IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA

HEATH BROOK HILLS OWNERS' ASSOCIATION, INC.,	**CASE NO. 2011-CA-2953-CAB**
Plaintiffs,	
vs.	
GARY SMITH, individually, KELLY HILL, individually, and DENNIS SAUNDERS, individually,	
Defendants,	

DEFENDANTS' MOTION TO DISQUALIFY PLAINTIFF'S ATTORNEY OR IN THE ALTERNATIVE, MOTION TO COMPEL DEPOSITION OF PLAINTIFF'S ATTORNEY

COMES NOW Defendants, **GARY SMITH** and **KELLY HILL** (hereinafter "Defendants"), by and through undersigned counsel, hereby files this Motion to Disqualify Plaintiff's Attorney, R. Gregg Jerald (hereinafter referred to as "Attorney Jerald"), from acting as trial counsel for Plaintiff **HEATH BROOK HILLS OWNERS' ASSOCIATION, INC.** (hereinafter "Association") in this matter. This Motion is based on the following points of law:

1. Attorney Jerald may have a conflict of interest due to his representation of individual members of the Plaintiff Association against the Plaintiff Association prior to filing this action on behalf of the Plaintiff Association, which is essentially the same matter;
2. Attorney Jerald, having provided the individual members of the Plaintiff Association with legal opinions and being involved in the recall process on their behalf, is a material and essential witness in this case.
3. Prior to the filing of the instant action on September 30, 2011, Attorney Jerald represented unknown members of the Plaintiff Association in essentially the same matter;
    a. Although Attorney Jerald has never identified his clients, Defendants have a good faith belief these individuals are:
        i. Tommy Henderson, who at the time of the events in question was a board

member;

ii. Diana McManaway, who currently claims to be the President of the Board of Directors;

iii. S. Wesley Herren of Property Management Consultants, who is the property manager for the Plaintiff Association.[1] *See* attached and incorporated hereto as **Exhibit "A"** Plaintiff Association's Vendor Detail Listing Report showing consultation between Attorney Jerald and S. Wesley Herren;

iv. Various other individual homeowners.[2] *See* attached and incorporated hereto as **Exhibit "B"** a letter from Diana McManaway proclaiming a legal fund to pay Attorney Jerald is being funded by individual homeowners;

v. The representation of individual homeowners and the Plaintiff Association represents a conflict of interest.

4. Attorney Jerald submitted a letter dated September 13, 2011 to the Plaintiff Association, but fails to identify his clients or the person who requested he submit this letter. A copy of the letter is attached as **Exhibit "C."** It should be noted Attorney Jerald's letter misstates the law and misrepresents the facts, which calls into question Attorney Jerald's experience and ability to represent the best interests of the corporation and created the dispute between the individual members and the Plaintiff Association:

   a. Attorney Jerald did not submit this matter to pre-suit mediation as required by *Fla. Stat. §720.311;*

[1] A majority Board of Directors voted to terminate the contract with Property Management Consultants and S. Wesley Herren, on August 8, 2011, for refusing to follow board direction, making board decisions without board approval, and after being charged for legal fees for consulted Attorney Jerald without their approval. See attached as **Exhibit "A,"** the Vendor Detail Report showing a fee of $29.90 for consulting with Attorney Jerald on July 19, 2011. Shortly thereafter the petition was circulated for the recall that is the subject of this dispute.

[2] See attached as **Exhibit "B"** a letter from Diana McManaway to Leland Management stating individual homeowners were contributing to pay the legal fees for this case; however, Attorney Jerald stated in correspondence to the undersigned, dated February 23, 2012, he is not being paid by the Association. Therefore, it can be deduced Attorney Jerald is being paid by individual homeowners. This letter has contains confidential settlement negotiations, therefore it is not attached as an exhibit.

