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April 6, 2007

FIRST CLASS MAIL AND ELECTRONIC MAIL

Board of Directors, Falls Run Community Association
c/o Sylva Southwell, Community Manager
101 Bridgewater Circle
Fredericksburg, Virginia 22406

Re: Use of Community Center

Dear Directors:

You have asked for guidance regarding the legality of certain Association activities and use of the Community Center, including: (1) religious and political meetings; (2) gaming, including bingo, bunko and poker; (3) "Friday Night Movies;" and (4) events where alcohol is served. This letter addresses each activity in turn.

Please understand that, while this letter is quite lengthy, a detailed analysis of each of the types of uses was required to answer the Board's questions fully.

General Note: Public Accommodations

As an initial consideration, we recommend that the Association should restrict the use of the Community Center by non-member groups. The Association must be careful to avoid the use of the Community Center by non-members so as to create a place of public accommodation, which would thereby subject the facility to the Americans with Disabilities Act ("ADA") restrictions. Briefly, the ADA requires the owners and proprietors of "public accommodations" to make their facilities accessible to the handicapped. While the ADA states that gated and secured private residential communities are generally not "public accommodations," the ADA also says a private residential community may have "public accommodations" within their borders when the Board makes certain facilities or amenities within the community open or available to the public for use. If so, then the Board has a responsibility to ensure that its general invitation or permission to the public reasonably includes the handicapped.

Board of Directors, Falls Run Community Association
c/o Sylva Southwell, Community Manager
April 6, 2007
Page 2

Determining whether a facility within a private residential community is a "public accommodation" is somewhat difficult because the statutory definition is ambiguous. In order to help resolve some of the ambiguity of how the definition of "public accommodation" applies, the Department of Justice has promulgated the ADA Title III Technical Assistance Manual, which addresses some of these issues. The manual states, in relevant part, as follows:

Does title III apply to common areas within residential facilities? Although title III does not apply to residential facilities, it covers places of public accommodation within residential facilities. Thus, areas within multifamily residential facilities that qualify as places of public accommodation are covered by the ADA if use of the areas is not limited exclusively to owners, residents and their guests.

ILLUSTRATION 1: A private residential apartment complex includes a swimming pool for use by apartment tenants and their guests. The complex also sells pool "memberships" generally to the public. The pool qualifies as a place of public accommodation.

ILLUSTRATION 2: A residential condominium association maintains a longstanding policy of restricting use of its party room to owners, residents, and their guests. Consistent with that policy, it refuses to rent the room to local businesses and community organizations as a meeting place for educational seminars. The party room is not a place of public accommodation.

The various events and uses of the Community Center may involve relatively significant use by non-members. For example, the wine tasting events or religious services may invite non-members to attend and use the Community Center. By doing so, the Association is making the Community Center a "place of public accommodation," which could result in the Association having to make additional improvements to the Community Center. We recommend, therefore, that the Association limit the use of the Community Center to events and activities for the residents and members, and their guests.

Religious and Political Meetings

The Board has asked whether there are any legal issues with imposing restrictions on political or religious meetings conducted in the Community Center. In general, the Association has a right to place restrictions on the use of the Community Center*. There are, however,

See Article II, Section 2.1 of the Amended Declaration.

Board of Directors, Falls Run Community Association
c/o Sylva Southwell, Community Manager
April 6, 2007
Page 3

certain limitations on the Association's rulemaking authority, including the federal fair housing laws. **Based on the following analysis, we believe that the Association can restrict political meetings. In addition, the Association can restrict religious meetings, but only so long as the Association restricts ALL religious meetings uniformly, and so long as the Association does not restrict the use of the Community Center by religious groups for non-religious meetings.**

Political Meetings

The Association is free to restrict political groups from meeting in the Community Centers. Political groups are not, as a matter of law, protected by federal fair housing laws. Under the federal statute, it is unlawful "to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C.A. § 3604(b)². If, however, the political group is actually a protected class of persons (such as a women's action group, for example), then the group may be able to claim protected status under the fair housing laws. As a result, the Association would need to be extremely careful to enforce a restriction against political meetings uniformly (i.e., all political meetings are prohibited), so as to avoid a claim of discrimination.

