

Ref: Responses to NPEA Legal Questions

In May 2019, NPEA Board Member Randy Sadler and NPEA Financial Manager, Mike Gobin, had discussions with Attorney Suzanne C. Ulmer, Kernodle Coleman Law Firm, 914 Folly Road, Suite 2, P.O. Box 13897, Charleston, SC 29422-3897, Phone: (843) 795-7800. After Randy & Mike provided questions to Attorney Ulmer and received her answers via emails, they had a two-hour in-person meeting with her on May 29. The following is a summary of Attorney Ulmer's responses to several NPEA questions.

1. Is NPEA required to permit non-board members to attend NPEA Board Meetings?

Background: NPEA Bylaws require at least two "General Membership" meetings a year that are open to all association members. At these meetings, updates are provided to members, and all members are allowed to participate in an open comment period. Bylaws also require the NPEA Board Officers to meet at least three times a year to transact old and new business. Some non-Board members have also asked to participate in Board Meetings. Their participation is not discussed at all in the bylaws, but the Board's policy has been to allow non-Board members to attend Board meetings as observers only. There has also been a request for an open comment period at the beginning of all Board meetings. **Question:** Are there anything in SC regulations pertaining to this?

Answer: No. There is nothing that requires your board meetings to be open meetings (See Answer #2 below). However, if some members have been complaining about the need for transparency, you might want to institute a procedure like the following to avoid any future issues:

1. You post a notice on your website that you will be having a board meeting on X day and provide the general agenda with the posting.
2. Along with the date and agenda, you could include a statement that if any member wants to raise any issue at the board meeting, they have to submit a written submission by X date and they would only have X minutes to speak at the beginning of the board meeting.
3. The written submission would not need to be anything formal—an email, a note in the mail, etc.
4. Then, at the beginning of the meeting, you could have a comment period for a few minutes so that the members had a chance to be heard. At the end of the comment period, you would remind them that it was now a board meeting and that they were not allowed to participate (but could remain to observe). (You also could skip 2 and 3 and just post the notice with the agenda and give a short open comment period before you got into board business. This way people were given the chance to attend/speak and they could not then complain about non-transparent meetings.)

2. Is NPEA required to conduct Board Meetings at public locations?

Background: Per NPEA's by-laws, the location of each board meeting is at the President's home or at a location specified by the president. Since NPEA has no dedicated meeting facility, and since the local school and library both have time use restrictions, most of NPEA's board meetings are held at a board member's home. An association member has complained that we violate open meetings laws by not conducting board meetings at public locations. **Question:** Is this objection valid?

Answer: No.

- a. First, only "public bodies" are required to hold open meetings. A "public body" is any entity supported by public funds, even in part, or that expends public funds. Public bodies include state and local agencies, school boards and city councils. Committee and subcommittee meetings are included. Even non-profit agencies and chambers of commerce that receive public funds are subject to the FOIA. But if you do not receive or expend public funds, which I assume you do not, you are not a public body and do not have to have open meetings.
- b. Second, there is nothing in the nonprofit act that requires board meetings to be held in public locations. In fact, the act provides that the meetings can be in state or out of state, can be through other forms (i.e. skype, phone conference, etc) as long as the participants can hear each other simultaneously, and the locations can be fixed by the bylaws or the board.
- c. Third, your bylaws provide the locations for the board meetings.

3. Are Board Members prohibited from serving on the Board for more than five years?

Background: NPEA bylaws require elections every two years and they do not prevent Board members from being reelected to successive terms. The past elected president also serves on the Board per a long-standing rule in the bylaws. One member has objected stating that SC law does not allow an officer to serve on the board for more than five years (his ref: SC Non Profit Corp Act 33-31-805). **Question:** Does he have a valid point?

Answer: No.

- a. The statutory provision is confusing as written. However, based on my analysis and the Official Comments addressing this provision, I am of the opinion that this provision means that a director's term cannot exceed five years. This limitation only relates to a "term" not to how long someone can serve over the course of their membership in the HOA. This means that there must be an election every five years, at a maximum. In other words, a director can serve for 10 years, 20 years, a lifetime, etc., as long as he is elected, at a maximum, of every five years.
- b. Your board is elected every 2 years. So, you have met the requirement that a director cannot serve more than 5 consecutive years without an election.
- c. The statutory provision specifically excludes directors that are appointed or designated from this limitation. I believe that the "past-elected president" director is such a director and, therefore, he can serve indefinitely. But, as you will see in my notes, this is a point that we should discuss. Do you want a procedure in place that limits how many successive terms the past-elected president serves? And/or do you want a procedure in place that specifically deals with that director's resignation?