b. Attorney Jerald confuses a written recall with a petition to hold a recall meeting, which are two different processes for recalling board members;

   i. Attorney Jerald properly acknowledges the petition was a request to hold a recall meeting in the first paragraph of his letter;

   ii. Attorney Jerald then misinterprets the statute in paragraph 2 to assert the delivery of the petition requesting a recall meeting is the same as a written recall agreement and requires the recall to be certified within five (5) days at a board meeting. A written recall agreement is substantially different than a petition for a recall meeting;

   iii. Attorney Jerald failed to validate the signatures on the petition for a recall meeting, which included more than one vote per lot, in violation of *Fla. Stat. §720 et. Seq.*, and included voting by non-owners of lots;

   iv. Attorney Jerald failed to acknowledge the attempted recall was substantially non-compliant with the recall procedures established by *Fla. Admin. Code 61B-81 et Seq.* and *Fla. Admin. Code 61B-80 et Seq.* Such materially non-compliance waives the requirement for a recall meeting and invalidates the recall as void *ab initio* pursuant to *Fla. Admin. Code 61B-80.102(6),* which governs recalls pursuant to *Fla. Stat. §720.303(10).*

5. A letter dated September 14 2011, attached hereto as **Exhibit "D,"** refers to the letter by Attorney Jerald, identifies him as "our attorney" and is signed by the "Recall Committee, Heathbrook Hills Homeowners Association." A recall committee, by definition, is not an organization of a homeowners association, but an independent committee of individual members whose interest are adversarial to that of the association as represented by the Board of Directors in control and responsible for management and operation of the association.

6. Attorney Jerald authored a letter dated September 29, 2011, which is addressed th the Heath Brook Hills "Recall Committee," "c/o Mr. Tommy Henderson." A copy of this

letter is attached hereto as **Exhibit "E."**[3]

7. Attorney Jerald filed this action on September 30, 2011 on behalf of the Plaintiff Association and asserts he was hired by the Board of Directors seated on September 29, 2011; however, the Complaint alleges the Defendants have refused to step down from their positions as directors. Attorney Jerald's assertions are conflicted as new directors cannot be seated if there are no vacancies on the board and the Complaint is asking this Court to remove the Defendants from the board.
8. Attorney Jerald's representation is an inherent conflict of interest and calls into question if he is representing the best interests of the Plaintiff Association and/or the individual members who hired him and/or the property manager trying to regain a contract with the Plaintiff Association.[4] This presents a violation of the *Florida Bar Rules 4.1-7.*
9. Plaintiff filed suit against Defendants asking the Court to confirm the Defendants' recall as directors of the Plaintiff Association, alleging that the Defendants had been recalled by written agreement of more than fifty percent (50%) of the Association membership, had failed to hold a meeting to certify, or not certify the written recall agreement, and thus, were deemed to have been statutorily recalled. [5]
    a. Such suit must be brought by the representative of the individual members wanting to recall directors, against the Plaintiff Association.
    b. The Association, as a non-profit corporate entity, can only act through the conduct

[3] This letter also misinterprets the statute and confuses the terminology of a written agreement or written ballot (the two are used interchangeably) with a written petition to hold a recall vote, which is a second method of recall.

[4] While Attorney Jerald may assert that he can represent the Plaintiff Association and individual board members, as long as their interests do not conflict, Attorney Jerald was not any individual board members and the persons asserting to be the Board of Directors are not legally board members until a court issues such a ruling. It should be noted Attorney Jerald and Diana McManaway both assert these individuals "have been certified by the State of Florida," and rely on the filing of an Annual Report on the Division of Corporations website as "certification." Such reliance is misplaced as the State of Florida does not investigate the accuracy of these electronic filings or require proof of such unless a complaint is filed against the organization.

[5] The individual members did not sign a recall agreement, but instead petitioned for a meeting and such petition was fatally flawed for non-compliance with the statute regarding the form of the petition and including invalid signatures of non-owners or more than one signature per lot.

