

STATE OF NORTH CAROLINA
COUNTY OF TRANSYLVANIA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.

TOXAWAY VIEWS HOMEOWNERS
ASSOCIATION, INC.

Plaintiff,

vs.

COMPLAINT

TOXAWAY VIEWS, INC.; JOHN
ANTHONY FISHER, III AND JEANETTE
KAY FISHER

Defendants.

Plaintiff, complaining of defendants, alleges and says as follows:

THE PARTIES

1. Plaintiff Toxaway Views Homeowners Association (sometimes, “TVHA” or “the Association”) is a North Carolina not-for-profit corporation organized and existing under the Nonprofit Corporation Act (Chapter 55A) and the Unit Ownership Act (Chapter 47A). Members of the Association include property owners in the Toxaway Views condominium complex (sometimes, “Toxaway Views,” “the complex” or “the property”) as more particularly described in Plat Book 4, Slot 451 of the Transylvania County Registry. Among other lawful endeavors, the Association, which consists of all property owners in the Toxaway Views complex, was formed for the purposes of administering, managing and operating the condominium property in accordance with the Unit Ownership Act, the declarations and the by-laws, as each may be amended. The Association has succeeded to the powers and privileges of the original developer. Further, the Association serves as a residential real estate management association and exercises rights and responsibilities appurtenant thereto.

2. Upon information and belief, defendant Toxaway Views, Inc. (sometimes, “TVI”) is a North Carolina corporation created on February 14, 1983 with its office and principal place of business in Transylvania County, North Carolina. TVI’s charter was suspended in December of 2004. Therefore, its principals are individually liable for its acts and omissions since that time, as well as for their individual acts and torts.

3. Upon information and belief, defendant John Anthony Fisher, III (sometimes, “Mr. Fisher,” or “the developer”) is a citizen and resident of Transylvania County, North Carolina. He is a principal of TVI, and at relevant times served as its president, employee, and/or agent.

4. Upon information and belief, defendant Jeanette Kay Fisher (sometimes, “Mrs. Fisher,”) is a citizen and resident of Transylvania County, North Carolina. She is the wife of Mr. Fisher, a principal of TVI, and, at relevant times served as an officer, employee and/or agent of TVI.

5. Defendants, individually and collectively, have acted as developers of the Toxaway Views condominium complex. They will hereinafter sometimes be referred to as “the developers” or “defendants.”

6. Upon information and belief, the developers entered into a joint venture, partnership, or other business association for profit in connection with developing Toxaway Views. As partners or joint venturers in this endeavor, the developers engaged in certain acts and omissions, for which they are jointly and individually responsible. The acts and omissions of each are attributable to the other.

UNDERLYING FACTS

7. The foregoing allegations are restated and incorporated herein by reference.

8. Upon information and belief, on or about June 17, 1983, Mr. and Mrs. Fisher owned the property described above, known as Toxaway Views, and caused to be executed that certain Declaration Creating Ownership And Establishing Restrictions, Covenants, and Conditions for Toxaway Views, Phase I (sometimes, "the Declaration"), which is applicable to the complex, as recorded in Book 130 at Page 921 of the Transylvania County Registry. Brevard Federal Savings and Loan Association, as beneficiary, joined in the Declaration for purposes of subordinating the lien of its Deed of Trust from Mr. and Mrs. Fisher to the Declaration and the condominium plan created thereby. Defendants, by these and other actions, and in furtherance of their joint acts as developers, established certain restrictions, covenants and conditions that were intended to run with the land and, in fact, do run with and touch and concern the land.

9. Toxaway Views is a condominium complex containing 49 units in eight buildings. The complex sits on two parcels of land which encompass 10.9 acres and 0.8 acres, respectively, totaling 11.7 acres, more or less, which are adjacent to Highway 64 in Lake Toxaway, North Carolina. The complex was started in 1983 when the first two buildings were constructed.

10. Defendants held the property out for sale to members of the public, including the TVHA board members and other property owners in the plaintiff.

11. Since the complex was established in 1983, it was governed by the North Carolina Unit Ownership act, Title 47A. Upon information and belief, the developers never elected to be governed by the North Carolina Condominium Act. Building 8, the most recent

addition, received its certificate of occupancy in 2003. Two of the six units in Building 8 have yet to be sold by the developer.

