CHESSER & BARR
ATTORNEYS
1201 Eglin Parkway, Shalimar, FL 32579
398 N. Main St., Ste. B, Crestview, FL 32536
www.chesserbarr.com

[redacted]
mike@chesserbarr.com
Please respond to Shalimar office

VIA EMAIL ONLY
[redacted]

[redacted], Treasurer
[redacted]
Homeowners Association, Inc.
[redacted], FL [redacted]

Re: Opinion Letter

Dear [redacted]:

You have asked that I provide an opinion regarding a number of matters confronting the Board of Directors of the [redacted] Homeowners Association, Inc. I have read all of the documents you provided to me, including the organizational documents for your association and all email and communication from members, the prior opinions of [redacted], [redacted] and [redacted], each one a very good lawyer.

From the correspondence and from the recent history of your association it is clear that there has been disagreement about the matters set forth in the attorneys' letters. In my opinion none of the letters is wrong, but each is written to provide support for one side or the other of the disagreements in your association, and each is only part of the better answer.

My assumption is that your members disagree about the amount of control your association should have over the conduct of individual members. That disagreement is as common as the national differences in politics. I have drafted subdivision documents with both philosophies, depending normally on the nature of the property.

On most occasions when confronted with relatively rural property and larger lots, the owners seek more freedom and less subdivision control. Others, like some in new and close together subdivisions (an example is Swift Creek in Niceville), the buyers look for and appear to appreciate very controlled relationships.

In general, the closer together people live, the greater the need for standardization in both building codes and in conduct of the residents.

There is no express provision in the law, or in your documents, for a board of directors to grant a "variance" from strict requirements set forth in Association documents. In addition, I know of no provision in *any* subdivision documents or in the law that permits any association board to grant a "variance." In that way an association is different from a local government, where a variance *can* be granted. But a variance can be granted by government only upon a finding of a narrow set of conditions. Without a legal variance, a government cannot pass laws and then enforce them differently among citizens.

I've said that there is no right stated in law for an association to grant a variance to its documents. But that's not the answer to your Association's questions. I don't mean this opinion to be didactic, but in a sense there is an analogy between your job as an Association to your members, and a parent to a child. You should have rules, and your policy must be that those rules be followed. But you can't be so rigid with those rules that strict compliance becomes ridiculous.

While you can't grant a variance, any board can elect not to enforce a rule. For instance, if you aren't sure of the meaning of a statement in your documents, you don't have to spend money to get a court to define an unimportant term. If circumstances are so ambiguous that you don't know whether a court would enforce something, you have a duty to protect an association's treasury. I wouldn't advise you waste money to make a point that's not important.

> "Courts have properly decided to give directors a wide latitude in the management of the affairs of a corporation provided always that judgment, and that means an honest, unbiased judgment, is reasonably exercised by them." *Otis & Co. v. Pa. R. Co.*, 61 F.Supp. 905, 911 (E.D. Pa. 1945). "The business judgment rule is a policy of judicial restraint born of the recognition that directors are, in most cases, more qualified to make business decisions than are judges." *Int'l Ins. Co.*, 874 F.2d at 1158 n.20.
>
> Florida courts have extended business-judgment deference to common interest associations "if [a] decision is within the scope of the association's authority and is reasonable – that is, not arbitrary, capricious, or in bad faith."
>
> "[T]he 'business judgment rule' protects the Association's board of directors when making business decisions in good faith." (Citation omitted.) The question of reasonableness under the business judgment rule is an issue of fact. *Miller*, 284 So.3d at 537 (citation omitted).

See 304 So.3d 1268.

The board of every association is expected to use the "business judgment rule" in enforcing its documents. That rule requires the board to do that which is in the best interest of the *association* depending on the facts and circumstances known to the board when a decision is made.

I see correspondence that indicates these covenants, even the setback covenants, have been regularly violated, with the consent of even that board which has now resigned. I also see an expression of their desire to turn over a complete new leaf and enforce all covenants prospectively.