of its officers, directors and agents. *See Florida Bar Rule 4.1-13.*

10. Attorney Jerald cannot allege to represent the Plaintiff Association without representing the board members of the Association and properly advising them and counseling them regarding the recall procedures.
11. Attorney Jerald instead consulted and counseled a board member, Tommy Henderson, who was on a mission to remove board members because of their vote to terminate the contract with S. Wesley Herren.[6]
12. Attorney Jerald, having an attorney-client relationship with S. Wesley Herren, was not looking out for the best interest of the Plaintiff Association by engaging and assisting an agent of the Association to recall board members. If Attorney Jerald represented the Association, as he asserts, he is representing parties with adversarial interests.
13. Defendants additionally move to disqualify Plaintiff's counsel, Attorney Jerald, because counsel is an essential and material witness of the allegations and affirmative defenses that support Defendants' claim.
14. At all times material herein, Defendants were and are currently directors of the Plaintiff Association.
15. Plaintiff asserts in its Complaint that after August 8, 2011, a plurality of the membership of Plaintiff Association petitioned the Board of Directors for a recall of the Defendants. Whereby, Defendants allegedly failed to take any action in response to the initial recall. At issue is the validity of the names on petition.
16. Plaintiff asserts in its Complaint that on August 24, 2011 and September 1, 2011, additional owners signed the petition requesting a recall meeting to vote for a recall and these additional names were submitted to the Defendants and the Defendants still refused to acknowledge the recall petitioners. Defendants assert there is a discrepancy between the signatures attached to the Complaint as exhibits and the signatures delivered to them by S. Wes Herren.
17. Defendants have a good faith belief that Plaintiff's counsel was hired by individual homeowners to address the failed recall attempt and Attorney Jerald filed a Complaint on

[6] S. Wesley Herren, being informed his contract was being terminated, told the board members he would have them recalled.

behalf of these individuals improperly in the name of the Plaintiff Association.

18. Attorney Jerald has refused to provide any documentation he was hired by the Plaintiff Association and has refused and objected to all request for discovery, citing attorney-client privilege, yet such objections were waived by the failure to file a privilege log.
19. Thereafter, Attorney Jerald asserted and held himself out to be the attorney of the Plaintiff Association prior to alleged replacement Board of Directors being elected and despite Attorney Bradford Tropello being hired by the Board of Directors with a majority vote.
20. Defendants assert that Plaintiff failed to comply with the proper recall procedures pursuant to the Plaintiff Association's Bylaws and the statutory procedures of *Fla. Stat. §720.303(10)*. Plaintiff cannot be represented by Attorney Jerald if:
    a. Plaintiff was represented by Attorney Bradford Tropello at the time;
    b. Plaintiff did not enter into a contract for representation with Attorney Jerald;
    c. Individual members of the Plaintiff Association were not and could not be members of the Board of Directors as the Complaint alleges the Defendant board members refused to vacate their positions;
    d. Attorney Jerald represented individual homeowners in the same matter prior to filing this litigation;
    e. All of these issues are material to the Defendants' defense of this case and Attorney Jerald, inserting himself into the middle of this dispute, is a material witness;
    f. The *Florida Bar Rule 4.3-7,* which prohibits attorneys from represent a client when it is likely the attorney will be called on to testify. The rule provides for the immediate disqualification of an attorney who is a witness in a case.
21. A lawyer who is a material witness at a trial may be disqualified as counsel for a party. *See* Ray v. Stuckey, 491 So.2d 1211 (Fla. 1st DCA 1986). A party moving to disqualify a lawyer on the ground that the lawyer is a material witness must demonstrate the necessity of the attorney's testimony and thus his disqualification. *See* Hiatt v. Estate of Hiatt, 837 So.2d 1132, 1133 (Fla. 4th DCA 2003) (the lower court "departed from the essential requirements of the law" when it disqualified the attorney in the absence of a "showing

that [the attorney] will be a necessary witness"). A material witness is one who possesses information going to some fact affecting the merits of the cause and about which no other witness might testify. *See* Sardinas v. Lagares, 805 So.2d 1024, 1026 (Fla. 3d DCA 2001) (quoting *Wingate v. Mach*, 157 So. 421, 422 (1934)).

22. Attorney Jerald is a material witness to this case because he possesses crucial information as to the timing and delivery of the "petitions," his representation, his authority to represent the Plaintiff Association, and other material facts of the alleged recall of Defendants and subsequent vote for new directors. *See* Sardinas at 1026. All of which are essential facts that affect the merits of this action because the Defendants assert that proper recall procedures were never complied with so they were and still are the legal Board of Directors and as such they never hired Attorney Jerald as the Plaintiff Association's counsel. *Id.*

23. The Defendants have a good faith belief Attorney Jerald held himself out to be the Plaintiff Association's attorney, as hired by the alleged replacement Board of Directors, prior to the so-called replacement Board of Directors being elected on September 29, 2011. Additionally, Attorney Jerald is a material witness to this case because he was present and an active participant in each event of this case for the alleged recall of the Defendants and the so-called election of the replacement Board of Directors

24. Defendants have attempted through the discovery process to obtain the crucial information that Plaintiff's counsel Attorney Jerald possesses by serving a Request for Production upon Plaintiff. However, Attorney Jerald untimely objected to the Defendants' Request for Production, waived objections based on attorney-client privilege by failing to attach a privilege log, and despite Defendant's diligent subsequent efforts to obtain the vital information from Attorney Jerald, he refuses to provide the requested written documentation. The Defendants have no other avenue available to obtain the information detailing the circumstances of Attorney Jerald's representation of the Plaintiff which is essential to the merits of this case.