4. What documentation is required to prove NPEA is a non-profit?

Answer: NPEA has filed a State of SC Secretary of State Nonprofit Corporation Articles of Incorporation. I cannot access the filings online (without paying a fee), but the Secretary of State website shows that NPEA has been registered as a nonprofit in good standing since 2/10/76 with its registered agent as Headquarters, 108 King Charles Circle, Summerville, SC

RANDY'S NOTE: Information on the incorporation of NEWINGTON PLANTATION ESTATES ASSOCIATION as a non-profit is readily available to anyone at www.sos.sc.gov. Just go to: Corporations File & Search at: <https://businessfilings.sc.gov/BusinessFiling/Entity/Search>
Search by business name using Begins with: Newington Plantation

You get four corporations. Two were filed by our developer, John Murfree. A third was our former HOA name. The fourth corporation is NPEA, our current HOA. On the Secretary of State's site, you can also retrieve official documents on file by creating an account and paying a fee, which NPEA should do.

5. Does NPEA qualify as a 501(c)(3) non-profit organization?

Answer: While NPEA is incorporated as a non-profit under South Carolina law, being "501(c)(3)" means that a particular non-profit organization has been approved by the Internal Revenue Service as a tax-exempt, charitable organization. Most HOA's do not meet this requirement. You will need a tax specialist/lawyer to provide guidance as to whether you meet 501(c)(3).

6. Covenants enforcement: What legal tools do we have to compel violators to comply with our covenants?

Answer:

- a. NPEA covenants provide, in Paragraph 11, that the NPEA Board or any lot owner can bring a proceeding at law or in equity against any other lot owner for a violation of the covenants. If the Board or the lot owner who brought the action wins, they can get a monetary award and attorneys' fees and costs.
- b. You could add provisions to the covenants that provide for some other type of recourse, such as fines. But those procedures would have to ensure fair and reasonable notice before such a fine could be imposed.

NOTE: On June 19, Attorney Ulmer provided the following analysis about delinquent accounts to Mike:

As we discussed at our meeting a few weeks ago, you asked for advice as to how you can proceed against homeowners who have been delinquent in paying assessments.

These are the two provisions in your covenants that address this issue:

11. Enforcement. If any person, firm, or corporation shall violate or attempt to violate any of said restrictive covenants, it shall be lawful for any person, firm, or corporation owning any said lots (or having any interest therein) or for the NPEA Board of Directors to prosecute any proceeding at law or in equity against the person, firm, or corporation violating or attempting to violate the same, and either prevent him, her, it, or them from doing so or to recover damages or other dues for such violation. In the event any person, firm, or corporation owning any said lots (or having any interest therein) or the NPEA Board shall prevail in any such legal proceeding allowed hereunder, they shall be entitled to a monetary award against such violator of reasonable attorney's fees, costs, and expenses incurred incident to such proceedings. The failure to enforce any of the covenants herein shall not be deemed as a waiver of the right of enforcement.

21. Annual Assessment for Regime Fee. Each owner of a lot within Newington Plantation Estates subject to these restrictions is deemed to covenant and agree to pay to the NPEA an annual assessment for the continuation of a NPEA operating fund, the amounts hereinafter set forth. The administration of the operating fund shall be vested with the Board of Directors of NPEA according to its bylaws. Each owner of a lot subject to these restrictions shall pay to the NPEA an annual regime fee of Fifty and no/100 dollars (\$50.00) beginning January 1, 2006. Such payment is due on the first day of January each year and shall be deemed late thirty days after such. A late charge of \$5.00 per month shall be payable for each month late or any portion thereof. Such payment shall be deemed delinquent sixty days after it is due, and it shall be the right and responsibility of the Board of Directors of the NPEA to prosecute any action against any lot owner for any delinquent payment and to recover reasonable legal fees and other costs related to the delinquency. The annual assessment shall be the personal obligation of the owner of a lot subject to these restrictions at such time as the assessment falls due. Each lot owner is responsible for the payment of such assessment whether or not a dwelling or residence has been constructed on his lot. The assessment will be paid to NPEA, P.O. Box 654, Summerville, SC 29484 unless another address or a management/collection agency is specified by the NPEA Board of Directors.

