

## **Revision of Covenants – 11/15/12**

### **Explanation of Stage One: The Vote**

For ease of identification, this will use the word “Developer” to refer to Governors Club Development Limited Partnership and the word “Covenants” to refer to our Declaration of Covenants and Restrictions.

Our community is governed by Covenants which contain guidelines and rules intended to preserve and protect property values within the community. It is a long and detailed document which all property owners agreed to abide by when they purchased property here. It is a standard document in any development such as ours. Since it is a Declaration, it has been drawn up by a “Declarant”; who is the party with the most authority and rights.

Before going further, let’s talk about this in a generic sense; in other words, in terms of any development similar to ours. The development and sale of property in a large project is a process which often takes many years. The Declarant, which is almost always the developer of the project, has numerous rights and powers within the project’s covenants that allow it to control many things within the community and thus control the development and sale process. This is perfectly appropriate while the developer is actively developing and selling property. It wants to make sure things are done properly so as to make the selling process easier.

However, once a development matures and all property has been sold, there is no reason for the original developer to retain those controls or even remain as the Declarant. In fact, it is normal for the original developer to eventually back out of the covenants document and turn full control over to the community association; effectively allowing the property owners to control their own destiny. This is appropriate because, at a certain point, the interests of the original developer are most likely not the same as those of the property owners.

Unfortunately, in our situation, what should have happened did not happen. It is not surprising that our original Covenants were drawn up by the Developer, that the Developer was named the Declarant, and that the Declarant had many powers within that document. That was normal and expected. But, what was not normal was how the Developer allowed for those Covenants to change (or not change) when it ceased operations; and therein lies the reason behind this vote.

### **The Problem**

Despite having ceased its operations in the development and now having nothing to do with the management of our community, The Developer left four items in our Covenants:

1. The Developer is still the Declarant and still retains numerous rights and powers within the Covenants. Two of those rights lead to the next two items.
2. The Declarant has the ability to propose property for annexation into our community subject to the approval of the POA Board; which approval may not be unreasonably withheld. This right is effectively unlimited and never expires.

3. The Declarant can modify the Covenants with voting consent of at least 51% of all property owners.
4. Any modification to the Covenants not proposed by the Declarant requires voting consent of at least 80% of all property owners.

## **Why These Are Problems**

### 1. Developer Being the Declarant

The declarant has numerous powers within the Covenants. However, the vast majority are applicable to the period of ongoing development. Nevertheless, there is no reason for the Developer to now be involved in such a critical document. Our property owners should control our own destiny through the POA. The developer's interests are no longer the same as ours. Taking the Developer out of this role is arguably something that should have been done some time ago.

However, far more important are two powers that currently remain with the Declarant that can impact our community. Those are the powers covered in the second and third items here. These present the most compelling reason for taking the Developer out of this role.

### 2. Ability to Propose Property for Annexation

This was the power exercised by the Developer (as the Declarant) to propose the Branch Meadows project for annexation into the community. As it now stands, the Developer's right to make future proposals of this nature is effectively unlimited and never expires. It is in our community's best interests to terminate this power.

Doing so will not prevent us from annexing property into the community at some point in the future. Rather, any annexation would be controlled by us and not by an outside party who has no connection to our community. And such an action would effectively be subject to a vote of property owners.

### 3. Declarant's Ability to Modify the Covenants

Granted, the Declarant needs a 51% vote to enact such a modification. But that does not get around the fact that the Developer has no continuing interest in the management of our community. Therefore, it should not have the right to propose modifications to our Covenants; even if they require 51% voter agreement.

### 4. 80% Requirement for Modifying the Covenants

By inserting this requirement, the developer placed an almost insurmountable hurdle in front the entire community. Obtaining the consent of 80% of all property owners is an extremely difficult

task. Keep in mind that we are not talking about 80% of those who vote. It's 80% of all property owners. Therefore, any property owner that does not vote is effectively casting a No vote.

Anyone with any knowledge of such procedures will agree that the 80% requirement is unreasonable. The NC Planned Community Act adopted a 67% voter approval for changing covenants, and our community should be subject to that standard. Even 67% is a difficult standard, but that is arguably a fair approval level for making changes to such an important document.

If you think about how these two voting hurdles interact, you will see that the Developer did something that is clearly not in the interests of the property owners. As it stands now, only the Developer has a reasonable chance of making any change to our Covenants, because only changes proposed by the Developer, as Declarant, need 51% voter approval. As property owners, we are almost effectively barred from making changes to our own Covenants with the Developer imposed 80% hurdle. And it just makes common sense that we, as property owners, should be allowed to control our Covenants.

### **How to Solve the Problems**

The easiest way to solve these problems would be for the Developer to voluntarily make the necessary changes. Unfortunately, it declined to do so. Therefore, if we want to control our own destiny, we must make the necessary changes ourselves. But, as you have seen, that will take a vote of 80% of the property owners, and that is what this effort is all about. It will require a concerted effort and a fair amount of time, but we essentially have no other choice.

Therefore, the best solution is a vote to approve four changes as follows:

1. **Change the Declarant from the Developer to the POA through its Board of Directors.**

The powers of the Declarant will then rest with us through our Board, and that is in our best interests. Other than the two issues which follow, the powers are innocuous given that there is no longer active development within the community. And, as discussed later, these powers can be eliminated at a later date as part of a general clean-up and rewriting of the covenants.

2. **Eliminate the Ability to Propose Property for Annexation**

It certainly makes no sense for the Developer to have this right, but there is also no reason for any Declarant to have such rights. If the situation arises, annexation should be subject to community wide approval. Therefore, the easiest way to deal with this issue is to simply eliminate the language and not allow anybody preferential rights to propose the annexation of additional property.

### 3. Eliminate the Declarant's Right to Propose Changes with a 51% Vote

Similar to the annexation rights, neither the Developer nor any Declarant should have the right to institute changes to our Covenants with only a 51% vote. The Board wants to change the approval percentage to 67%. Therefore, the easiest way to deal with this issue is to eliminate the language from our Covenants.

### 4. Change Voting Requirement for Modifying Covenants from 80% to 67%

Again, an 80% requirement is extremely onerous and effectively blocks the ability to reasonably manage the Covenants. The original Covenants were amended by the Developer 39 times over the course of its work, and they have not been cleaned up and modified to reflect the mature nature of our community. Once we make this change, it will give us the opportunity to control the management of our own community and modify the covenants to make them more understandable, more workable and applicable to a mature development. Input will be sought from the community, and any proposed changes will still be subject to a 67% approval. While that is still a difficult hurdle, it is in line with state law and more reasonable than the current 80% requirement.

### **What Will Happen If We Don't Make These Changes?**

- The Developer will continue to be the Declarant within our Covenants even though it has no interest in our community.
- The Developer will retain the right to propose property for annexation into our community, and the Board will have to deal with each request in the same manner as was required with the Branch Meadows proposal. This right will exist forever.
- The developer will retain the right to propose changes to our Covenants and can institute them with a 51% vote. This right will exist forever, and it will always be a more powerful right than we have as a community. In other words, it will be easier for the Developer to change our covenants than it will be for us as property owners to do so.
- If we do not change the 80% voting requirement, we will be almost effectively barred from making any changes to our Covenants; thus denying us the opportunity to manage our community as we see fit.

It is in our best interests to make these changes and obtain control of our Covenants. Because of the way they currently read, obtaining the necessary 80% vote will be a long and involved process. But, if we are successful, a similar effort will not be necessary for future changes, and the Developer will no longer have any influence over the affairs of our community.