HERITAGE ESTATES PROPERTY OWNERS ASSOCIATION
MINUTES FOR BOARD OF DIRECTORS' MEETING VIA ZOOM
WEDNESDAY JUNE 28, 2023

Directors present: Duane Esarey, President; Jimmy Copeland; Vice President; Gay Cass, Secretary; Janet Johnson, Treasurer; Michele Nowak, Assistant Treasurer. Paula Shepherd, Ginger Jordan and Robert Landen, directors at large. At 611 p.m. on Wednesday, June 28, 2023, President Duane Esarey declared a quorum and called the meeting to order.

Welcome and updates: since June 4 BOD meetingthe following is reported:

Caution signs on River Sound hill are now in place (Joe Nowak and Duane Esarey)
Limbs and trees/weeds have been cleared at the entrance and garden bed (Esarey)
Remnants of giant pine tree have been cleared from Common Area (Nowak, Jordan, Esarey).
Cut back the limbs and brush along Highway 163, making it safer to enter the highway (Esarey).
A new septic field has been installed on Lot 47.
New neighbors have purchased 137 Timbersong.
Cathy Rogers is here again for the full summer.

Upcoming projects:

Major trim planned along uphill side of River Sound.
Paint and stain gazebo.
Consider taking out/trimming one of the rhododendron bushes at the gazebo.
Install culvert at Common Area to manage flooding around the electrical box.

Today's agenda

Approve previous Board meeting minutes.
Introduce and approve 2024 proposed budget.
Review draft documents and notices for Annual meeting mailings.
Determine the status and course of action for uncollected assessments for seven lots.

Secretary's Report: The minutes and attachments for the June 4, 2023, BOD meeting were emailed to the directors in advance of this meeting, allowing them time to evaluate and determine if there were corrections to be made. Hearing no corrections offered, Janet Johnson made a motion we accept the minutes as presented, seconded by Michele Shepherd, motion carried.

Treasurer's Report: Janet Johnson, Treasurer reported we were granted a $275 refund from the attorney and that amount has been credited to our Annual Budget contingency fund. The Treasurer presented the 2024 proposed Annual Operating Budget to the Directors for consideration prior to it being mailed to the membership in the annual meeting packet. Paula Shepherd made a motion, seconded by Ginger Jordan that we approve the proposed budget and it be mailed to the membership as stated in our Bylaws. Motion passed.

Old Business:

- Annual meeting notices and document obligations
  - DATE August 5th @ 5:00 p.m. – potluck supper
  - LOCATION The County's new River Access Shelter 1 mile S. of Heritage Estates.
  - MAILING PLAN: Notice of annual open BOD Meeting (via Zoom July 30)
    Nominations/election notice
    Annual membership list distribution
    Annual meeting proxy form
    Annual fence notice

- Three Board of Directors seats expire at this Annual Meeting. 2023 is the second year of the BOD size reduction from 9 to 7 members. Jimmy Copeland and Paula Shepherd agreed to be nominated to additional BOD for 3-year terms. Robert Landen chose not to be nominated.
- Mike Shepherd and Jimmy Copeland are working to integrate new Bylaws terms into the ARC checklist.
- Long term Reserve Planning-interactive spread sheet video has been posted to the website
- *At this point* the Board turned its attention to the old business of examining the status of seven of the Heritage Estates lots for which dues have historically not been collected.
    - Jimmy Copeland and Robert Landen recused themselves from the rest of the meeting, each citing ownership of a lot under consideration.
    - The remaining six Directors then entered closed session to more freely discuss the history, legal advice from attorney, and ramifications of the matter and determine a resolution.
- Exiting closed session, the six members of the Board unanimously approved the attached motion to the following effects:
    - Affirmation that the extinguishment of both voting rights and assessments of two lots eliminated by the Declarant were in fact valid, in as much as the Declarant was acting under their special rights according to state statute; and…
    - On January 1, 2024 HEPOA will resume collection of annual assessments and reinstate voting rights for five lots which previous Boards had ceased collecting. These were done at various times when individual lot owners filed third-party consolidations with the County and subsequent to the period of Declarant control.
    - A detailed review of procedures and precedents used by the Board to reach these conclusions will be attached to the motion and shared with the Membership as part of the meeting minutes (attached).
    - The president would share the motion and its attachment along with a reader-friendly notification of the action taken by the BOD. This notification is to be shared by certified mail with the affected lot owners.

