

To the Massanutten Community:

In a previous post, I provided a history of the agreements between the Developers of Massanutten Resort (initially, Massanutten Development Corp., then First Federal, and then Great Eastern). In that post, I noted that in all of these agreements there was never a requirement for the three timeshare developments Great Eastern controls in the Kettle to be MPOA members. In this post, I'd like to explain our legal reasoning for this.

There are several aspects of state law related to this, which I'll mention below. But in simple terms: from a legal standpoint, the Kettle time-share owners can only be considered members of MPOA under one of the following ways:

1. **A Timeshare project is developed on land that is subject to the terms of a declaration of covenants and restrictions running with the land and binding on all successors in title to that land.** Only where the original Developer of Massanutten recorded plats and subjected the platted land to declarations of covenants and restrictions requiring MPOA membership does such a covenant relationship exist. When it does, an MPOA membership arises by operation of law when title vests in a new owner of any parcel of or interest in the platted area subjected to the declaration. Normally, the membership would be a full membership with voting rights.
2. **A Timeshare Association enters into a membership contract with a Property Owners' Association.** This is, and continues to be, the relationship between Mountainside Villas and MPOA, and under their agreement, Mountainside Villas negotiated for its own board seat.
3. **Through an at-will relationship, meaning that the Timeshare Association voluntarily contributes to the Property Owner's Association.** This, up until recently, was the relationship between MPOA and Eagle Trace, Shenandoah Villas and Summit at Massanutten. But as with any at-will arrangement – be it rental property or an employment relationship, the relationship may be terminated any time one of either of the parties chooses to do so.

So, with that noted, I'd like to now explain why, primarily under Virginia statutes relating to property owners associations, the relationship of these three Kettle timeshares has been at will.

MPOA is a Property Owner's Association ("POA"). POAs in Virginia are governed by the Property Owner's Association Act, Va. Code Ann. §55.1-1800 *et seq.* (the "POA Act"). The POA Act states that it applies to "developments subject to a declaration initially recorded after January 1, 1959. . . ." §55.1-1801(A).

A "Development" is defined as real property subject to a declaration which contains both lots and common areas "with respect to which any person, *by virtue of ownership of a lot, is a member* of an association and is obligated to pay assessments provided for in the declaration." §55.1-1800.

A "Lot" is defined as: "(i) any plot or parcel of land designated for separate ownership or occupancy shown on a recorded subdivision plat for a development or the boundaries of which are described in the declaration or in a recorded instrument referred to or expressly contemplated by the declaration, other than a common area." Thus, a Lot must be defined in a recorded plat or declaration or "expressly contemplated by the declaration". §55.1-1800.

The definition of “development” and its linking of real property containing “lots” subject to a “declaration” requiring membership in “association” “by virtue of ownership of a lot” precludes the possibility that non-lot owners were contemplated by the legislature as persons who could be required to be members of a POA.

If that logic were not enough, the POA Act specifically states that “*this chapter shall not apply to the (i) provisions of documents of, (ii) operations of any association governing, or (iii) relationship of a member to any association governing [...] time-shares created pursuant to the Virginia Real Estate Time-Share Act.*” Va Cod Ann. §55.1-1801(D) (emphasis added).

From 1971 through 1978, fourteen declarations were recorded by Massanutten Development Company relating to land platted for lots in single-family developments gradually adding those areas to MPOA’s territory¹ – and requiring MPOA membership of all lot owners. The platted land relating to those fourteen declarations did not include the areas where the Great Eastern’s Kettle timeshare projects, Shenandoah Villas, Eagle Trace, or The Summit at Massanutten were developed. Moreover, the declarations provided that “These covenants are to be recorded with the plat of the unit or portion of the lands of MASSANUTTEN DEVELOPMENT COMPANY to which they relate or apply. *They are not to be construed as relating to or binding any other units or subdivisions of Massanutten.*”²

Since Shenandoah Villas, Eagle Trace, and Summit (and Mountainside Villas as well) were developed on land where there is no statutory “development” with “lots”, and where no recorded “declaration” requires association membership, the estates in those timeshare projects and their owners have no covenant relationship with, or mandatory membership in, MPOA. Instead, the Kettle time-share projects are all “time-share projects” as defined by the Virginia Real Estate Time-Share Act. See Va. Code Ann. §55.1-2200. All timeshare projects and related matters governed by this act (hereinafter the “TSA”).

The TSA specifically states: “*This chapter shall have exclusive jurisdiction and shall apply to any product offering or disposition made within this Commonwealth after July 1, 1985, in a time-share project located within this Commonwealth.*” By reading both the POA Act and the TSA together, it is clear the legislature did not intend the two statutes to operate in concert – they are, in fact, mutually

¹ <i>Massanutten subdivision</i>	<i>Deed Book</i>	<i>Page #</i>	<i>Date Recorded</i>
Unit One	396	99	10/07/1971
Unit Two	397	556	11/23/1971
Unit Three	399	390	1/21/1972
Unit Four	405	505	6/26/1972
Unit Five	411	141	10/16/1972
Village Woods	416	5	1/30/1973
Piney Mountain Acres	417	429	3/09/1973
Skiside Courts East	421	778	6/08/1973
Grenoble Woods	430	94	12/11/1973
Greenview Hills	448	765	4/04/1975
Unit Six	451	439	6/02/1975
Unit Nine	458	364	9/19/1975
Skiside Courts	471	132	4/29/1976
Unit Ten	516	249	3/03/1978

All the developments above, except for Skiside Courts East and Grenoble Woods, contain substantively the same covenants within their recorded Declarations. These covenants either provided for the formation of a property owners’ association (which the property owner would be a member of) or reference the already created property owners’ association: MPOA.

² See Massanutten Unit Five Declaration ¶ 34; and Unit Nine Declaration, Massanutten Development Company ¶ 33 (emphasis added).

exclusive. One set of statutes and their regulations governs POAs; a very different set of statutes and their regulations govern time-share projects. While there are analogous concepts, the terminology and the particulars are quite different. For example, Declarations do not exist within the TSA. Time-share programs and projects are legally created by a “time-share instrument,” defined as “*any document, however denominated, which creates the timeshare project and program, and which may contain restrictions or covenants regulating the use, occupancy, or disposition of time-shares in a project.*” Both the language and the concepts are distinct from those in the POA Act.

The three timeshare developments under discussion—Shenandoah Villas, Eagle Trace and The Summit—were created via “timeshare instruments” in 1987, 1989 and 1994, respectively. Those instruments have been amended and restated multiple times since, but those changes never included terms that required owners to become members of MPOA.

For all of these reasons and others, no MPOA membership is required of Kettle timeshare owners based upon any covenant relationship. Their past membership can only have been contractual or at-will relationships. In 1990, Mountainside Villas Owner’s Association and MPOA entered into a contract providing for MVOA’s membership in MPOA following litigation. The contract settled the pending dispute, defined MVOA member rights in MPOA, defined seven-year membership terms and provided an MPOA board seat for MVOA. However, no such contract exists for Shenandoah Villas, Eagle Trace or the Summit’s associations. Therefore, their past membership was an at-will relationship which they terminated after providing MPOA six months advance notice and attempting for that entire period to enter in good faith into a negotiation process. In the absence of a negotiating partner they withdrew, as noticed, but remain committed to pursuing a balanced contractual relationship in the upcoming mediation.

Cordially,

Garret Smith, General Counsel, The Resorts Companies