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Forest Hill Home Owners, Inc.
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Memorandum Regarding Forest Hill Home Owners, Inc. (the "Association") and Planned Community Act Chapter 5312 of the Ohio Revised Code

You have asked that I review the relevant documents regarding the creation and operation of Forest Hill Home Owners, Inc. (the "Association") with special attention to specific issues you have raised, and with respect to the impact of the Planned Community Act in Ohio (Chapter 5312 of the Ohio Revised Code).

In connection with that review, I have reviewed the following:

Deed from John D. Rockefeller, Jr. to George A. Roose, trustee establishing covenants and restrictions dated September 28, 1948 and recorded November 1, 1948 in the Cuyahoga County, Ohio Records at Volume 6646, Page 524.

Copy of "Original Protective Deed Covenants Applicable to Forest Hill Homes (apparently, currently being given out by the Association to members).

Deed from George A. Roose, Trustee to Forest Hill Home Owners, Inc. transferring Block B of Forest Hill Subdivision along with rights of the Grantor in all covenants affecting certain described parcels, dated August 31, 1950 and recorded September 5, 1950 in the Cuyahoga County, Ohio Records at Volume 7066, Page 663.

Deed from George A. Roose, Trustee to Forest Hill Home Owners, Inc. transferring rights of the Grantor in all covenants affecting certain described parcels, dated August 31, 1950 and recorded March 27, 1952 in the Cuyahoga County, Ohio Records at Volume 7465, Page 67.

Deed from George A. Roose, Trustee to Forest Hill Home Owners, Inc. transferring all rights of the Grantor in all covenants affecting certain described parcels, dated April 23, 1953 and recorded April 30, 1953 in the Cuyahoga County, Ohio Records at Volume 7809, Page 219.

Deed from George A. Roose, Trustee to Forest Hill Home Owners, Inc. transferring all rights of the Grantor in all covenants affecting certain described parcels, dated October 18, 1956 and recorded October 22, 1956 in the Cuyahoga County, Ohio Records at Volume 8694, Page 305.

Deed from George A. Roose, Trustee to Forest Hill Home Owners, Inc. transferring all rights of the Grantor in all covenants affecting the Forest Hill Subdivision, dated September 28, 1976 and recorded October 1, 1976 in the Cuyahoga County, Ohio Records at Volume 14296, Page 839.

Notice of Claim to Preserve Interest in Land Pursuant to Marketable Title Act, dated October 23, 1976 and recorded in the Cuyahoga County, Ohio Records at Volume 14405, Page 305.

Affidavit and Notice of Claim to Preserve Interest in Land Pursuant to Marketable Title Act recorded October 18, 2016 in the Cuyahoga County Records as instrument 201610180481.

Articles of Incorporation of the Forest Hill Home Owners, Inc. with the Secretary of State of Ohio on June 15, 1950

Minutes of the October 26, 2004 Board of Trustees Meeting of Forest Hill Home Owners, Inc. approving proposed amendments to the Code of Regulations.

Minutes of the November 30, 2004 Annual Meeting of Forest Hill Home Owners, Inc. adopting proposed amendments to the Code of Regulations

Amended and Restated Code of Regulations of Forest Hill Home Owners, Inc. dated November 20, 2004 and recorded April 17, 2018 in the Cuyahoga County Records as instrument 201804170665.

Background and Assumptions:

I have been advised that the Forest Hill Subdivision (the "Subdivision") was created by the filing of plats beginning in the 1930's, and that the Subdivision restrictions (hereinafter referred to as the "Covenants") were created in the chain of title to all of the lots in the Subdivision, either by "straw-man" conveyances prior to the initial sale of a lot, or by recital in the initial conveyance of each lot. The lots so encumbered shall be referred to herein as the "Lots".

