

**From:** Steven M. Winter [mailto:smwinter@wczlaw.net]  
**Sent:** Wednesday, October 29, 2014 7:26 PM  
**To:** Lindsey Malone  
**Subject:** FW: Gran Forest - Retention Pond Maintenance

Lindsey,

This email is in response to your inquiry regarding maintenance responsibility for the retention pond located between Phases IV and VII of Gran Forest (the "Retention Pond"). Pursuant to our review of the relevant recorded documents and subdivision plats, such maintenance responsibility lies with the Lot Owners within whose Lots the Retention Pond is located. Gran Forest Swim & Tennis Club, Inc. (the "Association") does not have a duty to maintain the Retention Pond. Our conclusion is based upon the following facts.

Section 7.01(e) of the Declaration of Protective Covenants for Gran Forest (the "Declaration"), recorded on November 15, 1991, does not require the Association to maintain the retention pond. The Declaration merely reserves an easement for the benefit of the Declarant and his successors and assigns ("Declarant") to (i) use and enjoy the surface waters and (ii) to maintain the retention pond in case maintenance is necessary to facilitate the use and enjoyment of the surface waters. The Association is not a successor or assign of the Declarant. Therefore, this easement is not binding upon, nor does it give any benefit to, the Association. Furthermore, this easement is limited to the actual surface waters of the retention pond. There is no easement reserved for use, enjoyment or maintenance of the lakebed of the retention pond. Therefore, the Declaration in no way obligates the Association to maintain the retention pond, including the surface waters or the lakebed.

Section 7.01(e) of the Declaration is the only section that references retention pond maintenance obligations. This Section clearly states that the easement reserved by the Declarant will not relieve any Owner of a portion of the retention pond from maintaining that portion of his Lot located within the pond. The retention pond area is not Common Property. Each Lot that surrounds the Retention Pond includes a portion of the Retention Pond itself. Each Owner is responsible for maintaining his own Lot and is deemed to know what constitutes his property and what maintenance obligation exists at the time he purchased his Lot.

A separate document, called a Grant of Easement ("Easement"), was recorded in the Forsyth County land records on July 2, 1993 by the Declarant. By virtue of this Easement, the Association was granted an "access easement" between lots 100 and 101 for the purpose of maintaining the lake and dam as intended by Section 7.01(e) of the Declaration. As discussed above, Section 7.01(e) of the Declaration does not obligate the Association to do anything concerning the retention pond. A careful reading of the Easement reveals that it merely gives the Association a right of access to the retention pond for maintenance purposes. The Easement does not place an obligation on the Association to maintain the retention pond. The Easement states that the Association was granted an easement over the area shown as "Maintenance and Drainage Easement" surrounding the "lake under construction" as shown on the plat for Gran Forest, Phase IV, and that such easement was granted as Common Property. While we do not believe the Easement was sufficient to create Common Property, at best an argument exists that the Association might have the obligation to maintain the 10 foot easement area around the

Retention Pond only (i.e. - keeping the area mowed and free of overgrowth). We believe, however, that the most logical interpretation is that the Easement was recorded in order to give the Association an easement across each Lot on which the Retention Pond is located in order to perform any maintenance that the Lot Owners either fail or refuse to perform.

It is important to note that no homeowner may use the Retention Pond unless his Lot includes a portion of the Retention Pond. Furthermore, the Retention Pond is not visible to anyone but the homeowners who live around it. Homeowners who purchased Lots containing a portion of the Retention Pond are deemed by law to have legal notice of what is in their chain of title. These homeowners therefore bought with knowledge of the language the relevant documents.

None of the subdivision plats make any mention of any obligation on the Association to maintain the retention pond. In fact, the only mention of maintenance obligations regarding storm water is a notation that Forsyth County itself will not be responsible for storm water pipe or conduit maintenance.

Dams and retention ponds, such as are located in Gran Forest Subdivision, are subject to a Forsyth County "Storm Water Management" ordinance which was passed in December, 1996. This ordinance is not binding upon the Association, however. This ordinance was enacted after the recording of the Declaration and after the establishment of the Retention Pond and the development scheme for Gran Forest. This ordinance cannot apply retroactively and thus is not applicable to the Retention Pond and cannot bind the Association.

The documents discussed above must be read together to effectuate the intent of the developer to determine who is responsible for Retention Pond maintenance. When all documents are read as a whole, there is no expressed intention to obligate the Association to maintain the Retention Pond. If the Declarant intended to place responsibility on the Association to maintain the Retention Pond, it is has not been expressed in any document that binds the Association. Therefore, we believe the better position is that the Association has no obligation to maintain the Retention Pond and cannot be compelled to do so.

Copies of the Easement, and the plats for Phases and VII are enclosed for your reference. If you have any questions or would like to discuss the contents of this email, please feel free to give me a call.

Regards,

Steven M. Winter, Partner

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