12. In addition to statutory authority, Toxaway Views' governance includes certain documents such as the Declaration, By-laws, and Rules and Regulations, (sometimes, "the condominium documents"). The condominium documents constitute agreements between the parties and/or their successors in interest. The Declaration, in places, is a poorly drafted, ambiguous document, capable of multiple interpretations and so must be construed against defendants as drafters. Upon information and belief, under portions of the condominium documents, the developers have claimed and/or continue to claim the following:

- (a) That they own the interior roadways along with other common areas within the 10.8 acre footprint which they have not deeded to the Association;
- (b) That they have the right to continue to build additional buildings and add them to the condominium;
- (c) That TVI is entitled to select and designate one person to serve on the TVHA board of directors; and
- (d) That TVHA owes TVI money for terminating TVI's management contract and for outstanding maintenance invoices.

13. Upon information and belief, until January 1, 2005, the Association was effectively controlled by Mr. and Mrs. Fisher, who sat on the five-person board of TVHA. Two of the remaining three directors had close connections to the Fishers. After years of self-dealing by defendants, the homeowners of Toxaway Views ousted the former TVHA board, elected new directors and terminated TVI's management contract. Since January of 2005, TVHA has been

governed by a board of directors elected by the homeowners. Such board of directors currently has six members.

14. Until the ouster, TVI managed the property for its own benefit and to the detriment of the homeowners. Of TVHA's \$100,000 budget for 2004, TVI collected \$21,600 as a "management fee" for which it performed no service other than minor landscaping with a value of less than \$5000 per year.

15. TVI effectively made it impossible for an outside management company to successfully bid for the management contract by including a requirement that there be an on-site property manager for a minimum of 30 hours per week. Mr. Fisher maintained his office on site, whereas no potential competitors did so or could do so.

16. Defendants caused TVI to contract with the Association to perform maintenance and repairs. Defendants routinely charged the Association between \$1,000 and \$3,000 per month for maintenance work. Mrs. Fisher, who at relevant times served as secretary of the Association, concealed the fact that she was charging between \$3,000 and \$4,000 per year for her services despite a by-law provision prohibiting payment to Association officers, in which capacity she served from time to time.

17. In 2004, the Association collected roughly \$140,000 in regular and special assessments. Over \$101,000 was paid directly to TVI and Mr. and Mrs. Fisher. Many components of these payments were procured in bad faith, or are otherwise unlawful and must be repaid to plaintiff.

18. Without limitation, defendants are indebted to TVHA based on the following circumstances:

- (a) The developers improperly installed siding on Building 8 and, in 2006, the Association was required to spend \$18,447.00 to replace and re-nail same.
- (b) The developers have collected an amount in excess of \$10,000 from the Association for maintenance work that was either not authorized by the Board, was not properly accounted for, and/or was improperly performed. The improper performance included, but was not limited to, improperly installed flashing on the decks on Building 7, allowing water to enter condominium units behind the siding.
- (c) For the years 2001-2004, TVI overcharged the Association in excess of \$10,000 per year in the management agreement.
- (d) Mrs. Fisher collected between \$8,000 and \$20,000 for services as Secretary of the Association contrary to Section 5.8 of the by-laws. The developers made false statements to homeowners in annual financial reports that no officers were being paid for services.
- (e) TVI owes in excess of \$26,000 in assessments on the five units in Building 8 which should have been added to the condominium when the building was completed, and which arise out of the developers' inconsistent treatment of the condominium documents in efforts to avoid financial responsibility to the Association.
- (f) The developers owe \$3,500 in fines and additional damages for allowing patrons to park in the Association complex without authorization; and for operating a

shuttle through the property, constituting acts of trespass, and subjecting the Association to potential liability to third parties.

- (g) TVI owes the Association \$812.55 for gas logs that the Association paid for, but which TVI sold to an individual homeowner or homeowners in the complex.

19. Defendants have, on many occasions, used the well associated with Building 3 to pursue private interests without authorization. The plat filed at File 4, Slot 451 of the Transylvania County Registry shows the detail of each of the eight buildings at Toxaway Views and provides a legal description of the parcels of land which surround them. The parcels of land which contain the wells, septic tanks, parking lots, trash receptacles, roadways and additional common areas and which support each building were intended to be conveyed with each building.

20. Defendants failed to pay assessments upon completion of 5 units in Building 8, which units should have been added to the condominium when the building was completed.

21. While the Declaration allowed the developers to add additional phases to the complex, and many were added by amendment, some were improperly done. The practice followed with respect to Buildings 3, 4, and 5 was to add them in their entirety to the condominium between 1984 and 1986. Then, with Building 6, the developer amended the declaration to add individual units to the condominium, as they were sold, but not the building in its entirety. It continued this practice with Building 7. With Building 8, the developer added the entire building, and Units 802, 804, 805 and 806, reserving the right to add others later. The actions of the developers in this regard constitute self-dealing as well as an abuse of the amendment process of the Declaration. They were undertaken to avoid paying the Association

the assessments owed on the units between completion and the time they were sold to third parties.