I am assuming that the Covenants in the respective chains of title to all of the Lots are substantially identical to the set of Covenants reproduced in the "Affidavit and Notice of Claim to Preserve Interest in Land Pursuant to Marketable Title Act" referenced above, recorded October 18, 2016 in the Cuyahoga County Records as instrument 201610180481; except for: (a) one section in the original Covenants which were deleted from the current version, dealing with a restriction on the conveyance of Lots without the consent of the original Grantor, which, by its terms, expired in 1967; (b) the definition of a "successor" in the original Covenants, which references an "allotter"; and (c) a new section indicating that the restrictions shall be enforced exclusively by Forest Hill Home Owners, Inc. I am also assuming that there are no other provisions in any of the chains of title to the Lots, placing any additional requirements on the Lot owners vis-à-vis membership in a home owners association or obligation to pay mandatory fees to such association.

The Association was created by the filing of the Articles of Incorporation of the Forest Hill Home Owners, Inc. with the Secretary of State of Ohio on June 15, 1950.

I do not have a copy of the original Code of Regulations of the Association, nor do I know the procedures used to adopt them. For our purposes, I am assuming that they were properly adopted and that the provisions regarding amendment permitted the "Amended and Restated Code of Regulations" dated November 30, 2004 to be adopted in the manner in which it was adopted. It is my understanding (and I am assuming, in reviewing the same) that the Amended and Restated Code of Regulations (hereinafter referred to as the "By-Laws") were properly adopted by the Board of Trustees of the Association at a meeting on October 26, 2004 and by the members of the Association at an annual meeting on November 30, 2004.

With regard to the "Notice of Claim to Preserve Interest in Land Pursuant to Marketable Title Act" referenced above, dated October 23, 1976 and recorded in the Cuyahoga County, Ohio Records at Volume 14405, Page 305, and the "Affidavit and Notice of Claim to Preserve Interest in Land Pursuant to the Marketable Title Act" (which I will refer to herein as the "Marketable Title Act Notice") referenced above and recorded on October 18, 2016, I have assumed that all statutory requirements were fulfilled to properly identify all Lots and provided the required notice to preserve the Covenants as proper encumbrances upon and servitudes binding the Lots in the hands of their current owners.

The rights of the original "Grantor" in the Covenants were assignable to the successor, who was defined originally as an "allotter". Subsequent documents assign the right to enforce the restrictions to the Association. For our purposes, we will assume that such designation is enforceable, within the parameters outlined in this memorandum.

I have requested, and have been told there are no written agreements between the Association and any owners outside of the Subdivision relating to membership by such outside owners or voting rights extended to such outside owners, or the right to serve on the board of trustees.

Applicability of the Planned Community Act

The first question concerns the impact of the new Chapter 5312 of the Ohio Revised Code (the "Planned Community Act"). The act is intended to "establish a uniform framework for the operation and management of planned communities in this state and to supplement any planned community governing document that is in existence on the effective date of this chapter." '5312.15

The act defines a planned community in '5312.01(M) as a community comprised of individual lots for which a deed, common plan, or declaration requires any of the following:

(1) That owners become members of an owners association that governs the community;

The Covenants do not "require" any of the owners to become members of the Association.

In the covenants contained in the original deeds, I didn't find a reference to the association (the "Forest Hill Home Owners, Inc. Association") until the 2016 recordation of the Marketable Title Act Notice referenced above, which referenced the enforceability of the covenants by the association after the conveyance of all enforcement rights previously retained by the common Grantors.

Even in the Articles of Incorporation, there is no definition of who makes up the membership of the Association. The Code of Regulations ("By-Laws") contains a reference to: "Every person who owns and occupies a single family home or condominium in the community known as Forest Hill, and the owner's spouse or companion, is a member." Although there is this reference in the By-Laws, no membership requirement is in the chain of title to the Lots.

> In the 2011 case of *Cianciola v. Johnson's Island Property Owner's Assn.* 2011 WL 9976625, an individual lot owner objected to being charged assessments where the declaration of covenants made no reference to any owner's

association or requirement of membership therein, nor was there any reference to anyone's ability to assess or lien. There was no mention of any owner's association maintaining or owning common areas, and no requirement that lot owners be members of any association. The Common Pleas Court of Ottawa County found that the Code of Regulations of the association ("by-laws") which govern the organization are not encumbrances against the properties. Thus, the association does not have the right to impose restrictions on the owner's real estate through the Code of Regulations.