There being no other business meeting adjourned at 7:40 p.m.

Respectfully submitted,
Gay T. Cass

HEPOA Board of Directors: Motion passed June 28, 2023

Having conducted a comprehensive study of state statute, relevant case law, and our own governing documents, the Directors of Heritage Estates Property Owners Association (HEPOA) finds support for the legality of the Developers' decision to extinguish assessments and voting rights for Lots 34 and 5 before the dissolution of their development company (Heritage Estates, Inc.) in 2007.

However, the Board acknowledges a lack of proper review or discussion regarding the applicability of deed consolidations filed with the County that were initiated by owners themselves that had supposedly extinguished the assessments for five additional lots from 2014 through 2020. The Board's Treasurer stopped collecting assessments for these lots, but our study suggests neither the owners nor the Board had the authority to take these actions. Furthermore, the Board failed to examine the added financial burden of these changes to the other 49 assessment-paying lots.

This situation, if continued unchecked, could encourage other owners to attempt extinguishing their assessments, despite questions about the legality of these extinguishments and the increased financial burden placed on remaining lots. Therefore, beginning January 1, 2024, the Board has decided to resume collecting annual assessments for the lots consolidated by owners rather than by the developer, in line with state statute NCGS 47F-103 and numerous case-law decisions. Future decisions about forgiving or collecting back assessments will be addressed separately.

Approved by the 2023 HEPOA Board of Directors on June 28, 2023.

Attachment: Comprehensive review of HEPOA assessment collection discrepancies until 2023.

Notice: Pursuant to North Carolina law § 7A-38.3F, we encourage potential litigants to voluntarily initiate mediation. HEPOA is open to participating in any mediation for potential litigation.

Attachment approved by HEPOA Board June 28, 2023 for assessment motion of same topic and date

Comprehensive review of HEPOA assessment collection discrepancies until 2023
Prepared by D. Esarey for HEPOA Board of Directors (incorporating/adding to information from legal consultation)

Section 1: Introduction: Heritage Estates is a planned community in Ashe County, North Carolina, platted in 1999 as 56 lots. To date, seven of these lots have been treated as exempt from assessment collection by the Association Board.

The exemptions fall into two categories: The first category includes Lots 5 and 34, which were exempted by actions of the Declarant (President of Heritage Estates, Inc. development corporation) in 2002 and 2005 respectively. At this point, HEPOA did not yet exist. In these lot's sale deed, the Declarant (and her 2004 successor) recorded details further illustrating her logic and intent, referring to the Declaration/Covenants and detailing rights held as the Declarant. The second category of lots treated as exempt from collection from assessments consists of five lots for which assessments were no longer collected after three separate lot consolidations with the County were executed. These three combinations took place from 2014 to 2020, well after the end of the Declarant control.

Guidance on the conditions under which Declarants and lot owners in HOAs can legally eliminate assessment fees is provided by North Carolina statutes and case law (law as established by past judicial decisions). When viewed in the light of these legal standards, the past actions by the Association Board in ceasing collection of assessments for the second group of lots are legally questionable. This review provides a detailed overview of factors relevant to both groups of assessment variances.

Section 2: Declarant rights and actions during the period of Declarant control: In creating and marketing the lots of the Heritage Estates community, the Declarant was authorized by state statute to deploy specific exclusive rights. The powers listed in the 1999 Declaration primarily derive from NCGS 47F-103 (especially Sections 2, 6, 9, and 11 (ii and iii). These development rights are further explained under NCGS 47F-103 (28 ii) as Special Declarant rights. Special Declarant rights are "reserved for the benefit of a declarant" and can only be transferred to the HOA by an instrument explicitly listing their transfer.