22. The entirety of Building 8, including all six units located therein, should have been added to the complex no later than the date of the first sale of a unit which occurred on September 15, 2003 when Unit 806 was sold to third parties. The developers should have begun paying both quarterly and special assessments on all remaining units in Building 8 on that date. With the exception of Unit 802, no payments were made to the Association on any of those units until they were sold by the developers.

23. The developers are indebted to the Association in the amount of \$26,906 for unpaid assessments on Units 801, 803, 804 and 805.

24. Defendants have, in these and other ways, wrongfully treated the property as their own. A road constructed by the developers on property Mr. Fisher owns adjacent to the condominium complex encroaches on the property of the Association.

25. Many of the circumstances described herein became apparent to plaintiff once the governance of the Association was secured by the residents when the defendant-dominated board was ousted in 2005.

26. As a direct and proximate result of the acts and omissions described herein, plaintiff has been damaged and will be damaged in an amount in excess of \$10,000.00. It is entitled to recover from defendants for same.

FIRST CLAIM FOR RELIEF
(Breach of Fiduciary Duty)

27. The foregoing allegations are restated and incorporated herein by reference.

28. As a non-profit corporation, TVHA is governed by the provisions of the North Carolina Non Profit Corporation Act, Chapter 55A of the North Carolina General Statutes. Section 55A-8-30 requires all directors to conduct their duties (1) in good faith; (2) with the care of an ordinarily prudent person, and (3) in a manner the director believes to be in the best interest of the corporation. Section 55A-8-31 allows the corporation to void transactions in which a director has a financial interest unless the transaction is either (a) approved by the majority of all other directors; or (b) fair to the corporation.

29. Defendants also owed common-law fiduciary duties to TVHA to be truthful and honest, and not to benefit themselves at the expense of the plaintiff.

30. Defendants have failed to pay assessments to plaintiff, have collected sums from plaintiff, and have engaged in self-dealing and manipulation of the condominium documents as described herein. The conduct of defendants is in violation of legal duties owed to plaintiff.

31. Plaintiff, to whom the defendants owed fiduciary duties, has been damaged in an amount in excess of \$10,000.00 by virtue of defendants' breaches of fiduciary duty and is entitled to recover damages from defendants for same.

SECOND CLAIM FOR RELIEF
(Breach of Contract)

32. The foregoing allegations are restated and incorporated herein by reference.

33. The acts and omissions of defendants under the condominium documents, as described herein, including inconsistent treatment of the amendment process, failing to pay assessments upon completion of separate units and to add units to the condominium complex when the buildings were added, and other acts and omissions by defendants, constitute breaches

of the implied obligations of good faith and fair dealing under the condominium documents, which constitute contracts among plaintiff, defendants, and members of the Association.

34. As a direct and proximate result of the defendants breaches of the contract, the plaintiff has been damaged and will be damaged in an amount in excess of \$10,000.

35. Defendants' cavalier treatment of the amendment process and failure to pay assessments upon completion of separate units will create irreparable harm to plaintiffs if such actions are not halted.

36. Plaintiff further seeks an order of the Court enjoining defendants from any further mistreatment of the condominium documents.

THIRD CLAIM FOR RELIEF
(Specific Performance and Mandatory Injunction)

37. The foregoing allegations are restated and incorporated herein by reference.

38. Plaintiff is contractually entitled to written conveyances deeding the entire 11.7 acres described in Exhibit A to the Declaration to plaintiff.

39. If defendants are not required to deed such property, then plaintiff will be irreparably harmed. Plaintiff's remedy at law is inadequate.

40. Plaintiff seeks an order of specific performance, or other mandatory injunction, directing that defendants deed said property to plaintiff as described herein.

FOURTH CLAIM FOR RELIEF
(Trespass)

41. The foregoing allegations are restated and incorporated herein by reference.

42. The developers used the well associated with Building 3 to pursue private interests, including for permitting and staging commercial endeavors on adjoining property.

43. At Mr. Fisher's direction, the patrons of the June 2006 music festival "Smilefest" used the roadways and parking areas of Toxaway Views without authorization from the plaintiff.

44. The developer did not notify or receive permission from plaintiff to do so.

45. Upon information and belief, 35 vehicles or more entered Toxaway Views to attend "Smilefest" via plaintiff's roadways and parked in the center circle and building 8 parking lot. The developers also used a shuttle services between Toxaway Views and the festival site.