The court of appeals for the Sixth District (Ottawa County) upheld the decision, stating that the Code of Regulations, where it expanded the scope of the association's authority beyond that granted by the declaration of restrictions, did not properly give the association the authority to levy assessments on property owners, and did not establish the association or any other organization to which the property owners would automatically belong.

> The declaration of restrictions vests JIPOA with certain limited powers, including: (1) the determination as to whether a particular use constitutes a nuisance; (2) the right to approve fencing that varies with the restrictions; (3) the right to approve sales or transfers of property on the island; (4) the right to waive restrictions contained in the declaration of restrictions for the benefit of the island's development; and (5) the right to enforce the declaration of restrictions. Notably, the declaration of restrictions does not provide JIPOA with authority to levy assessments on property owners in order to fund its efforts to maintain common areas. Further, the declaration of restrictions does not establish a homeowners' association or any other organization to which property owners automatically belong by virtue of their ownership on the island. Accordingly, JIPOA's argument that the declaration of restrictions authorizes JIPOA to adopt sweeping restrictions such as those promulgated in its code of regulations is misplaced.

Cianciola v. Johnson's Island Property Owner's Assn. 981 N.E.2d 311 (App. Ct 6th Dist, 2012).

The second definition of "planned community" which could bring the Association within the definition permitting the application of the statute, is:

(2) <u>That owners or the owners association holds or leases property or facilities for the benefit of the owners;</u>

Remember, again, that the statutory definition requires that the Covenants must "require" that the Association hold or lease facilities for the benefit of the owners. At some point, property was conveyed to the Association, which is used as the corporate office of the Association. But the Covenants do not require this or even reference it as a possibility. It is likely that this was an after-thought since: (a) the drafters would probably have provided for some mechanism to support such ownership if it had been contemplated at the time of the creation of the Covenants; and (b) the main purpose of the Covenants appears to be the regulation of the sale and initial construction of homes on the part of the Grantor and his successor developers, not the continued regulation of those homes in the indefinite future.

There is no reference to property or facilities in the Association's articles, and the only reference in the current Amended and Restated Code of Regulations is a statement that the Association may not sell its offices at 2419 Lee Boulevard without the approval of the members. Again, the references to such facilities in any corporate documents do not put the owners on notice of the existence of such burdens on the members, so as to alert an owner to the likely necessity of supporting the Association with mandatory fees.

The third definition of "planned community" which could bring the Association within the definition permitting the application of the statute, is:

(3) <u>That owners support by membership or fees, property or facilities for all owners to use.</u>

Remember, again, that the statutory definition requires that the Covenants must "require" that the owners support such property or facilities with membership or fees. There is no mention of fees in the Covenants, nor in the articles, and only appears in the Code of Regulations, and even there, it is referenced as being voluntary. The preceding analysis concluded that references in the Code of Regulations, even if it mentions fees, could not be considered as making up for the lack of such provisions in the chain of title.

<u>Whether the reference to a "common plan" can remedy a deficiency in the breadth of the requirements contained in the Covenants.</u>

It may be argued that the reference to a "deed, common plan, or declaration" in '5312.01, opens up the possibility that any one of these elements might be satisfied by something contained, not in a deed or declaration (in our case, the "Covenants"), but in

some other component or feature of the project which might qualify as exhibiting a "common plan" being implemented throughout the project.

The term "common plan" appears most frequently in the law of servitudes where the focus is the enforceability of restrictions which are repeated (or which may not be repeated) in all deeds in a community, and the ramifications where the restrictions are not identical. The question is sometimes asked whether the obvious, observable existence of a "common plan" can supplement the lack of uniformity in the written restrictions so as to aid the enforceability of the restrictions upon all properties, including those which lack the specific restrictions in their chains of title.