25. Pursuant to *Rule 4-3.7(a), R. Regulating Fla. Bar.* a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client unless: 1) the testimony relates to an uncontested issue; 2) the testimony will relate solely to a

matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; 3) the testimony relates to the nature and value of legal services rendered in the case; or 4) disqualification of the lawyer would work substantial hardship on the client.

26. In the present case, none of these four exceptions apply. Attorney Jerald's testimony will be both substantively valuable and related to a contested issue of whether he legally represents the Plaintiff Association and how the alleged recall was conducted. Furthermore, his testimony would likely go well beyond the nature of his legal services and include details of the facts in dispute.

27. In *United States v. Abbell*, 939 F. Supp. 860,862 (S.D. Fla. 1996), the Court held that "a court may recognize a presumption in favor of [a party's] counsel of choice, but that presumption may be overcome by a showing of a serious potential for conflict or proof that an actual conflict exists. The conflict may arise under varying circumstances, e.g., representation of co-defendants, attorney as witness in same proceeding, attorney's interest in the outcome of litigation, etc. The standards of disqualification of an attorney derive from the pertinent disciplinary rules."

28. The *Abell* Court refereed to *Rule 4-3.7(a), R. Regulating Fla. Bar.*, and further relied on the American Bar Association Code of Professional Responsibility Rule EC 5-9, which reasons that a lawyer who is both counsel and witness becomes more easily impeachable and thus may be a less effective witness. Conversely, opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. And advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively. *Id.*

29. There is little doubt that to *Rule 4-3.7(a), R. Regulating Fla. Bar.* exists specifically to protect against the situation presented by the case at bar. Attorney Jerald's unavailability as a witness materially prejudices the Defendants and aids the Plaintiff in a way that is inexcusable. The Plaintiff may not retain Attorney Jerald in an effort to disqualify him as a material witness, and Attorney Jerald may not continue representing a client who is

adverse to the party seeking his testimony. As such, Attorney Jerald should be disqualified on these grounds.

ALTERNATIVE MOTION TO COMPEL DEPOSITION

30. Alternatively, if this Court is inclined to deny Defendants' Motion to Disqualify, the Defendants respectfully request that this Court compel the deposition of Attorney Jerald. Case law specifically suggests that in certain instances the taking of a deposition of opposing counsel should be allowed to determine whether a motion to disqualify that counsel should ultimately be granted. *See Nucci v. Simmons*, 20 So.3d 388 (Fla. 2d DCA 2009) (quoting *Quality Air Conditioning Co. v. Vrastil*, 895 So.2d 1236, 1238 (Fla. 4th DCA 2005)).
31. The Defendants have attempted through the discovery process, to obtain the crucial information that Plaintiff's counsel Attorney Jerald possesses by serving a Request for Production upon Plaintiff. However, Attorney Jerald untimely objected to the Defendants' Request for Produce and despite Defendants' diligent subsequent efforts to obtain the vital information from Attorney Jerald, he refuses to provide the requested written documentation. The Defendants have no other avenue available to obtain the information detailing the circumstances of Attorney Jerald's representation of the Plaintiff which is essential to the merits of this case. The deposition of Attorney Jerald will likely lead to a greater record in support of Defendants' Motion to Disqualify. *See Singer Island Ltd. v. Budget Constr. Co.*, 714 So.2d 651, 652 (Fla. 4th DCA 1998).

WHEREFORE, Defendants **GARY SMITH** and **KELLY HILL** respectfully requests this Honorable Court to disqualify Plaintiff's counsel R. Gregg Jerald, or in the alternative, compel Mr. R. Gregg Jerald's deposition, to award attorney's fees and costs for bringing this Motion and for any further relief this Court deems just and proper.

