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Furthermore, owners in other subdivisions may, at this late date, be estopped to challenge the validity of a member vote that took place many years ago. At the very least, like Mr. Hall, any challenging owner would have the burden of establishing that there were either specific provisions contained in the superseded CC&Rs or defects in the voting process which render the Amended CC&Rs invalid. That may be difficult for an owner to establish many years after the vote was conducted.

One approach that the POA could take at this juncture would be to initiate an action for declaratory relief in which the Superior Court is asked, in effect, to determine the rights and obligations of all parties under the CC&Rs. The benefit of this approach is that it would conclusively settle this issue, once and for all.

The down-side risk of bringing a declaratory relief action is that it will be expensive and, like this very investigation, it could result in a very careful analysis of all the old CC&Rs and the voting record which proves the very point that you do not want to establish. The expense would come in three ways. First, the court would probably require the mailing of notice and a copy of the pleadings to all owners. Second, there is the risk that some of the owners will actively resist the suit (the sons of Hall) and require a vigorous defense on the Association's part.

Finally, even in the absence of organized opposition, my informed guess is that the court would want the Association to present at least a prima facie case establishing the merits of the Association's position (i.e., that the Amended CC&Rs are valid). Besides my own careful review of each of the old CC&Rs, this would probably require a comprehensive search of the chain of title to lots within each of the subdivision phases and perhaps the testimony of an expert witness. Of course, if the Association's position was challenged, the level of proof required by the court will also increase.

For these reasons, I think that the Association is better off to develop a very fair and understandable

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set of enforcement procedures which it then administers in a uniform and non-discriminatory manner. If, in the context of a specific CC&R enforcement action, an owner were to challenge the legal status of the Amended CC&Rs, that challenger would face all of the problems I outlined on the second page of this letter. It would be that owner's nickel that would be spent to plough through a considerable amount of paperwork. Furthermore, a single challenger would not have the legal standing to bring into issue the validity of the CC&Rs as they apply to other subdivisions.

If the CC&Rs are fairly administered, my hunch is that very few owners will want to spend the money to challenge their validity. Furthermore, the court hearing the enforcement action will be inclined to back up the Association if it is apparent that due process was accorded the accused.

I should also comment on the letter you received from Anthony Farrar. Like Mr. Hall, he is challenging the legal effect of the new CC&Rs as they apply to a specific subdivision (Tract 4223). We will have to look at the original CC&Rs for that Tract and see what they say about amendments. Just because the old CC&Rs said that there would never be an Association does not mean that the very same CC&Rs cannot be amended by a vote of the owners to change that rule (assuming the old CC&Rs contained an amendment provision). An analysis would then have to be made of the vote which was taken and, as noted above, the burden would be on Mr. Farrar to establish that the vote was ineffective.

Once you have read and considered this letter, please give me a call. I would like to hear your thoughts on how we should proceed from here. In conclusion, it is my opinion that you are on the right track to focus your attentions on developing a fair set of notice and hearing procedures. Every day that goes by makes it a bit more difficult to resurrect old bones and, who knows, a Community Services District or other form of local government might arise and make the entire issue of land use regulation moot.

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I look forward to hearing from you. Once again, my apologies for the delay in getting this letter into your hands.

Very truly yours,

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