In this instance, we are asking whether a "common plan" can be recognized as fulfilling one of the statutory requirements so as to qualify the Lots as being part of a "planned community." That argument was raised in the Court of Appeals for the 5th District, Fairfield County. There, the homeowners' association argued that the various subdivisions were zoned in a common zoning resolution, which amounted to a "common plan" for them being in one recognizable community. That zoning of the subdivision, the association argued, constituted a "common plan" for the subdivision, and that once the existence of a "common plan" was established, other elements of the common plan (such as the incorporation of a non-profit corporation to take over responsibility of the enforcement of rules, or the acquisition of property by the non-profit association which required maintenance) could be evidenced by such later actions themselves, and the statute would then empower the association to require membership and contribution to the association's expenses.

The Court held that the Planned Community Act did not abrogate the owners' right to have notice of the requirements of the covenants to be in their chains of title. The court was not persuaded by the association's argument that they were entitled to charge all lots in the subdivision where the specific covenants in the chain of title to the owner's unit did not reference membership and assessment requirements. "The Planned Community Law recognizes the common law principal of [the requirement for] constructive notice for restrictive covenants." *Lubow v. Haaf Farms Homeowner's Association*, 91 N.E.3d 61, 68 (2017).

Given the number of years between the dates that the initial version of the Covenants were recorded and the conveyance of some of the lots to ultimate users, it is possible that some owners took title after the Association received the conveyance of property which it held for the benefit of owners. The preceding cases make it clear it would take an expansive interpretation of "common plan" to overcome the requirement that the "deed, common plan, or declaration require" one of the three elements which define a "Planned Community."

Even if a court were to determine that the Association meets the definition of "planned community", the Association would still not be able to require the payment of assessments.

1. The case law holds pretty firmly that the payment of assessments which is not required in the chain of title could not be enforced.

2. The By-Laws of the Association reference only voluntary contributions, and the Planned Community Act provides, at 'Sec. 5312.15 that: "This chapter shall be construed to establish a uniform framework for the operation and management of planned communities in this state and to supplement any planned community governing document that is in existence on the effective date of this chapter. In the event of a specific conflict between this chapter and express requirements or restrictions in such a governing document, the governing document shall control.

3. The Planned Community Act provides, at 'Sec. 5312.10 (C)(1), that the board may not charge assessments for common expenses unless the declaration provides for or contemplates the charging of such assessments.

Is the Association is constrained from taking advantage of all of the "Robust Provisions" of the Planned Community Act because of its technical failure to come within the definition of a "planned community."

1. Amendment by 75% of the members.

The original covenants state (in paragraph 15) that they remain in effect "until the first day of May, 2029 in any event, and continuously thereafter unless and until any proposed change shall have been approved in writing by the owners of the legal title to all of the land on both sides of the highway within the block in which is located the property, the use of which is sought to be altered by said proposed change..."

First of all, it is obvious that the section quoted only pertains to changing the use prescribed by the Covenants with regard to a specific lot. There is no other provision addressing the general alteration of the Covenants.

So, this is a situation in which we would like to take advantage of the Planned Community Act's default provision in '5312.05(A):

> Unless otherwise specified in the declaration or bylaws, the owners may amend the declaration and bylaws by the consent of seventy-five per cent of the owners, either in writing or in a meeting called for that purpose.

But does the paragraph 15 of the Covenants quoted above "otherwise specify?"

The Court of Appeals for the 5th District (Licking County) has held that restrictions which were, by their terms, not to expire until 2037, and thereafter automatically extended for successive 10-year periods, unless amended by a document signed by a majority of owners, were not subject to being amended prior to 2037. *Cumberland Trail Homeowners Assn, Inc. v. Bush*, 2011-Ohio-6041 (2011).

Following this analysis, it is probable that the provisions of the Covenants restricting amendment before 2029 would be interpreted as "contradictory" to the default provisions of the Planned Community Act's provision allowing amendment with 75% approval of the members, even if the Planned Community Act were interpreted as applying to Forest Hill as a "planned community."