46. The developers' use of the well associated with Building 3 for Smilefest constituted trespass and caused unnecessary and unauthorized wear and tear on the well pump for Building 3.

47. The developers' use of the parking area and roadways as described herein was unauthorized action that violated the rights of the homeowners and put the Association at legal risk.

48. Pursuant to condominium documents, the board levied a fine against the developer for Smilefest in the amount of \$3500, representing \$100 for each of the cars that parked in the parking lot. It remains unpaid.

49. A road the developers constructed on property adjacent to the Association's property encroaches on the property line of the Association along the south boundary line on the 10.9 acre tract. The entire road, a portion of which is the encroaching area, is approximately a one mile circle and accesses property which the developer owns.

50. This encroachment is unauthorized and constitutes a trespass.

51. As a direct and proximate result of the defendants' acts of trespass on the well, roads and common areas of the complex, as described herein, plaintiff has been damaged and will be damaged in an amount in excess of \$10,000.

52. Plaintiff further seeks an order enjoining all defendants from any further trespass, including the use of any common areas of the complex for any commercial or other endeavors unrelated to the business of the Association.

FIFTH CLAIM FOR RELIEF
(Quiet Title to Common Areas)

53. Defendants have by actions, words or a combination thereof, made the following claims:

- (a) That the developers own the interior roadways along with other common areas within the 11.7 acre footprint which he has not deeded to the Association;
- (b) That the developers own the well associated with Building 3;
- (c) That the developers have the right to continue to build additional buildings and add them to the condominium; and
- (d) That the developers can add units or entire buildings at their whim in an unstructured manner in order to avoid paying assessments to the Association.

54. The common areas of the condominium complex, including the roadways, wells and sewer systems, belong to the plaintiff. The developers are asserting claims to these common areas which are adverse to the plaintiff's right, title and interest.

55. The plat filed at File 4, Slot 451 of the Transylvania County Registry shows the detail of each of the eight buildings at Toxaway Views. It provides a legal description of parcels

of land which surround them. These parcels contain wells, septic tanks, parking lots, trash receptacle areas, roadways and additional common areas that support each building, if some of these necessary physical features fall outside of the buildings' footprints. They are intended to be conveyed with each building. The Amendments to the Declarations and other filed plats contemplate the transfer of these properties to the Association.

56. It is illegal to sell a dwelling house in North Carolina without access to water and/or waste removal. Thus the well and septic tanks associated with Building 3 belong to the Association.

57. N.C.G.S. 41-10 provides that an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims.

58. Because the developers use the common areas as if they belonged to them, rather than to the Association, defendants are claiming an interest in the lands that rightfully belong to plaintiff.

59. Plaintiff therefore requests that title be quieted in its favor to the well and septic tanks of all units, as well as all other common areas of the complex as described herein.

SIXTH CLAIM FOR RELIEF
(Negligent and Unworkmanlike Construction)

60. The foregoing allegations are restated and incorporated herein by reference.

61. Defendants owed the Association a duty arising out of contractual and other responsibilities under the law to perform with ordinary care and in a workmanlike manner the construction, improvements or other work undertaken.

62. Defendants breached duties owed to plaintiff through acts and omissions constituting negligence and/or a failure to discharge duties in a workmanlike manner.

63. Without limitation, the developers: (a) improperly installed the original siding on Building 8 in the condominium complex, which had to be replaced and repaired by the plaintiff at a cost of \$18,447.00; (b) improperly performed work on the Building 7 decks, which now must be redone at a cost to the Association in excess of \$10,000.00.

64. As a direct and proximate result of the defendants' negligent and substandard construction practices, plaintiff has been damaged and will be damaged in an amount in excess of \$10,000.00.

WHEREFORE, plaintiff respectfully pray as follows:

1. That it have and recover compensatory damages from defendants, and each of them, in an amount in excess of \$10,000.00;
2. That the Court enter an order enjoining defendants from inconsistent treatment of the amendment process.
3. That the Court enter an order of specific performance or other mandatory injunction directing that the developers prepare written conveyances of the entire 11.7 acres described in Exhibit A to the Declarations to plaintiff;
4. That the Court enter an order enjoining defendants from trespasses, including the use of any common areas of the complex for any commercial endeavors;
5. That plaintiff be given a trial by jury on all issues fact;
6. That the costs of this action be awarded to plaintiff;

7. That the Court quiet title to all common areas of the Association's property to plaintiff; and
8. That plaintiff have and recover such other and further relief as the Court may deem just and proper.

This, the _____ day of December, 2007.

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