In addition, the constitutional rights of freedom of speech and assembly are inapplicable here. Those constitutional rights attach only to state actors, meaning only entities with governmental authority. A body of case law indicates that there is no state action involved in the adoption or enforcement of private covenants by private associations. "The First Amendment does not protect speech rights against interference or impairment by private individuals, but instead only against state action that interferes with an individual's constitutionally protected rights." *Kir Huber Heights, L.P. v. Liakos*, 2001 Ohio 1761 (Ohio Ct. App. 2001) (citing *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 567 (1972)).

However, a recent decision in New Jersey has challenged the premise that homeowners associations are private entities, and not state actors. In particular, the Appellate Division of the Superior Court of New Jersey decided a homeowners association was required to afford the owners New Jersey constitutional protections, including free speech and free assembly, as the association was akin to a state actor. *See Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association*, 890 A.2d 947 (N.J. App., 2006). Notably, however, no other jurisdictions have followed the holding of the New Jersey court at this time. Also, the *Twin Rivers* case involved the New Jersey Constitution. We do not believe that a Virginia court would follow the *Twin Rivers* opinion with respect to whether a Virginia homeowners association is

² The provision under the state and county statutes are almost identical to the federal statute. Accordingly, the discussion will focus on the federal statute because federal law would be controlling.

Board of Directors, Falls Run Community Association
c/o Sylva Southwell, Community Manager
April 6, 2007
Page 4

akin to a state actor, and therefore subject to the constitutional protections of free speech and freedom of assembly.

Accordingly, in our opinion, the adoption of private restrictions against political meetings in the Community Center would not be subject to the free speech and free assembly protections of the constitution.

Religious Meetings

As noted above, the Association is a private entity regulating the use of a privately-owned facility. As such, the private covenants and rules are not subject to the protections of the First Amendment to the United States Constitution. Yet, the Association must be careful to restrict religious meeting uniformly.

Restrictions against religious meetings in the Community Center or elsewhere on the Association's common areas may raise claims of discrimination. See the discussion above regarding the Fair Housing Act's prohibition against discrimination on the basis of, among other things, religion. 42 U.S.C.A. § 3604(b). In our opinion, however, so long as the Association enforces a ban on religious meetings in the Community Center, the restriction would withstand a challenge of discrimination.

In *Savanna Club Worship Service, Inc. v. Savanna Club Homeowners' Association*, a federal district court in Florida recently considered a similar ban on religious meetings in a homeowners association's common areas³. In that case, "the crux of the claim is that the Club's members, who are fully entitled to assemble in Savanna's common areas for any non-religious purposes, are illegally being treated differently than other members who choose to assemble for non-religious purpose, and that such disparate treatment is a religion-based discrimination in the provision of services under the FHA."⁴ The court, however, found that "the application of a rule barring all religious services from a community's common areas without impeding a homeowner's right to practice his or her religious, and without denying access to the common areas for all other purposes is not sufficient to establish that the club is now being treated differently from persons of other religions."⁵ Thus, the rule was not discriminatory so long as it was applied uniformly.

Based on the holding in the *Savanna Club* case, we believe that Association can restrict the use of the Community Center for religious meetings, but only so long as it does so uniformly. In addition, the Association must permit all members to use the Community Center for non-religious purposes.

³ See *Savanna Club Worship Serv. Inc. v. Savanna Club Homeowners' Ass'n.*, 456 F.Supp.2d 1223 (S.D. Fla. 2005).

⁴ Id.at 1230.

⁵ Id.at 1232.

Board of Directors, Falls Run Community Association
c/o Sylva Southwell,
Community Manager
April 6, 2007
Page 5

Gaming Operations

According to the information provided to us, it is our understanding that the Association permits certain games to be played in the Community Center, including bingo, poker and bunko. These games are played for money, rather than purely for entertainment purposes. In particular, the Association's bingo games generate less than \$25,000.00, annually, the poker games are played with chips and money and they include sums up to \$200.00, and the bunko games involve a \$5.00, fee per person. Please let us know if our understanding is inaccurate in any way.