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that a true and correct copy of the foregoing was served via Certified U.S. Mail to Plaintiff's attorney on record, **R. GREGG JERALD,** c/o Landt, Wiechens, LaPeer & Ayres P.A., 445 N.E. 8th Avenue, Ocala, Florida, 34470 this 4th day of May, 2012.

Respectfully submitted,

Barbara Billiot Stage

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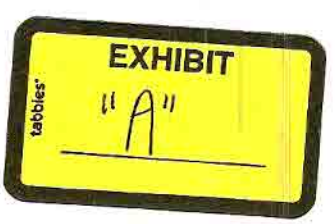
Heath Brook Hills Owners Assoc., Inc.
Expenses by Vendor Detail

Cash Basis — **July 2011**

Type	Date	Num	Memo	Account	Original Amount	Balance
Bill Duncan's A/C & Heating						
Bill	7/19/2011		#42221 - Installed new 2 ton A/C unit & thermostat	Equipment Repairs	4,481.00	4,481.00
Total Bill Duncan's A/C & Heating						4,481.00
Century Link						
Bill	7/13/2011		#311736063 - Bill Date: 6-19-11	Telephone	41.30	41.30
Bill	7/19/2011		#311737230 - Bill Date: 7/13/11	Telephone	39.93	81.23
Bill	7/29/2011	#311736063	#311736063-bill dated 7-19-11	Telephone	41.10	122.33
Total Century Link						122.33
City of Ocala						
Bill	7/19/2011		#2140873071 - 6/3/11 to 7/5/11	Water and Electric	1,415.22	1,415.22
Total City of Ocala						1,415.22
Clerk of the Court						
Bill	7/18/2011	Filing Liens	Filing Liens-Bajalia,Russell,Grice,Kent & Hernandez #6425	Filing Liens-Clerk of Court	92.50	92.50
Total Clerk of the Court						92.50
Ernest Martinez						
Bill	7/18/2011	File Liens	File Liens-Bajalia,Russell,Grice,Kent & Hernandez #6425	Filing Liens-Process Server	100.00	100.00
Total Ernest Martinez						100.00
Good & Dependable Cleaning						
Bill	7/14/2011		Inv #3615 - General June Cleaning & remove broken trash bag from ro...	Club House - Cleaning	245.00	245.00
Total Good & Dependable Cleaning						245.00
Property Management Consultants						
Bill	7/14/2011		Reimbursed Expenses - 6-1-11 to 7-1-11	Reimbursed Expenses	48.11	48.11
Bill	7/14/2011		Management Fee - 6-16-11 to 7-15-11	Management Fees	725.00	773.11
Bill	7/18/2011	Lien Preparation	Lien Preparation-Bajalia,Russell,Grice,Kent & Hernandez #6425	Prepare Lien	100.00	873.11
Bill	7/19/2011		Legal Fee - Mtg w/ Atty. Gregg Jerald to discuss Senate Bill 1193 & dr...	Legal Fees	29.90	903.01
Total Property Management Consultants						903.01
Scott Ripley Pool Service						
Bill	7/26/2011	#2567	#2567-May pool service	Pool Maintenance/Supplies	450.00	450.00
Bill	7/26/2011	#2631	#2631-June pool service	Pool Maintenance/Supplies	450.00	900.00
Total Scott Ripley Pool Service						900.00
TOTAL						**8,259.06**



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Heath Brook Hills Owners Association, Inc.

October 6, 2011

Leland Management
8009 South Orange Avenue
Orlando, Florida 32809

Dear Management,

Our association has been through a very contentious period of our history. While it doesn't appear that it will end soon, what follows is what we know so far. The three board members, Gary Smith, Dennis Saunders and Kelly Hill, that were removed by a recent recall meeting (enclosed) have not been forthcoming with many people in the association, the banks or your firm after three repeated attempts to ask for a recall meeting.

The day after the recall meeting, the three removed members ran to the banks to withdraw the funds from the accounts and apparently forwarded them to you. The banks then came back with rulings from their legal departments that their attorney review also agrees with the newly elected board and allowed the signature transition to occur. The new board signatories are official as of yesterday. We have now held an official meeting of the new board and have voted to send out the annual meeting notices as originally planned earlier in the year.