On the other hand, one might consider the restriction of the Covenants as addressing only the change of the use of a specific lot, and not addressing the general amendment of the restrictions as they apply to all Lots. In that case, the argument could be made that '5312.15 might give a planned community the option of using the default provision (allowing for 75% approval of an amendment) because the language in the Covenants is silent regarding (i.e., does not specifically address) a general amendment of the Covenants.

> '5312.15 ... In the event of a specific conflict between this chapter and express requirements or restrictions in such a governing document, the governing document shall control. This chapter shall control if any governing document is silent with respect to any provision of this chapter.

If a court determined that Forest Hill is not a "planned community", or that the Covenants addressed all amendments (and, therefore, under the reasoning of the *Cumberland Trail* case, could not be changed even if it were considered a "planned community"), we would be left with a regime that was relatively inflexible, which might offend a judge and encourage a judge to find an alternative theory upon which to permit application of a more reasonable process for the amendment of the Covenants. In that event, it might be worthwhile exploring the possibility that such an absolute prohibition on any general amendment could be addressed using an analysis of the provisions of the Restatement of Property (Servitudes) '6.10 Power to Amend the Declaration, but that analysis is outside the scope of this assignment.

2. Enforcement tools of the Planned Community Act

The Planned Community Act provides mechanisms for the enforcement of rules by the use of "enforcement assessments", securing the collection of such assessments by placing liens upon individual lots, and even by authorizing a planned community to enforce such collection by foreclosure of such liens. (This last power is assumed since the holder of a lien may always enforce the lien by foreclosure. However, without a statutory authority to levy such a lien outside of the context of litigation, the association is required first to bring a lawsuit to obtain a judgment which, in a world where mortgage foreclosures rarely net any proceeds in excess of the amount owed on the first mortgage, is like throwing good money after bad if it requires the expenditure of attorneys' fees to obtain such judgment.)

The first issue to be addressed here is whether the Covenants even contemplate the enforcement of any obligation to keep individual Lots in good condition and repair. The original covenants addressed the single-family nature of the improvements that were allowed, with value requirements and requirements for architectural approval by the Grantor, front and side yard set-backs and the right of the Grantor to vary the requirements and to come on to the properties to abate violations. The Grantor also reserved the right to cancel the restrictions. Additional provisions covered topics concerning garages, driveways and restrictions on what may be placed in the yards, restrictions against livestock, the manufacture and sale of liquor, etc.

In short, there were no provisions for an association to enforce the restrictions, which rights were, instead, reserved to the Grantor. The original Covenants in the deed from John D. Rockefeller, Jr. to George A. Roose, trustee, discussed the definition of Grantor to include heirs, devisees, personal representatives, successors and assigns, and the following detail:

> By way of more detailed definition of the term "grantor" (and having application to the reservation of various rights to approve, designate, determine, modify, consent and otherwise take future action as reserved to the Grantor in the present or in any prior or future deed or deeds to any lot or lots, now or hereafter laid out, in any of the "Blocks" as shown in the above named plat of layout of streets), it is hereby expressly declared that each and every reservation and right shall pass to and vest in the successor from time to time ... of the Grantor in and to his title as an allotter and being his title to any lots in any of said "Blocks" not previously sold to an ultimate or prospective user; and when intending, by any deed, to convey his title as an allotter in any one or more "Blocks", the

> Grantor, in any such deed, shall so designate such title or otherwise manifest such intention.

I was unable to find any definition of "allotter" in "Words and Phrases" covering Ohio resources, but *Black's law dictionary* defines "allotment system" as the practice of dividing land into small portions for cultivation by agricultural laborers and others." It also uses the word "parcel" as a verb in the example "the land is parceled out in allotments..."

It would appear to me that the restrictions were created as a means for the developer (and any successor developer, as opposed to a successor who took title as a "user") to control the construction of improvements on the lots. It was not uncommon to recite such restrictions without any mechanism for future enforcement after the completion of the subdivision, when the developer no longer had an interest to protect in the subdivision. In this author's opinion, this was common in these early days of development activity. Early subdivisions frequently ignored what is now common place: the provision of a mechanism for the enforcement of restrictions after the lots have all been sold and the developer is no longer interested in the maintenance of the standards. This is further evidenced by the absence of any general covenants for keeping the property in good condition and repair (which would not have been a concern of the original developer after the lots had all been conveyed.)

