Today's Law Practiced with Small Town Tradition

March 10, 2011

Erin Steenwyk
Stoney Point Harbor Homeowners Association
P.O. Box 361
Southmont, NC 27351

RE: Fallen Trees and Underbrush Issue

Dear Erin:

Per our phone conference I have reread the relevant Stoney Point Harbor documents in this matter to determine the duties and obligations of the Board of Directors. A question has been raised about the Stoney Point Harbor restrictive covenants with respect to both the ability and duty of the Board of Directors to enter the property of a lot owner in order to remove deed trees and plant growth. From my review of the documents and the law on this matter it's my conclusion that it is not in the best interest of the homeowner's association and may not be within its power to enter a property owner's land for the sole purpose of removing dead trees, branches, or underbrush.

I have found no North Carolina case law directly on point, but the general view of the courts is that restrictive covenants in general are valid so long as they do not impair the enjoyment of the estate and are not contrary to the public interest. Due to the preference of courts under public policy analysis for the free use of property by owners, any unclear language will be interpreted in favor of the owner's rights. The specific provisions at issue here are set forth in Article II, Section 4, Subparagraphs (c) and (d) of the Declaration of Covenants, Conditions, and restrictions of Stoney Point Harbor (Deed Book 1049, Page 1578). In it the Association is granted the power **in its sole discretion**, if it determines that any lot has become **unsightly** due to grass or weeds that have not been mown, or due to **debris** of any nature having accumulated on the lot and if it so determines then on the giving of ten (10) days notice the Association can go on the lot to mow or remove debris (emphasis supplied). If the Association does so, it then has the right to charge back the actual mowing or removal costs to the owner of the lot.

Looking at the plain language of the restriction the first thing of note is the sole discretion of the Association (through its Board of Directors) to act in this matter. This means that the Board is not obligated to do anything on the matter unless it votes to do so. In legal terminology this kind of language is technically the opposite of a mandate, because instead of demanding that the Board do something in certain situations (i.e. "the directors shall have annual meetings") it merely grants discretionary authority to do so.

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The second word of note is "unsightly", which is a modifier for Board action either as to grass/weeds or debris. Since there is no definition set out in any of the formational documents for unsightly, typically courts will use a dictionary definition for the word, which is "not pleasing to the sight." So from the outset the use of this power is strictly limited to cosmetic concerns rather than that of public safety. The final term of note is "debris", which is similarly undefined in the documents and which has a dictionary definition of "(1) The remains of something broken down or destroyed, (2) An accumulation of fragments of rock or (3) Something discarded." Taking this analysis to the question at hand it is my legal opinion that the plain language of the provision itself does not allow the homeowner's association access to private property in order to remove dead trees in the woods or underbrush, but that it would allow for access if a person's grass/weeds were exceptionally high or if a person had piles of junked products or stone fragments in their yard.

From what I've gathered there are two arguments being proposed for requiring the association to take action: safety and aesthetics. With respect to safety the association's responsibility is solely to the maintenance of the common area. The sections I just went over do not allow the association the authority to enter a person's property due to safety concerns, but only in certain circumstances that the association deems appropriate to enter the property if it is unsightly from grass/weeds or debris. The association does have the duty to ensure that the common areas are maintained, and from that duty I think it is appropriate for the Board or a committee to periodically look for dead trees located near the common areas that may cause damage if they fall. However, the association does not have the authority to cut down such trees unless they are located within the common area. The association should instead notify in writing (preferably by certified mail) the lot owner of the existence and location of such trees and ask that the lot owner to take care of the situation. If the lot owner does not take action and the tree falls, then the damage caused by the tree to the common area becomes an insurance claim, and the insurance company can subrogate and sue the lot owner for negligence if it sees fit. The association is like a normal lot owner in that it does not have the power, without consent, to enter another owner's property to cut someone else's tree down. If the association intends to be proactive about this issue I would recommend having an annual survey of trees adjoining common areas to determine the location and number that may need to be removed. Provided that the owners of the lots in question agree, in that event I think that the association has the power to pay to have these trees removed through the special assessment provision[1].

With respect to aesthetics a court will look both at the plain language of the relevant sections and to the scope of similar provisions in the restrictions and covenants to determine the reasonableness of removal for aesthetic purposes. As I went over above, the association has the sole discretion to enter the owner's property only if it "determines that any lot has become unsightly due to grass or weeds that have not been mown, or due to debris of any nature having accumulated on the lot." Beyond this plain language the court would look to other similar provisions in the restrictive covenants. General use restriction 15 says that no portion or part of any lot shall be used or maintained as a

[1] Declaration of Covenants, Conditions and Restrictions of Stoney Point Harbor, Article II, Section 3

dumping ground for rubbish or other refuse and general use restriction 19 provides that there shall be no junk automobiles, junk of any sort, unserviceable vehicles or salvage stored on a lot.[2] Looking at all of these sections in the aggregate these are directed toward things that the majority of people would consider to be an aesthetic nuisance. Nothing in these sections suggests to me that trees and undergrowth in a natural environment would be a restriction.

On a practical level it is possible if the homeowners and the declarant desire, to amend the covenants to allow specifically for the intrusion of the association onto a person's property for the sole purpose of removing anything it deems unsafe. However on a legal level, the courts will not uphold amendments that are not within the reasonable contemplation of the original documents. What this means is that if an amendment changes a restriction in a way that makes it more burdensome to the property, it will not be upheld if the restriction is broadened in a way not contemplated in the original documents. Given my analysis above, it is my opinion that a court would not support an amendment that would broaden this provision to allow for the association to go onto and remove dead trees and undergrowth from an owner's property.

From the formational documents the sole duty of the homeowner's association with respect to land is the maintenance and upkeep of the common areas[3]. There is no affirmative duty, either in those documents or in the caselaw for a homeowners association to maintain a lot that is not common area or limited common area. Even if you were to construe the language of the documents to grant a discretionary power to do so, this does not protect the homeowners association from legal liability arising from those actions. The obvious example would be a homeowner suing the association for trespass and damages to land, with the claim that the association lacked authority for its actions. A potentially more costly action would be a personal injury claim for damages caused by the tree removal itself. The attorney fees alone in such actions could be quite high, so if you were to proceed with such actions you'd need to be certain that your current insurance would provide representation in that kind of circumstance.

The final question you had was whether the provisions I had related to both improved and unimproved lots. Given the definition of the word "lot" being defined in the restrictions as both improved and unimproved lots, it's my interpretation that these provisions apply to any lot in the subdivision, with the exception of lots still held by the developer. My response set forth above applies both to improved and unimproved lots within Stoney Point Harbor.

I hope this clears things up a little bit as a legal perspective on the documents and the situation at hand. If you have any further questions don't hesitate to give me a call.

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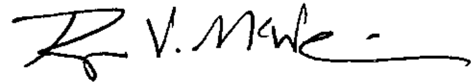
[2] From the Declaration of Restrictive Covenants of Stoney Point Harbor Subdivision (Book 1049, Page 1571, Davidson County Registry)

[3] Bylaws of Stoney Point Harbor Homeowners Association, Inc., Article VII, Section 2, Subparagraph (g)

Sincerely,

BRINKLEY WALSER
A Professional Limited Liability Company



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