County Registry ("HC Covenants").

The HC Covenants, among other things, reiterated mandatory membership in the Association.

Over time, plats depicting lots and roads were recorded for Hunter's Glen and the section called Hunters Cove. The original plats for Hunters Cove from 1987 were substantially amended and refiled in 2003 to depict larger lots (essentially a combination of earlier platted lots) and a modified road network.²

² It is beyond the scope of this opinion to analyze what rights the owners of lots had related to the roads depicted on the earlier plats recorded around 1987 in Slides 329 and 329A as juxtaposed with the right of developer to file new plats. It is interesting to note that the access way in question to Laurel Forest is not

For roads within Hunters Cove, the HC Covenants stated in pertinent part:

11. Primary access to HUNTERS COVE shall be over roadways in sections of Hunter'[s] Glen Subdivision; however, secondary access is available for construction vehicles and emergency use via Laurel Forest Subdivision. Maintenance of this right of way shall be the responsibility of the Developer until ten dwellings are completed in HUNTERS COVE, after which maintenance shall be the responsibility of owners of dwellings in HUNTERS COVE.

All of the named roads depicted on recorded plats for Hunter's Glen and Hunters Cove are public and maintained by the State. Extending from West Turkey Paw Trail in a westerly direction is a private gravel way known locally as Konarske Lane. Konarske Lane is shown on the 2003 plat recorded in Slide 4859 and identified as "Proposed 50' R/W Private" and "Private, Gravel Drive". For many years, the Association has maintained a gate (consisting of posts and a chain) at the westernmost point of Konarske Lane at its entrance to Laurel Forest subdivision. For some time, the chain has been repeatedly cut by trespassers. With the chain not in place, cut through traffic occurs coming from Laurel Forest to public road West Turkey Paw Trail and then through and along other public roads within Hunter's Glen and Hunters Cove. With the chain down, the potential is there for unrestrained traffic coming from the direction of Hunters Cove to get to Laurel Forest. With a gate closer to West Turkey Paw Trail, it should be more easily supervised and protected.

fully shown on the earlier plats running from what is known as West Turkey Paw Trail to Laurel Forest. Instead, the way ends at a proposed cul-de-sac around the common boundary point of Lots 9, 10, 11, and 12. This is strange in light of the HC Covenants (registered in 1998) mentioning secondary access to Laurel Forest, which presumes that it existed and was disclosed somewhere already on a plat.

ANALYSIS

A. So long as reasonable means of opening the gate is provided to the owners of Lot 5 and Lot 6 shown on Plat Slide 4859, the Association can erect and maintain a gate to preserve the privacy of Hunters Cove and Hunter's Glen and to mitigate damage arising from the traffic of those encouraged to use Konarske Lane as a cut through to a public road.

It is well-established that when lots are sold by reference to a recorded plat, nothing else appearing, the purchasers acquire easement rights to the streets, parks and playgrounds shown on that plat. *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 162, 418 S.E.D 841, 846 (1992). Easement rights to streets for purchasers of lots can also be created by express grant or dedications within written instruments such as restrictive covenants or on the face of plats. *Realty Co. v. Hobbs*, 261 N.C. 414, 135 S.E.2d 30 (1964). Here, the plats of record and the HC Covenants (Paragraph 11) establish access rights over roads within Hunters Cove. However, when an easement is created by express conveyance and the conveyance is precise to the extent of the easement, the terms of the conveyance will be controlling. *Williams v. Abernethy*, 102 N.C. App. 462, 464-465, 402 S.E.2d 438, 440 (1991).

For most of the roads shown on the various plats, those ways are now public, which moots issues related to their use and maintenance. All of those issues are now subsumed by the control of the North Carolina Department of Transportation, the state agency responsible for managing and maintaining those public roads. In the case at hand, only the Private Road known as Konarske Lane remains at issue.

It is my opinion that the terms of the HC Covenants appear to limit the use of Konarske Lane as "secondary access" "for construction vehicles and emergency use." See *Williams, supra*. Although the language is written passively, I believe the Association could reasonably construe its use with this limitation in mind.

Although use over Konarske Lane may be limited, it still appears to be meant for uses beneficial to the larger community. Fire emergency vehicular access is one example of an important use.

Although the HC Covenants mention inartfully that the "maintenance" of the Private Road "shall be the responsibility of owners of dwellings in Hunters Cove" upon the completion of ten dwellings,³ I believe it would be reasonable that the Association manage this action and the collection of assessments related thereto. In support thereof, one of the powers of the Association in the bylaws is "to provide for the upkeep and beautification of the subdivision entrance, streets, roads and rights of way for streets and roads."

