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September 28, 2006

Ms. Kim A. Montgomery
PO Box 1374
Buxton, NC 27920

Re: Brigands' Bay

Dear Kim:

I am writing to address your questions regarding the enforcement of dues or assessments in the Brigands' Bay Subdivision. The North Carolina Planned Community Act (hereinafter, the "Act") provides for the enforcement of assessments for common expenses. All planned communities created after January 1, 1999 are subject to the Act. Planned communities created prior to January 1, 1999 have certain enumerated powers as set forth in the statute. In order for the statute to apply to a pre-1999 subdivision, the subdivision must be a "planned community". That term is defined in the statute to mean "real estate with respect to which any person, by virtue of that person's ownership of a lot, is expressly obligated by a declaration to pay real property taxes, insurance premiums, or other expenses to maintain, improve or benefit other real estate described in the declaration" (emphasis added). My review of your declarations discloses that there is no expressed obligation on any owners in Brigands' Bay to pay assessments. Your articles of incorporation reference assessments; however, the assessments must be in accord with the declarations. As such, the Act does not apply. Likewise, there is no private right of action because your declarations do not create any such obligation. Absent any obligation under the Act or the declarations, your association does not have the authority to collect or enforce assessments.

Your next question involves how to amend the restrictions, so you may collect assessments. The restrictive covenants for the subdivision shall be binding until January 1, 1990, "at which time the said conditions, reservations, easements and restrictions shall automatically be extended for further successive periods of ten (10) years each unless, by vote of the then owners of record of a majority of the sites

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shown on said plat acting by and through the Brigands' Bay Homeowners' Association, Inc.; it is agreed on or before such expiration dates, to change the said conditions, reservations, easements and restrictions in whole or in part." As such, based on that language, you will need over fifty percent. The timing of the amendment is ambiguous as set forth in the language (do we have to wait until 2009 or may we proceed now?).

Assuming you can amend the declarations now, I do not believe you can do so to include the collection of assessments. I have enclosed a North Carolina Supreme Court case handed down in August, 2006. As you can see, in that case the original covenants required the owners to pay for the lighting of the subdivision sign. The covenants were amended to allow for assessments for the "welfare, recreation, health, common benefits and enjoyment" of the lot owners. The amendments were held to be unreasonable and not enforceable. As such, without unanimous consent of the lot owners, I believe it will be difficult for you to amend the covenants to allow for assessments.

As to the declarations, they are enforceable by any lot owner.

Thank you for your time and attention. Please do not hesitate to contact me with any questions or concerns.

Very truly yours,



M. Peebles Harrison

MPH/kmc
Enclosure(s): As stated