Neither of these provisions reference liens, charges or foreclosure. Because of this, and the case law addressing unpaid assessments, I am of the opinion that you do not have a lien and cannot file a notice of lien if a homeowner fails to pay assessments. In order to have a lien or the ability to file a notice of lien, these provisions would have to include specific language stating that unpaid assessments shall constitute a lien or charge on the property. In a case where the covenants had provisions for unpaid fines and unpaid assessments, the court found that because the provision relating to unpaid assessments stated that unpaid assessments "shall constitute a lien on the property" but did not have the same language for unpaid fines, that the HOA did not have authority to record a lien for unpaid fines.

Accordingly, until you amend the covenants, at this time, I believe you can only file suit in magistrate's court for monetary damages.

There is also something else that you need to be aware of related to this. There is recent case law addressing when you can get attorneys' fees. The way that Paragraph 21 is written, a court may find that you can only get attorneys' fees after you have successfully prosecuted an action against the homeowner. And paragraph 11 affirmatively states that you cannot get attorneys' fees until after you successfully prosecuted an action.

Accordingly, at this time, I believe a court would find that you could only get attorneys' fees after filing and winning in Court. You will want to amend this section so that attorneys' fees are owed even when you don't file suit.

During our meeting, we discussed the need for you to amend the provisions in the covenants related to assessments. Also, you should consider adding a provision that addresses fines for other violations of the covenants.

With respect to the assessments, the following is some language that you should consider including when amending the covenants:

"The assessments, together with interest, costs and reasonable attorneys' fees, shall be a charge on the land and shall be a continuing lien upon the property against which each such assessment is made. Each such assessment, together with interest, costs, and reasonable attorneys' fees, shall also be the personal obligation of the person who was the owner of such property at the time when the assessment fell due."

"The Association may bring an action at law against the Owner personally obligated to pay the same or foreclose the lien against the property and such Owner shall be responsible for all costs of collection, including reasonable attorneys' fees and expenses incurred whether before or after a suit for collection is brought."

"The lien of the assessments provided for herein shall be subordinate to the lien of any first mortgage. Sale or transfer of any lot shall not affect the assessment lien."

7. Any issues with NPEA's Covenants Paragraph 16 (Pond Maintenance)?

Background: Our pond is privately owned by 10 homeowners. The covenants specify pond owner restrictions in paragraph 16. **Question:** Does this paragraph contain valid legal restrictions?

Answer: I do not see any issue with Paragraph 16. But, please confirm that the pond owners are the only lot owners that have access to the pond.

RANDY'S NOTE: Yes there are 10 homeowners who each legally own a portion of the pond. These portions have been surveyed and made a part of each homeowner's deed. This makes the entire pond private property.

8. Should the pond funds collected be monitored by NPEA and reported with our tax filings?

Answer: I do not know the answer to this as it is a tax issue.

9. What recourse do we have if a member becomes overly disruptive (coarse language, personal attacks, frequent interruptions, etc.) during a homeowners meeting?

Answer:

a. There is nothing in the regulations or in your covenants regarding this issue. You can add something to identify the procedure that you will follow.

b. Following Robert's rules, I think you can call the meeting to order and ask that the member refrain from such further actions. If he does not, you can warn him that he will either need to leave the meeting or you will adjourn the meeting if he continues. You could have some type of security attend the meeting. You could call the police depending on the level of attack. You could seek a civil restraining order/injunction.

10. Do you see anything in our by-laws that needs to be changed to conform to SC regulations?

Answer: In the attached documents, you will see that I have drafted notes about some points to discuss. But, I did not see anything that per se violated the regulations.

RANDY'S NOTE: Attorney Ulmer did a complete review of our Bylaws and Covenants and she provided us with several recommendations to improve them.

MEMO Prepared by:

RANDY SADLER, NPEA Board Member