It should be noted that the bad behavior of these three has now added to the original 62.5% of the voting interests. Two new owners that are to be added to the list have offered $3,000 in legal defense funds to pursue these removed members if they keep on. Even if they can eek out a marginal success in any of their legal defenses, a new recall will be immediately served to them with a possible 70% of the voting ownership and they will be immediately removed the instant they achieve an assumed (on their part) success.

We are desperately trying to avoid filing a complaint against your firm at the state and naming your firm in our legal pursuits, but your acceptance of unauthorized funds and continuation to perform unauthorized transactions for our association, according to our own documents, leaves us no choice but to do so by close of business today if you do not cease your actions and return the funds to us that have now been misappropriated.

We also ask that you do nothing further with our association until we can sit down and discuss management firms. Thank you.

Sincerely,

Diana McManaway

Diana McManaway
Board President
HeathBrook Hills Homeowners Association, Inc.

LANDT, WIECHENS, LaPEER & AYRES

A Limited Liability Partnership

ATTORNEYS AT LAW

FREDERICK E. LANDT, III
EUGENE A. WIECHENS, P.A.
RUSSELL W. LaPEER, P.A.*
BENJAMIN H. AYRES (1947-2005)
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PLEASE REPLY TO
OCALA OFFICE

September 13, 2011

VIA HAND DELIVERY
HeathBrook Hills Owners' Association, Inc.
1136 N.E. 14th St.
Ocala, FL 34470

Re: Recall of Directors

To Board of Directors:

It is my understanding that a petition/agreement was delivered to the Heath Brook Hills Owners' Association, Inc. (the "Association"), Board of Directors, individually, on or around September 1, 2011 and which petition was signed by more than fifty percent (50%) of the voting interests in the Association and sought the recall of three of the Board members, to wit: Kelly Hill, Gary Smith and Dennis Saunders. The September 1st recall notice was a follow-up to notices submitted August 10th and 24th which were signed by more than thirty percent (30%) of the voting interests in the Association and requested a recall meeting. The August recall meeting request was unanswered by the Board. Pursuant to section 720.303, Florida Statutes, the Board had a period of five (5) days from the receipt of a petition within which to hold a recall meeting to certify the recall of the directors that were sought to be recalled or, alternatively, if the Board did not wish to certify the recall of its directors, then to file a petition for binding arbitration with the State of Florida within five (5) days of receipt of the signed petition.

Unfortunately, it is my understanding that the Board neither held a recall meeting, nor filed a petition with the State for arbitration, within five (5) days of delivery of the most recall petition and, of course, likewise failed to respond to the August petition. To that end, section 720.303(1)(f), Florida Statutes, provides as follows:

> If the board fails to duly notice and hold a board meeting within 5 full business days after service of an agreement in writing...the recall shall be deemed effective and the board directors so recalled shall immediately turn over to the board all records and property of the association...

Thus, it would appear that because the Board failed to hold a recall meeting or file a petition for arbitration, the Board members who were subject to the recall petition are deemed, by statute, to have been recalled and are required to immediately turn over to the remaining board members all records and property of the Association. Furthermore, it is my understanding that a meeting will be held in approximately two (2) weeks to elect replacement directors to the Board. In the meantime, it would be recommendation, and I believe the duty of the remaining board members, that the board carry on Association business as usual until the recall meeting can be held in two weeks.

I believe it is also prudent to acknowledge the correct procedure for recalling board members in Florida in general and in this instance in particular. The declarations and covenants for the Association do not speak to the issue of recalling directors, however, the issue is addressed in the Association By-Laws. Section 4.4 of the Association By-Laws appears to require the holding of a recall meeting in order to recall directors with the notice of such meeting required to be delivered not less than 14 days from the date the meeting is scheduled. Section 4.4. goes through a number of additional requirements that are required to be in the notice of such recall meeting.