This does not mean that an association of owners would be unable to enforce such restrictions as are contained in the Covenants. The restrictions ran to the benefit of all owners, and there are numerous Ohio cases in which the courts have held that an association of owners is a proper party to bring an action which would otherwise appear to vest in the owners themselves.

Even though the Association may not have been a proper "allotter" as could receive an assignment of enforcement rights, the attempted assignment of the "personal" rights of the Grantor to enforce the Covenants, and the above analysis of courts' willingness to permit home owners associations to bring actions, would appear to give the Association the authority to bring actions to enforce the Covenants.

Such actions, on behalf of owners and as assignee and successor to the Grantor's rights, would probably be limited to "equitable" proceedings (meaning actions resulting in what are categorized as "equitable remedies) such as actions to require the specific performance of an owner's obligations under the Covenants, or injunctive relief to stop violations of the Covenants, or declaratory actions asking the court to interpret the respective parties' obligations under the Covenants. There would not be a personal right for an owner, nor did the Covenants give the Grantor a right to recover

enforcement assessments against a defaulting owner, nor would there be any right to recover attorneys' fees for bringing a successful proceeding.

So, it is possible that if a court determines that the Association is not a "planned community" under Chapter 5312, the only action permitted by the Association would be one which enforces the terms of the Covenants without the benefit of fines or the recovery of attorneys' fees.

On the other hand, it is possible that a judge, exercising his powers in equity, could determine [as was done in the *Nottingdale Homeowners' Ass'n v. Darby* case 33, Ohio St. 3d 32 (1987)] that it would be inequitable to prohibit the association from recovering its costs of enforcement of its rules. However, in that case, the right to recover attorneys' fees was written into the constituent documents.

3. Makeup of the Board of Directors

The Planned Community Act requires an owners association the board of which is to be elected from among the owners and their spouses. The By-Laws require that the "trustees" be dues paying members of the Association, and further defines members as owners who are occupants of a single family home or condominium in Forest Hill.

If the Association does not meet the definition of "planned community", it need not concern itself with the statutory requirements.

If the Association were to be interpreted as meeting the requirements of being a "planned community", the Association could not vary the requirement that members be allowed full participation in the Association (including membership, voting, and the right to be a trustee or other officer) unless the contrary provision was recorded prior to September 10, 2010.

> '5312.02(C) Nothing in this chapter invalidates any provision of a document that governs a planned community if that provision was in the document at the time the document was recorded and the document was recorded prior to the original effective date of this chapter.

I am assuming that the By-Laws were not recorded prior to that date, and I found nothing in the Secretary of State's office to indicate that they were filed there either. Accordingly, if the Association is interpreted as meeting the definition of "planned community" under Chapter 5312, then membership, voting and the right to be elected as a trustee must be open to all owners, regardless of whether they are occupants of the property.

4. Membership by owners of lots outside of Subdivision

The By-Laws of the Association recite that owners who are also occupants of single family homes or condominiums in the community known as Forest Hill, as defined in its Articles, and their spouse or companions, are members. No one outside of that definition is permitted to be a member, or be elected to the Board.

The exclusion of owners of lots outside the Subdivision is not inconsistent with the requirements of Chapter 5312. If the members wanted to amend the By-Laws to permit such persons outside the community to be members, they would run afoul of the requirement in '5312.01(L) which defines an owners association as an organization that is comprised of owners of lots in a planned community. So if the Association meets the definition of "planned community", it could not amend its By-Laws to permit membership by people not in the Forest Hill community, as defined in the Articles.

If the Association is not interpreted as meeting the requirements of being a "planned community", the Association could amend its By-Laws (by a vote of its members who are currently required to be owner who are also residents of the Forest Hill community as defined in the Articles) to permit others to be members.

Sincerely,

Kenton L. Kuehnle