It is our opinion that it is illegal for the Association to host any type of gaming operation, including bingo, poker and bunko, where legal tender is exchanged, regardless of whether such tender is kept by the Association. Under Section 18.2-325 of the Virginia Code, "illegal gambling" is defined as "the making, placing or receipt of any bet or wager ... of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependant upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of this Commonwealth." We believe the bingo, poker and bunko games qualify as illegal gambling, which, under the Virginia Code, is punishable as a Class 6 felony. Further, it is a Class 1 misdemeanor for any person, firm or association to knowingly aid and abet in the operation of an illegal gambling activity. We further believe that a bingo, poker or bunko night hosted by the Association would constitute aiding and abetting the operation of an illegal gambling activity. In addition, Section 13-3 of the Stafford County Code makes it a Class 1 misdemeanor for a property owner, who knows or reasonably should know of illegal gambling, to permit gambling to continue on the property without having notified a law enforcement officer of the presence of such illegal gambling.

As you may know, Section 18.2-340.15, of the Virginia Code does create an exception for charitable gaming provided that the operator of the charity event obtains a permit from the Department of Charitable Gaming. However, this exception only applies in certain narrow circumstances, to permits for bingo games and raffles, and does not apply to any other gambling where a buy-in is required, chance is involved, and there is a prize for winning, even if the buy-in and winnings eventually are dispersed to a charity organization. We understand that the Commonwealth's Attorney has actively been prosecuting cases of illegal gambling. Because the exceptions are narrow, **we recommend that the Association obtain a formal opinion from the Virginia Department of Charitable Gaming before it permits any such activities to take place in the Community Center.**

An additional exception is created by Section 18.2-340.23, of the Virginia Code, which provides that organizations that reasonably expect, based on prior charitable gaming annual results or any other quantifiable method, to realize gross receipts of \$25,000.00, or less in any 12-month period, are exempt from notifying the Department of its intent to conduct charitable

Board of Directors, Falls Run Community Association
c/o Sylva Southwell, Community Manager
April 6, 2007
Page 6

gaming and from complying with the Department's charitable gaming rules. **Again, this is a determination that should be made by the Virginia Department of Charitable Gaming, before the Association permits bingo or other gaming in the Community Center.**

Even if the Association obtains a permit, please note extensive reporting and record-keeping requirements for charitable gaming organizations, as set forth in the Virginia code.

Accordingly, in our opinion, the Association must refrain from hosting gaming activities where the winnings are retained in the Association's coffers or are distributed to players as winnings. In addition to the reasons set forth above, such earnings, if retained by the Association, could be perceived as income and subject to taxation. If the Association desires to continue hosting the games, we recommend that it host only those where no "buy-in" is required to be fronted, and no prizes are distributed to winners.

If you request it, we can contact the Department of Charitable Gaming and the Commonwealth's Attorney for a formal legal opinion as to whether the games, as you described, are prosecutable. However, based on our review of the case law and our previous discussions with the Virginia Department of Charitable Gaming on other matters, we believe that the Commonwealth's Attorney would find such activity illegal.

The Virginia Department of Charitable Gaming's website is www.dcg.state.va.us. The Department can also be reached by telephone at (804) 786-1681.

Friday Night Movies

You have indicated that the Association currently shows a movie every Friday night in the Community Center. The movie is advertised on the Association's website or on Channel 11. We presume that the movie showing is open for all residents to attend. We do not know if the Association charges an entrance fee. **Based on the following analysis, it is our opinion that the Association cannot show copyrighted movies in the Community Center without first obtaining a license to show the movies.**

Please be aware that the showing of movies outside of private, home use is a violation of federal copyright laws. Title 17 of the United States Code ("the Copyright Act") provides that the rental or purchase of a video, including DVDs, does not provide the renter or owner the right to perform the copyrighted work publicly. Instead, a separate license is required if the video is to be shown "publicly." Section 101 of the Copyright Act provides in part:

"to perform or display a work 'publicly' means ... to perform or display it at a place open to the public or at any place where a substantial number of

Board of Directors, Falls Run Community Association
c/o Sylva Southwell, Community Manager
April 6, 2007
Page 7

persons outside of a normal circle of a family and its social acquaintances is gathered."