As a result of the HC Covenants' references to an association, to the collection of dues and assessments and, at a minimum, to the obligation of some grouping of owners to care for the roads, Hunter's Cove is a "planned community" under Chapter 47F of the North Carolina General Statutes ("Act").⁴ Pursuant to the Act, an association has the

³ It is assumed that more than nine (9) dwellings are completed in Hunters Cove. The use of the "phrase "owners of dwellings" rather than lots is potentially material in defining who should be assessed.

⁴ There are some counter arguments that could be made, which I will not detail; notwithstanding, I believe the better argument is that Hunters Cove is a "planned community" under the Act.

right to regulate use, maintenance, repair, replacement and modification of common elements, including roads owned by others but maintained by the association. *Happ v. Creek Pointe Homeowner's Association*, 215 N.C. App. 96, 107, 717 S.E.2d 401, 407 (2011(citing G.S. 47F-3-102)). As part of that authority, an association can erect a security gate as long as reasonable access through it is provided to members or those with access rights. *Id.*

In addition to finding support in the Act, the *Happ* Court held that, under contract principles, as a consequence of the obligation of an association to maintain a road, the association has the right to install a gate to minimize damage or injury to the roadway and therein reduce the scope of its expenditures. *Happ, supra.* at 107, 717 S.E.2d at 408.

In the case at bar, the authority to place a gate or gates somewhere on the commonly used or available right of way known as Konarske Lane would be supported by the Act or contract principles. Following the logic of *Happ*, a gate or gates would accomplish three objectives, among others: (1) Providing additional security to Hunter's Glen and Hunters Cove, which is referenced in the Articles as a valid purpose of the Association; (2) Discouraging cut-through traffic, which will inevitably lead to less traffic and damage to that access way; and (3) Encouraging traffic for the limited purposes described in the HC Covenants so as to insure compliance with that use restrictions in that instrument.

The owners of Lots 5 and 6 shown on Plat Slide 4959 have two sets of interests that need to be accounted for, to wit: (1) the right of those folks as landowners to use the

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easement area in any manner and for any purpose which is not inconsistent with the reasonable use and enjoyment of the easement. *Hundley v. Michael*, 105 N.C. App. 432, 435, 413 S.E.2d 296, 298 (1992); and (2) their easement right of access to the public roads within Hunters Cove and Hunter's Glen. I believe that in order to not unlawfully interfere with their interests, reasonable access must be afforded to them through any gate by way of key or combination, depending on the lock mechanism.

B. Although the Private Road should be maintained by common funds, there is no obligation to improve the road, especially to NCDOT standards.

As stated above, the HC Covenants sets forth the scope of "maintenance" responsibility for the roads within Hunters Cove. Under the plain meaning of "maintenance", such activity is limited to "the process of keeping something in good condition." *Happ, supra.* at 107, 717 S.E.2d at 408. It envisions the status quo, nothing more. As mentioned above, the Association is authorized by the Act to regulate in its discretion the use, maintenance, repair, replacement and modification of the common elements. G.S. 47F-3-102. Nothing therein triggers a specific standard of care or any actual improvement of the conditions of the property to be used, maintained, etc.

What is "good condition" must be judged by the purposes of the easement, which in this case is "secondary access" for "construction vehicles and emergency use." To my knowledge, there is no express obligation in the covenants or otherwise mandating that the Association "improve" the road to a standard different than its historical graveled

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condition.⁵ It is my opinion that the Association has no responsibility to improve the Private Road to public road standards. It is recommended that the Association hire a civil engineer or other expert in roads to give his or her opinion of the minimum requirements for maintaining a road for construction and emergency access purposes only.

This opinion letter is delivered solely for the benefit of the Hunter's Glen Home Owners Association, Inc., and may not be used or relied upon by any other person or for any other purpose without our prior written consent in each instance.

Please feel free to contact me if you would like to discuss this matter further.

Sincerely,
**VAN WINKLE, BUCK, WALL,
STARNES AND DAVIS, P.A.**
Craig D. Justus
(Electronically Signed)
Craig D. Justus

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⁵ The developer did record a Road Maintenance Agreement in Deed Book 679, Page 157 obligating itself to construct all roads within "Hunter's Glen Subdivision" and to pave same in accordance with NCDOT standards for turn over to that agency. That obligation is not assumed by the Association.