In Article 2 of the Declaration, the Declarant reserved the right "to change the property line **to any unsold lot**" (emphasis added). Together with the stipulation in Article 4 that "no lot shall be further subdivided," these provisions, together with the terms of NCGS 47F-103, indicate that the Declarant held the exclusive right to change lot boundaries and combine lots. Another Declarant right is the ability to modify voting rights and assessment obligations. This right was specifically detailed in Article 1 as "in the event two or more lots are combined and one residence is constructed on the combined tract" (emphasis added) the combined tract would "thereafter be considered as one tract" for annual assessment purposes. In the context of a Declarant right, Article 1 can be interpreted to mean that when the Declarant sold multiple lots as a combined unit, followed by the construction of a residence on these lots, the buyer/builder will be entitled to having only a single assessment for the combined tract. This intended interpretation is further validated in the terms of a 2002 sale where the Declarant sold and combined Lots 5 and 6, and further detailed the exact condition under which the assessment would be reduced.

The Declarant crafted the respective deeds for Lots 5 and 6 to specify that the lots would henceforth only be sold together (Ashe County Book 282:1490-1492 and 1493-1495). In permanently binding the two lots in their deeds, the Declarant added the explicit condition that the combined lots would pay a single assessment "providing that a home was ***subsequently*** constructed on the conjoined lots" (quoting text in the deeds, but with emphasis added). This stipulation further clarifies the Declarant's intent, as expressed in Article 1 of the Declaration, requiring a home must be subsequently constructed upon the multiple-lot combination to qualify for the Declarant to allow them to have a single assessment.

Note that, under the Declarant's authority, these actions altered the per-lot covenanted assessment status of Lots 5 and 6. But they had no effect on the lots' status in Ashe County deeds and tax records. Both lots continued to pay individual taxes and were recognized as separate parcels. The Declarant's right was exercised to modify the assessment status (and by extension the voting status) of the combined lots only for the purpose of the covenanted pro-rata, planned community assessment obligation. NCGS 47F-103 authorized this and other Declarant powers for developers to offer as incentive to potential buyers, thus enhancing sales in the new developments. Neither the statute nor Declarant would have any incentive to otherwise extend community members themselves the power to reduce some their own per lot assessment at the expense of other members.

After the 2002 combination of Lots 5 and 6, home construction there proceeded, and the two lots were assessed as one (and shared one vote). In 2004 and 2005, the owner of these combined lots then purchased two more adjoining lots from private owners. It is especially instructive that owners of these four adjacent lots did not continue the consolidation pattern and combine all four lots into a single tract for the purpose of paying only a single assessment. The fact that NCGS 47F 103 describes this as a Declarant right indicates that association members did not possess the same powers as the Declarant. In all probability, with the Declarant active in the community, the owners were aware they were unable to consolidate lots obtained from other owners into a single assessment. That option was only available to the Declarant, whose only incentive to exercise it would have been in the sale of previously unsold lots. If Article 1 of the Declaration expressed a right open to all multiple lot owners in the nascent subdivision, it would have been extremely attractive to the owners of the combined Lots 5 and 6.

In 2004, the development corporation, Heritage Estates, Inc., was sold. The following year, the succeeding developer, as successor to the special rights of the Declarant, invoked his rights on two more occasions, in each case to aid in the sale of previously unsold lots. In these deeds, the developer again further clarified the Declarant's exact interpretation and intention in Articles 1, 2, and 4 of the Declaration.

One of these instances involved Lot 34, which the Declarant subdivided equally and permanently by creating two separate deeds (Ashe County Book 326:683-685 and 686-688). Each half was then permanently attached to the adjacent lots (33 and 35). This attachment was executed by use of the Lot 34 South and 34 North deeds (the Declarant obviously having no way to cement the arrangement in the previously executed deeds of Lot 33 and 35). In the Lot 34 deeds, the Declarant "specifically excludes this transaction from restriction number four (#4) [no lot shall be further subdivided] and invokes its right under restriction number two (#2) to change the property line of any unsold lot in Heritage Estates." Again, this Declarant right was deployed to incentivize the sale of unsold lots. Not having the ability to mirror these permanent attachments using the Lot 33 and Lot 35 deeds, the Declarant added additional text into each deed of the partitioned Lot 34 that "the Grantees, by their acceptance of this

deed, agree that the above-described property must be conveyed with any adjoining property owned by the Grantees. This condition is appurtenant to said tract and shall run with the land" (quoting the respective deeds with emphasis added).