However, section 720.303(10)(b), Florida Statutes, expressly permits the recall of directors without a membership meeting, but rather, for the recall of directors without a meeting performed pursuant to the procedure spelled out under that statute. While there is an apparent conflict in the procedure to be followed between 720.303(10), and the by-laws of the HOA, it is my opinion that the statute controls. Specifically, section 720.303(10)(a), Florida Statutes, provides, in relevant part, **"[r]egardless of any provision to the contrary contained in the governing documents** [of the Association]...any member of the board of directors may be recalled and removed from office with or without cause by a majority of the total voting interests." Additionally, section 720.303(1), Florida Statutes, provides in relevant part that "the powers and duties of an association include those set forth in this chapter and, except as expressly limited or restricted in this chapter, those set forth in the governing documents." As a result, the statute tells us that the powers and duties of the Association are those set forth in section 720.303, in addition to those set forth in the governing documents except where the Association's powers limited or restricted by section 720.303. Thus, the provisions of section 720.303(10), Florida Statutes, controls on the procedure for recalling directors to the extent that procedure conflicts with

the procedure set forth in the Association By-Laws. As a result, it is my opinion that the procedure for the recall of directors set forth in section 720.303(10) – which does not require a member meeting – is a wholly appropriate, and proper, procedure to follow.

Finally, I have also been advised that the recalled Board members have requested that the current property manager for the Association, Property Management Consultants, hand over voluminous Association documents which would be performed at a significant cost to the Association. The requested document production has previously been requested by the recalled Board members to take place on or before September 15, 2011. By this correspondence, it would be my opinion that, due to the significant cost to be incurred by the Association, the current property manager abstain from producing the requested records until the meeting to elect new Board members to be held in two weeks. This opinion is premised on the assumption that the remaining Board members do not wish for the production to take place. Should the remaining Board members have a different opinion, and affirm the document request made by the now recalled Board members then, of course, the production should continue. It seems illogical to compel the Association to incur the significant expense associated with the production of documents which were only requested by Board members who have now been recalled. Should the recalled Board members request by affirmed by the new Board once then, of course, the production would need to continue.

Should you have any questions concerning the foregoing please feel free to contact the undersigned at our Ocala office.

Sincerely,

LANDT, WIECHENS, LaPEER & AYRES, LLP

R. Gregg Jerald

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September 14, 2011

On August 8, 2011 board members Kelly Hill, Gary Smith and Dennis Saunders made several bold announcements that they had released our current management company and had hired another company. These decisions were never submitted to the board (two directors were unaware) or homeowners for discussion or approval.

At least 30% of the voting interests that are aware of these events immediately asked for a recall meeting. The notice of recall was delivered to the three board members and a copy hand delivered to the Secretary, Kelly Hill, and the management office. The letter petition was ignored.

The actions of the three board members and their non-response to a meeting request coupled with their failure to notice homeowners of meetings, where major decisions were being made on behalf of the homeowners, is not a healthy situation for our association.

The signed contract with the new management company will cause a severe liability to the homeowners. If the new contract were to actually be fulfilled, the cost could exceed $2,000.00 a month for management fees based on the work performed now without cost. We are currently paying a gracious $ 725.00 a month. The new contract is complete with many advantages and fees for the new company and nothing new for the homeowners except less work, more cost and no access.

The recall was again submitted on August 24th with more names and then again on September 1st with over 50% of the voting ownership signing. Pursuant to our by-laws and Florida Statutes, the board members should have acknowledged the recall and noticed the homeowners within 14 to 60 days. All notices ignored should have been acknowledged within 5 days as required by Florida Statute. Finally the only option that remained was for the voting interests to obtain more than 50% of the voting interest making it mathematically impossible for them to stay in office regardless of a meeting. Had they scheduled a meeting, they would have been allowed time to address their actions to the homeowners.

Based on our Attorney review, it is now necessary and legal to move on at this point and elect three new board members to replace Gary Smith, Dennis Saunders and Kelly Hill as they are now officially removed from the board. A letter has been written to the State of Florida for oversight and the State has been consulted on this matter. An attorney firm has also been consulted and official letters have been sent to the three former board members to hand over any items belonging to the association. The new management company has been contacted and informed to cease any actions until the new board meets and make the proper decisions. Our current management company will remain in place and continue the functions of the association including payment receipts until the new board meets and makes its decisions.

Please refer to the proxy ballot and notice of meeting enclosed. You may select three names you wish to proxy, if you do not wish to attend the meeting. Be careful with your vote and please inform yourself before voting. The meeting will be held on the 29th of September at 6 PM to be followed by an organizational meeting of new officers. Anyone interested in sitting on the board should contact our management company, Property Management Consultants at the same address as has been used in the past (Please send your proxies or correspondence to this address, Heath Brook Hills HOA 1136 NE 14th St, Ocala, Fl 344470). In addition, nominations will be accepted from the floor. There will be no meeting on the 20th of September. Thank you for your help.