Even performance in "semipublic" places, such as clubs, lodges, factories, summer camps and schools are "public performances" within the definition of the Copyright Act.⁶ Here, the Association is showing the movies in a club environment to an audience of residents in a community center. The residents comprise a substantial number of persons outside a family and its circle of social acquaintances. As a result, the Association must secure a license to show the movies, regardless of whether an admission fee is charged.

For your convenience, we did some brief research regarding the options for obtaining a license to show movies in the Community Center. The Motion Picture Licensing Corporation ("MPLC")⁷ offers umbrella licenses for purchase. The umbrella license would allow the Association to publicly-perform videos produced by MPLC's Member Licensors. It is our understanding that all the major Hollywood studios are MPLC Member Licensors. The license is generally for one year, with the license fee based on a variety of factors, including the type of facility, the number of exhibitions to be held, and the number of attendees anticipated per exhibition. However, the license does NOT cover showings where admission is charged or where specific titles are publicly advertised. Thus, even with such a license, the Association could not charge admission for the Friday Night Movie, and could not advertise the showing of the specific movie title to be shown. MPLC can be contacted on the Internet at www.mplc.com, or by phone at 1-800-462-8855.

Alcohol Use

It is our understanding that the Association hosts certain events in the Community Center involving the use of alcohol, including the following: (1) "bring your own booze" events, for which there is an entry fee to compensate the band and food; (2) wine tasting held once a month, for which wine is brought by the residents; and, (3) the Veranda Party each Friday, for which there is no entry fee and wine is brought by the attendees. Thus, the Association is not directly providing the alcohol at the above-referenced events. Please let us know if our understanding of these events is incorrect in any way. Subject to the following analysis, it is our opinion that the Association may host certain events involving alcohol, so long as the Association maintains the proper licenses and insurance coverage, and so long as the Association takes certain precautions.

It is our opinion that the Association must obtain the proper insurance coverage and adequate licenses from the Virginia Alcohol and Beverage Control Board for each event at which

⁶ Senate Report No. 94-473, page 60; House Report No. 94-1476, page 64.

⁷ We believe there may be additional such licensing agencies through which the Association may obtain a license to show movies in the Community Center. It is our understanding that such licenses may be available through Swank Motion Pictures, Inc. (www.swank.com), or through www.copyright.com.

Board of Directors, Falls Run Community Association
c/o Sylva Southwell, Community Manager
April 6, 2007
Page 8

alcohol is served. As a general comment, whenever the Association permits the consumption of alcohol on the common area (e.g. the Community Center), the Association assumes some liability exposure in the event any harm occurs that can be related to the consumption. The more directly the Association is involved in providing the liquor, the greater the Association's potential exposure to liability. It follows, of course, that the safest course of action is not to permit the consumption of liquor on the common areas. I suspect that is not a viable option for the community.

The Board can take steps to reduce liability exposure with a moderate amount of preplanning for such events. First, I recommend that the Association obtain host liquor liability insurance coverage. I suggest that Board determine whether the Association has host liquor liability coverage and that the Board specifically ask the insurance agent what exclusions exist under the current policies maintained by the Association. For example, many policies include exclusions relating to the sale and distribution of alcoholic beverages. **For this reason, we recommend that our association clients do not contemplate charging members for their consumption of alcohol or charging an admission price, which includes the cost of the alcoholic beverages.**

Next, if the Association is sponsoring the event at which it will serve liquor or permit liquor to be consumed, it should, in each instance, confirm with the Virginia Alcohol Beverage Control Board ("ABC") whether it requires an event license. Under Section 4.1-209 of the Virginia Code, community associations in Virginia generally need to obtain a banquet license from ABC for events that are Association-sponsored where alcohol will be served or sold. The Association should not conduct or sponsor an event for which a license is required if it has been unable to obtain a license by the scheduled time of the event. The Board should also bear in mind that the ABC deems the party that obtains the license to be responsible to stop serving persons who have consumed more than they should and to prevent the consumption of liquor by persons below the legal age for drinking (21).