There is case law that a board of directors has the authority to change its direction and to declare that all future violations will be prohibited. In order to do that, the board would have to adopt a rational consistent future policy and announce it. That policy change, particularly one poorly rationalized, would require almost unanimous application in order to be enforced. More importantly, the more frequent and pervasive the previous violations of that rule, the more unlikely a court would enforce that change, even if your board announces a new policy of uniform enforcement.

You all know that your board has a fiduciary relationship to its members. That does not mean that it has to enforce every rule or punish every violation. Some rules are not worth what they cost to enforce, and sometimes enforcement is not worth the expense or resistance it causes. Your fiduciary relationship does not mean, for instance, that you have to file liens or lawsuits in every instance, and your documents do not require that you do that. It does mean that you try to enforce your covenants in every reasonable way, unless there is a powerful argument to do otherwise. If there is such an argument, a board may in fact properly exercise its fiduciary duty by doing nothing.

The board can decline to take action if that's in the best interest of the association, considering all matters known to the board. A part of the rationale for that is the fact that each member may bring an action against another member if they feel strongly about a violation. The mediation requirements in Chapter 720 would still apply, and the winner of litigation would generally have his legal expenses paid by the loser. The association would only be involved if someone joined the association in the lawsuit. The board should then decide whether a specific conduct is in fact a violation and, if it is, whether the conduct is of general importance to all members, or whether the violation is primarily a personal matter between a limited number of members. Some disputes will not invoke the association's involvement.

If the board finds itself stepping back from enforcing any particular covenant on a consistent basis, it should probably make reasonable efforts to amend that rule.

Now to address specifically the questions asked:

1. *The "variance" granted to Mr. _____ to build a roof over his RV within 18 feet of the property line.*

I understand there are other similar roofs and other structures built closer to property lines than 30 feet. If in fact you have enough other violations that this one fits among many that already exist, you have no absolute right to prevent this one. Particularly where the board has no idea what would happen in litigation, in my opinion you may exercise your business judgment, not to grant a variance, but to decide to do nothing. If you went to court, I know it would cost you money, I know it would cost the homeowner money, and I don't know which one of you would win and be required to pay the other. You could, in my opinion, exercise good judgment not to risk the association's treasury.

CHESSER & BARR
ATTORNEYS

2. *Somebody in the subdivision has chickens.*

I see from correspondence that there are very strong feelings about keeping them, and equally strong feelings about removing them. I also see correspondence that says those chickens were there before the covenants were amended to prohibit them. If that's true, I think you'd find it very difficult to have a court enforce that covenant. I don't know the size of the lot of this owner who has chickens. In my opinion the board of directors could use its discretion not to file a lawsuit to remove the chickens, in part because this may be more personal between two owners than of general interest. The offending member has some fairly powerful defenses, and no one can predict the outcome of court action. You may tell these owners to use the authority of the covenants to file an action against each other. If the board elects not to become involved in my opinion the board would be dismissed from an action filed by either member.

Please remember that the conclusion that the board has the discretion not to file actions on behalf of the entire association is in part motivated by the fact that any owner who is especially upset by somebody else's violation of a rule has a right under these documents to file a private action to ask a court to enjoin the violation. That owner would pay the costs and if he is successful be reimbursed by the offending owner for that expense. In my opinion neither owner would have a claim against the association for failing to bring the action. Remember too that the board's decision to take no action carries the message that a particular violation is unimportant and will be considered precedent in future similar violations unless the board carefully explains its rationale in its minutes. The board should always deal with a complaint by reciting in its minutes whether it's in the association's best interests to get involved and include in the minutes why or why not.

I know this opinion is likely to make association decision-making more difficult because there are not always right (or wrong) answers. As a rule, require covenants to be followed unless you clearly document in your minutes why you did not. Then expect exceptions to always be challenged, because undocumented, arbitrary or illogical exceptions will set precedents. Amend your documents if you can to reflect what your subdivision really wants.

Please call me if there are questions about the meaning of this letter.

Yours sincerely,

Mike Chesser

DMC:sah