It is noteworthy that the Declarant uses the exact wording of statute NCGS 47F:103, in which "appurtenant" refers to the special right of the Declarant to allocate (or extinguish) lots' covenanted rights and obligations that run with the land. Once again, note that, under this statute, these Special Declarant rights could only be passed on to the Association by being specifically enumerated in a transfer. As a result of these actions, Lot 34 was split into two independent parcels for the county's deed records and tax purposes, but at the same time became linked to the adjacent lots for the purposes of the HOA. While these newly created lots (34 South and 34 North) continued to pay individual Ashe County taxes, their appurtenant interests (i.e., their "per lot" vote and assessment under NCGS 47F:103) were permanently conjoined with Lots 35 and 33, respectively. Considering that the two half lots had originally been apportioned a single vote, it seems reasonable to infer that the transaction extinguished the allocated interests for the purposes of Association governance. If this was not the case, there would have been no need to formally link the lots. The Declarant could have simply divided and sold them as new lots with vote and assessment obligations.

In a third instance, the Declarant simply adjusted the shared boundary of Lots 8 and 9, in order to make the initial sale of Lot 8 (Ashe County Book 328:1279-1281). This alteration was achieved by way of matching and opposed surveyed exceptions and conveyances. This modification made no change in the net size, or votes, or assessment status of each lot.

Section 3: after 2008 – the period of HEPOA control:
The developer's corporation was dissolved with the Secretary of State in 2007. Heritage Estates Property Owners Association was formed one year later.

In three subsequent cases, multi-lot owners in Heritage Estates filed documents attempting to eliminate the assessment obligations for a total of five lots. Each instance involved the purchase of lot(s) adjacent to a lot that had already containing a residence for many years, followed by filing a recombination survey or instrument of combination with the County. Each of these combinations was carried out between seven to 15 years after the Declarant's corporation was dissolved.

None of these cases involved a lot owner who purchased all of their lots directly from the Declarant. None could be characterized as an invocation or continuation of Declarant rights to alter the covenanted status of the lots. Being a legal operation carried out with the county to put multiple lots under a single deed and a single county tax assessment, the combinations contained no references to the HEPOA member's right or intent to change these lots' covenanted status with HEPOA. There are no records of the Association Board's response to these county deed combinations, but assessment collection all but one of the combined lots ceased in the following year after each combination.

None of the internal references to the county's residential subdivision ordinances in these combinations indicate the county has any power under NCGS 47F to obligate HEPOA to recognize an alteration to the Association's covenanted matters of record that run with the land. Considering the terms of NCGS 47F 103, it seems unlikely that any corporate or public party other than the Declarant, *including the Association's Board (unless acting under the aegis of a formally documented transfer of Special Declarant Rights)*, can extinguish covenants and per-lot rights and obligations that run with the land.

There appears to be no written record that the consolidating owners formally requested the Association Board release them from assessment obligations on these lots, or of such requests being approved by the Association Board. The absence of any formal requests, evaluations, or actions regarding these purported extinguishments complicates a reconstruction of the process. However, it seems Association Board simply stopped collecting assessments, accepting without review that these actions met the terms of the Declaration by rendering all combined lots to a single title with the County. Setting aside the fact that Articles 1, 2, and 4 of the Declaration refer to Special Declarant rights, none of these cases' sequence of adding and combining adjacent lots to a lot already having an existing residence matches the terms or intent of the Declaration as expressed by the Declarant in extinguishing appurtenant allocations during the period of Declarant control. Accordingly, the situation can best be described as "a series of unrecorded general agreements to stop collecting assessments on these five lots."

In summary, the Association Board, either at the time of these actions, or until now, does not seem to have made any detailed examination or taken any position (except by default in ceasing collections) on whether the lot owners, or the Association Board itself, had the right under state statute, relevant case law, or the Association's governing documents to extinguish these five assessments.

