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Beach Walk Homeowners Association, Inc.
Board of Directors
c/o Ms. Tracy Mitchell
1029 N. Lake Park Blvd.
Carolina Beach, NC 28428

VIA E-MAIL

In re: *Exercise Classes within the Common Elements*

Dear Board Members,

You have asked for my opinion regarding the association's exposure to liability in relation to certain exercise classes taking place within the community pool (i.e., the common elements); and furthermore, whether the governing documents for Beachwalk Subdivision authorize the Board of Directors to regulate and/or prohibit said exercise classes from taking place within the common elements. To aid my analysis, I have referred to the following documents: The Articles of Incorporation for Beachwalk Homeowners Association, Inc.; Declaration of Restrictions recorded in Book 2149, Page 710; Bylaws for Beachwalk Homeowners Association, Inc. recorded in Book 5818, Page 1358; and the Amended and Restated Declaration of Covenants and Restrictions recorded in Book 5818, Page 1323, all of the New Hanover County Registry.

I. Conducting exercise classes upon the common elements increases the association's exposure to liability.

The Association, as the owner of the common elements (which includes the community pool), has a legal duty to exercise reasonable care in the maintenance of the common elements for the protection of lawful visitors, which extends to all owners and their lawful guests. As such, when special events take place upon the common elements, the amount of people to whom the association's duty of care is owed expands and its exposure to liability increases. Thus, the association, by permitting exercise classes to take place within the pool, is routinely expanding its duty of care, in some cases, even to non-association members. Moreover, in addition to the expanded duty of care, the heightened risks associated with the exercise classes will almost certainly cause an increase in the association's insurance rates (and potentially a cancellation of the policy), in violation of the use restrictions contained in Section 3 of Exhibit B to the Declaration.

Furthermore, if the exercise classes are to continue within the pool area, then the association should consider taking the following steps: conducting daily inspections of the pool area to discover and warn of any potential hazards, such as cracks, slippery spots or uneven surfaces; increasing liability insurance coverage; working with the association's insurance agent to obtain Special Event insurance coverage, or a similar endorsement to the liability policy; hiring a lifeguard to be present during classes; installing signage to draw attention to slippery surfaces and other potential hazards surrounding the pool; obtaining liability waivers from all participants; installing an emergency phone, if none is available; and installing one or more Onsite Automated External Defibrillators.

However, in furtherance of the Board's fiduciary duties to act in good faith and in the best interests of the association, I believe the most prudent approach for the Board of Directors to take is to prohibit exercise classes, or any other type of class, from taking place within the pool. Although this action may not appease all of the owners within Beachwalk subdivision, it is imperative for the Board of Directors to take reasonable measures to minimize the likelihood of incidents occurring on the common elements and to prevent the unnecessary increase of insurance costs when possible.

II. The Board of Directors is authorized to enact rules, regulations, or policies regarding the use and enjoyment of the common elements, including the community pool.

The Declaration provides the Board of Directors with broad authority to adopt rules and regulations governing the use of the pool and other common elements. In particular, Article 5, section 5.1(f) of the Declaration authorizes the Board of Directors to "[i]mpose use restrictions for the use and enjoyment of the common elements, and improvements thereon, which may further restrict the use of the common elements." Further, Article 4, section 4.5(c) of the Declaration clarifies that, although the owners generally possess easement rights to access and use the common elements, such rights are "subject to the right of the Board to adopt rules, regulations or policies regulating the use and enjoyment of the common elements."

Therefore, based upon the foregoing, it is my opinion that it is in the best interests of the association for the Board to prohibit exercise class from taking place in the pool. In addition, as stated above, the Board possesses the authority to regulate the use of the common elements; and any such rule or regulation aimed at minimizing incidents on the common elements should be understood to be consistent with the fiduciary duties owed by the Board to the association members.

Sincerely,

Mitchell C. Barnes