Sincerely,

Recall Committee, Heathbrook Hills Homeowners Association

KHGS11-000029
00015-00015

Handed out at meeting 9-29-2011

LANDT, WIECHENS, LaPEER & AYRES

A Limited Liability Partnership

ATTORNEYS AT LAW

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PLEASE REPLY TO
OCALA OFFICE

September 29, 2011

VIAELECTRONIC DELIVERY
Heath Brook Hills Recall Committee
c/o Mr. Tommy Henderson
6470 SW 50th Ct.
Ocala, FL 34474

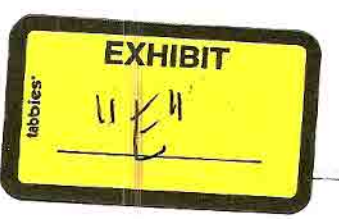
Re: Gary Smith letter dated September 26, 2011

Dear All:

I have been provided with, and reviewed, a letter from Gary Smith wherein he asserts that he is acting as President of the Heath Brook Hills Owners' Association, Inc. (the "Association"), despite his recent recall. In his letter, Mr. Smith makes the statement that "[a]fter a complete legal review the recall was improper". Presumably, Mr. Smith makes this assertion based upon the advice of Mr. Tropello, an attorney with Blanchard, Merriam, Adel & Kirkland, P.A., although, Mr. Tropello was not the writer of that statement. However, to be clear, the statement by Mr. Smith in this regards is, I believe, incorrect, and is in conflict with the status of the law on this issue.

Mr. Tropello has previously represented to me that his position is that the recall petition was invalid because of the failure of the ballot to include the names of as many replacement directors as were subject to the recall petition. While this is a requirement of the law with regard to recall petitions, the argument is, nonetheless, immaterial to the question of whether the Mr. Smith, Ms. Hill and Mr. Saunders were properly recalled.

Specifically, section 720.303(10)(b)(2)(d), Florida Statutes, **requires** that upon receipt of a recall petition, regardless of whether the form of the petition is correct or not, a board upon which directors are sought to be recalled shall hold a meeting **within 5 days of receipt of the recall petition**. By law, the purpose of that meeting is to place the burden on the board itself, and those members subject to recall, to either certify the petition for recall or to not certify the petition for recall. Either way, whether the board decides to certify the recall or not, it is the board's obligation to hold the meeting. However, in the instant case, the directors sought to recalled were provided with the recall petition and failed to hold the required meeting within 5 days as required by law.



The law further provides in section 720.303(10)(b)(2)(f), Florida Statutes, that if the board fails to hold the required meeting to certify, or not certify, the recall petition, within 5 days of receipt of the petition, those board members who were sought to be recalled are deemed to be recalled by law and are required to turn over possession, custody and control of all association property, documents, and the like. Thus, **because Mr. Smith, Ms. Hill and Mr. Saunders failed to hold the meeting required by law to certify, or not certify, the recall petition, they are deemed by law to have been recalled and are required to relinquish control over Association property.**

The argument forwarded by Mr. Smith, and Mr. Tropello, regarding the allegedly defective form of the recall petition would have been a proper argument for Mr. Smith and the other board members to raise at the meeting as to whether to certify the recall petition. In fact, it was within their prerogative to not certify the recall petition due to their claim that the petition was defective. However, by doing nothing, despite their legal requirement to hold the recall meeting within 5 days of receipt of the recall petition, those former directors **waived** their rights to make that claim and were recalled by law.

I have conveyed this opinion to Mr. Tropello both in conversation and in writing and have not received any rebuttal to my opinion. Based on the foregoing it is, and remains, my position and, I believe, the proper status of law, that Mr. Smith, Mr. Saunders and Ms. Hill have been recalled pursuant to Florida law. Because they have failed and refused to turn over Association property despite their recall, our office intends to proceed with filing a petition with the court promptly, and as authorized by law when a director refuses to turn over his or her office after being recalled, to have the court compel these directors to do as we believe the law requires.

Sincerely,

LANDT, WIECHENS, LaPEER & AYRES

R. Gregg Jerald