Section 4: North Carolina statutes and case law on HOA lot consolidations and assessment obligations:

In 2001, a little more than one year after the Heritage Estates Declaration was filed, a North Carolina Court of Appeals rendered a final decision on a 1999 court case regarding lot-owner combinations in a Henderson County home-owners association established in 1987 (Claremont Prop. Owners Ass'n v. Gilboy, 1, 42 N.C. App. 282, 542 S.E.2d 324, 2001). The 2001 appeals decision decided that extinguishing covenanted HOA lot assessment obligations by way of combinations places an improper burden on other lot owners. According to the Claremont decision, absent a specific provision to the contrary in the covenants/declaration, combining of HOA lots does not alter the lot owner's obligation to pay assessments ("a real covenant that runs with the land"). The lot owners in the Claremont case had purchased previously combined lots but were subsequently ordered by the North Carolina Court of Appeals to retroactively pay separate assessments per lot.

While Article 1 of Heritage Estates' Declaration might seem to read as an opportunity for HEPOA members to attempt to match the Developer's terms for extinguishment of assessments, we contend that Article 1 quite clearly expresses Special Declarant rights that the Developer employed, in combination with Articles 2 and 4, to market previously unsold lots. There is no evidence that these Declarant rights were subsequently transferred to the Association as of the dissolving of the Declarant's development corporation. With regard to ambiguity in reading the Declaration, case law has ruled that, when restrictive covenants are ambiguous, their meaning must be construed by determining the intent of the parties (Long v. Branham, 271 N.C. 264, 268, 156 S.E.2d 235, 238-39 (1967). In a previous section we attempted to examine the Declarant's intent by reviewing actions and statements in constructing deeds of trust, as well as in the Declarant's construction of the Covenants. Beyond this, Smith v. Butler Mtn. Estates Property Owners Assoc. (324 N.C. 80, 85, 375 S.E.2d 905, 908) established in 1989 that, "in the absence of a provision in the covenants to the contrary, restrictive covenants running with the land in a subdivision may be modified or repealed only by a release or agreement executed by all of the property owners in the subdivision" (emphasis added, otherwise quoting Claremont Prop. Owners Ass'n v. Gilboy).

Although Article 2 of Heritage Estates' Declaration prohibits changing lot boundaries following the Developer's tenure, it is noteworthy that the Claremont decision does recognize the right of lot owners

in North Carolina HOAs to lawfully combine their lots with a third party for a variety of reasons. However, the Claremont decision also explicitly states that such combinations alone do not eliminate the inherent obligation to pay assessments proportionately with other lot owners, as covenanted on a per-lot basis. In fact, citing Ingle v. Stubbins (240 N.C. 382, 82 S.E.2d 388 (1954), Claremont also held that even though a property that was once multiple lots that were obligated for assessment was subsequently conveyed as a single combined lot, these properties remain subject to and must always conform to the servitudes created by the covenants as they originally attached to the property.

Subsequent court decisions have consistently affirmed these points (Fawn Lake Maintenance Commission v. Abers, 149 Wn. App. 318, Wash. Ct. App. 2009; Diercks v. Odom, Ex parte Odom, 254 So. 3d 222, 2017; Tanglewood Prop. Owners' Ass'n, Inc. v. Isenhour 254 N.C. App. 823, N.C. Ct. App. 2017). Likewise, cases continue to affirm that both the exact language and the intent of the original covenants and the Declarant must be considered (Haas v. Jurgis, 709 S.E.2d 601 N.C. Ct. App. 2011). Likewise, Dragt v. Dragt/DeTray, LLC (139 Wn. App. 560, 571, 161 P.3d 473 [2007] agree a lot owner cannot unilaterally modify their covenant by actions taken with the county; also see Claremont, as cited above).

When addressing past mistakes by former HEPOA Boards to allowed non-Declarant extinguishments, our current HEPOA Board of Directors also refer to other existing legal precedents. For example, Riss v. Angel (131 Wn.2d 612, 623-24, 934 P.2d 669 (1997) moved courts towards placing “special emphasis on arriving at an interpretation [of the covenants] that protects the homeowners' collective interests." The Fawn Lake decision (also cited earlier) offers yet another crucial principle. In this case, the court ruled for the reinstatement of assessments for each of the distinct lots combined, even though the Association Board and other Association representatives previously and erroneously suggested assessment extinguishments were possible.