The type and cost of the license will depend on the type of beverages that will be served or sold at the event. Information about the licensing process can be found at www.abc.virginia.gov. For Association-sponsored events where alcoholic beverages will be served or sold, in general, the Association should obtain a one-day special event banquet license, a specialty banquet license or a tasting license, depending on the type of event being sponsored. The Virginia ABC website lists the fees and types of licenses and the Association can apply online for a license. For example, for a holiday party where beer, wine and mixed drinks may be served, the Association should obtain a one-day special event banquet license. This license costs \$60.00, for a single-day event and is utilized for private events where guests are present by invitation and where beer and wine will be sold, complimentary beverages will be served, or residents and owners bring their own alcoholic beverages to the event. See <http://www.abc.virginia.gov/enforce/fonns/banquet.pdf> for the license types, qualifications,

REES, BROOME & DIAZ, P.C.

Board of Directors, Falls Run Community Association
c/o Sylva Southwell, Community Manager
April 6, 2007
Page 9

authorizations and fees. Furthermore, the Association can contact the regional Virginia ABC office for information. The telephone number of the regional office for Stafford County (Richmond North) is (804) 213-4620.

If the Association is planning a catered event on-site, the Association should also obtain a license, even if the caterer already has one, in order to limit exposure. In the case of an Association-sponsored BYOB event, the Association must still obtain a special event banquet license under the Virginia ABC requirements.

For any Association-sponsored event, the Association should take measures to ensure that it complies with state and county laws on alcohol consumption. For example, the Association should check identification to ensure that persons being served are over 21 years of age and the Association should not serve alcohol to visibly intoxicated persons. Establishing a "drink limit" may help reduce risks and liability exposure. Furthermore, if applicable, the Association should take precautions to ensure that intoxicated persons do not drive vehicles to and from the event. Arranging for transportation or cab services may aid in limiting the Association's exposure to liability.

With respect to the Association's liability, Virginia is a non-dram shop state, meaning that there is no statute in place that places strict liability on a person or entity that serves alcohol to an individual and where that individual, because of his or her alcohol consumption, causes injury to a third-party or to property. Similarly, Virginia courts have been reluctant to place liability on persons or entities that sell alcoholic beverages to persons who then, because of their intoxication, cause damage to a third person or to property⁸. However, the Virginia General Assembly could, at any time, pass a law imposing such liability or the courts may begin to find liability where it did not exist in the past.

Finally, if the Association intends to permit a person who rents the Community Center facilities to serve liquor or have liquor consumed at the event, the Association should use a rental agreement that makes the renter responsible to comply with ABC laws and for the supervision of the consumption of liquor. The agreement should require the renter to obtain insurance naming the Association as a third party beneficiary and that insurance should be primary over the Association's insurance. The agreement should also require the renter to indemnify and hold the Association, its officers, directors, agents and members free from claims arising from or related to the use of the premises and the consumption of alcohol. If the Association permits such

⁸ See *Robinson v. Moran, Inc.*, 525 S.E.2d 559, 562 (Va. 2000) (holding that "the act of selling alcoholic beverages [is] too remote to be a proximate cause of injury to a third party resulting from the negligent conduct of the purchaser of the beverages"); *Lucas v. C&B Assocs.*, 18 Va. Cir. 446, 447 ("Virginia law is clear that liability is not imposed upon an establishment that serves alcohol to a patron who subsequently drives an automobile an injuries a third party.")

REES, BROOME & DIAZ, P.C.

Board of Directors, Falls Run Community Association
c/o Sylva Southwell, Community Manager
April 6, 2007
Page 10

private events, the Association should expressly disclaim any responsibility to supervise the consumption of liquor and it should not have anyone attend for this purpose on its behalf.

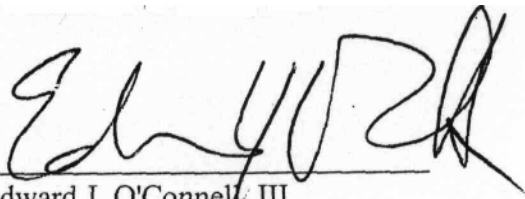
I am available to the Board to discuss any of these issues in greater detail. Please let me know if I can assist the Board further.

With kind regards, I remain

Very truly yours,

REES, BROOME & DIAZ, P.C.

By:



Edward J. O'Connell, III

KCM:jlk
cc: James Armstrong, Managing Agent (AMS)
Katherine C. McCarthy, Attorney-at-Law