Madden Law Firm LLC

April 19, 2017

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APR 28 2017
COMMUNITY DEVELOPMENT
SEZ2017-00003

VIA EMAIL & Hand delivery

Jessica Leatherman, Planner
Department of Community Development Zoning Division
P.O. Box 398
Fort Myers, FL 33902

RE: Olde Hickory Golf and Country Club / SEZ2017-00003

Dear Ms. Leatherman:

We are in receipt of your April 11, 2017, letter directed to Stacey Hewitt at Banks Engineering regarding the Olde Hickory Golf and Country Club Special Exception Application. While we are somewhat disappointed in the decision to revoke the finding of sufficiency for the Special Exception Application, we understand why it was done based upon the mountain of paperwork that you received from attorney's for an association member that is opposed to the matter.

The purpose of this letter is to specifically address the staff comments set forth on Page 2 of your letter. The first staff comment asks for confirmation from the HOA for the authority of the General Manager to represent the HOA in this application. It notes that acceptable confirmation will be a) addressing the HOA Annual Meeting Minutes from March 20, 2017, where the proposed alterations of the common area/pool cabana project is rejected; and b) if the HOA asserts other, or additional authority to override the vote, then that authority must be detailed in this response.

Attached for your use is a copy of a letter dated August 15, 2016, signed by the Master Association Board authorizing Peter Tschertnitz, as General Manager, to make application for the Special Exception. The document speaks for itself.

To address subparagraph a) and subparagraph b), we think it is necessary to point out that the narrative that you received from the Pavese Law Firm together with the HOA's Annual Meeting Minutes from March 20th all deal with proposed alterations to the common areas/pool cabana project having to do with capital improvements. It is important to realize that the application for the Special Exception is not an application for Development Order or Limited Review Development Order or Building Permit for any alteration to the common area/pool cabana project.

Much to the contrary, the Special Exception Application and approval is an application to legitimize a use of the common areas of the community that has been used for this purpose historically. The Special Exception will legitimize the use and applying for the Special Exception has been authorized by the Board.

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As you will see from the attached excerpts from the community's association documents, the Board has the authority to conduct all matters on behalf of the association except those which specifically require member approval. The Special Exception application does not require any vote from the members of the association.

This opinion is submitted for your use in finding the application sufficient, as was done in the past, and for moving the matter forward to hearing.

Thank you in advance for your cooperation.

Sincerely,

Joseph M. Madden, Jr.

JMM:sh
Enclosures
cc: Client
John Fredyma, Senior Assistant County Attorney
Audra Ennis, Section Manager, Zoning Department

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OLDE HICKORY
GOLF & COUNTRY CLUB

14670 Olde Hickory Blvd., Ft. Myers, FL 33912
Phone: (239) 768.2400 • Fax: (239) 768.9797 • www.oldehickory.cc

Ft. Myers, August 15th, 2016

Reg.: Pool Cabana / Liquor License

We hereby authorize Peter A Tschernitz, General Manager of The Olde Hickory Golf & Country Club Master Association, Inc to act and sign any and all documents and communications and act on behalf of the association as it relates to the pool cabana project. This may include County Zoning and Permitting, liquor license permitting, building permits and others.

Board of Directors

Olde Hickory Golf & Country Club Master Association, INC

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Joseph Madden

From: Ellis, Sean <SEllis@ralaw.com>
Sent: Monday, April 17, 2017 4:50 PM
To: Joseph Madden
Subject: Excerpts from Olde Hickory Governing Documents

Powers of the Board:

Sections 2.5 and 2.6 of the Master Declaration of Covenants, Conditions and Restrictions for Olde Hickory:

> **2.5 Express and Implied Powers.** The Club may exercise any rights, power or privilege given to it expressly by the Governing Documents or by law, and every other right, power or privilege reasonably inferable therefrom.
>
> **2.6 Acts of the Club.** Unless the approval or affirmative vote of the Members is specifically made necessary by some provision of applicable law or the Governing Documents, all approvals or actions permitted or required to be given or taken by the Club may be given or taken by its Board, without a vote of the Members. The Officers and Directors of the Club have a fiduciary relationship to the Members. A Member does not have the authority to act for the Club by reason of being a Member.

Also, the Declaration provides that the Club's responsibilities may be carried out by the General Manager:

> **2.2 Manager.** The Club may contract, employ and pay for the services of an entity or person to assist in managing its affairs and carrying out its responsibilities, and may employ other personnel as the Club shall determine to be necessary or desirable.

The Bylaws of the Association contain a similar provision:

> **4. BOARD OF DIRECTORS:** The administration of the affairs of the Club shall be by a Board of Directors. All powers and duties granted to the Club by law, as modified and explained in the Governing Documents, shall be exercised by the Board, subject to approval or consent of the Members only when such is specifically required by the Governing Documents or law.
>
> Second Amended and Restated Bylaws
> (Exhibit "B" to Second Amended and Restated Master Declaration
> of Covenants, Conditions and Restrictions)
> Page 6 of 18

The provision in question requiring Member approval is contained in Section 7.2 of the Master Declaration, and only applies to expenditures of over $200,000:

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7.2 Maintenance and Alteration. The Club is responsible for the maintenance, repair, replacement, insurance, protection and control of all Common Areas in accordance with all applicable laws, and shall keep the same in good, safe, clean, attractive and sanitary condition, and in good working order at all times. There shall be no material alterations of or substantial additions to the Common Areas requiring the expenditure of more than Two Hundred Thousand Dollars ($200,000.00) in the aggregate during any fiscal year unless first approved by two-thirds (2/3rds) of the Voting Interests of the Club present, in person or by proxy, and voting at a duly noticed meeting of the Club at which a quorum has been obtained. However, if work that is reasonably necessary to meet the Club's obligations under the first sentence of this Section 7.2 also constitutes a material alteration or substantial addition, no prior membership approval is required. Without limitation "reasonably necessary" shall include the use of improved technologies, products or materials or the use of alternative technologies, products or materials which the Club believes are preferable to those technologies, products or materials being replaced, and which does not change the basic function of the property, but may include updated finishes, coverings, color schemes or motif. Any material alterations, substantial additions or reasonably necessary work which requires a Special Assessment shall also be governed by Article 7.7 of the Bylaws, providing for a maximum Special Assessment of $200 per Lot or Living Unit in any fiscal year, unless approved by a majority of the entire eligible Voting Interests. The Board shall have the authority to purchase or lease personal property and equipment necessary or desirable for the operation of the Club, and there shall be no monetary cap on said authority, except that the purchase of any personal property which is not identified in the Association's reserve schedule, exceeding Fifty Thousand Dollars ($50,000.00) in cost, in the aggregate in any fiscal year, shall require the same level of approval for material alterations, substantial additions or capital improvements to Club Common Areas, as set forth above.

Sean M. Ellis, Esq.
Roetzel & Andress, LPA
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