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November 13, 2007

Mr. Gil Vick  
4619 Blanchard Road  
Durham, NC 27713

Re: Opinion on enforceability of share restrictions/Waccamaw Sailing Club

Dear Mr. Vick:

Per your request, the following is an analysis of the current issues facing Waccamaw Sailing Club, Inc. as described by you to us. The analysis includes a brief summary of the facts presented. I trust this is responsive to your request, but if you require anything further, please just let us know.

Factual Summary

Waccamaw Sailing Club, Inc. ("WSC") is a closely held North Carolina corporation formed in 1973. According to the current NC Secretary of State records, WSC authorized 400 shares of common stock with a par value of \$200. Of those shares 335 are issued and the shares are currently sold for \$250. From 1973 until sometime after 2005 all of WSC shares were certificated shares. The Articles of Incorporation filed in February 1973 state "The preferences, limitations and relative rights in respect of the shares of each class are as follows: None." The Articles of Incorporation were amended in 1978 but with no mention of share transfer restrictions. However, the 1976 and 1980 versions of the Bylaws, and your summary of all amendments through 2001 do include specific provisions regarding share transfer restrictions. As to the shares themselves, from 1973 through the end of 2001, the share certificates issued were silent as to transfer restrictions. After 2002, all new certificates issued bear share transfer restriction language (no copies of these shares or the actual restriction language provided); after 2005 WSC ceased issuing certificates and now provides shareholders actual written notice of the restrictions via "letters of receipt."

You stated that the intent of the founders of the corporation was to restrict the transfer of shares so shares would only be held by current members of the sailing club. Due to the increase

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in the value of the corporate assets (primarily real property with a tax value of \$500,000 and estimated fair market value of \$2,000,000 to \$4,000,000), the value of the corporation has significantly increased since its creation in 1973; consequently WSC is working to recover shares from ex-members to ensure ownership remains closely held and controlled by its current members. Some of the subsequent transferees of the unmarked certificated shares have voluntarily consented to having their shares restricted upon the request of WSC. You and some of the current board members disagree over the enforceability of the intended but unwritten share restrictions against the current holders of the pre-2002 shares. As WSC works to obtain the outstanding shares from non-members, several issues are raised and each is addressed below.

1. Are the unmarked certificated shares of WSC stock, all of which were issued prior to 2002, subject to the intended transfer restrictions as contemplated by the WSC founders and as recited in the bylaws?

The answer to this question depends upon who the current holders of the shares are and what type of notice of the restrictions they received. If the shareholders are those parties who voted to approve the bylaws that include the transfer restrictions, then the restrictions are enforceable against those shareholders. However, the enforceability of such restrictions (those that are only contained in bylaws and not on face of the certificate) against subsequent transferees is questionable.

In North Carolina, there are two applicable statutes governing the restrictions of transfers of securities, both of which explicitly require that the certificate itself contain language notifying the holder of the transfer restrictions in order for the restriction to be effective against a transferee without actual notice. N.C. Gen. Stat. § 55-6-27(b) provides:

[A] restriction on the transfer or registration of transfer of shares is valid and enforceable against the holder or a transferee of the holder if the restriction is authorized by this section, it is not unconscionable under the circumstances, *and its existence is noted conspicuously on the front or back of the certificate* or is contained in the information statement required by G.S. 55-6-26(b). Unless so noted, a restriction is not enforceable except against a person who receives actual written notice of the restrictions (emphasis added).

Similarly, because shares of closely held corporations are securities as defined under N.C. Gen. Stat § 25-8-103, the transfer restriction provisions of N.C. Gen. Stat. § 25-8-204 apply. This section provides:

A restriction on transfer of a security imposed by the issuer, even if otherwise lawful, is ineffective against a person without knowledge of the restriction unless (1) *[T]he security is certificated and the restriction is noted conspicuously on the security certificate*; or (2) *[T]he security is uncertificated and the registered owner has been notified of the restriction* (emphasis added).

NORTHEN BLUE, L.L.P.

A shareholder who voted to approve of the restrictions undoubtedly has actual notice of the restrictions; thus the restrictions would be enforceable against that owner. N.C. Gen. Stat. §55-6-27(a). In the case of subsequent transferees or those who did not vote in favor of the restrictions, they also would be subject to the restrictions only if they had actual notice. N.C. Gen. Stat. §55-6-27(b).

2. Propriety of WSC's repurchase of shares from shareholders at a price of \$250.

WSC is "working to recover shares from ex members" by offering to repurchase shares at a price of \$250 per share. The offer is for the same price for which the shares are currently sold. There is no shareholder's agreement, corporate resolution, or other governing document setting forth the terms of share repurchase or redemption or the formula to determine the value of the shares. Without such an agreement, there is no requirement that the purchase price offered be based on the value of the assets of the corporation. The flip side of this is that the shareholders are not obligated to sell their shares nor accept the price offered.

3. Concerns regarding (mis)representation of shares of stock as restricted.

WSC's board of directors should be mindful of its duties of loyalty, good faith, and due care they owe the corporation. These duties are set forth in N.C. Gen. Stat. §55-8-30 and a number of cases decided under that section and its predecessor. Certainly WSC's directors should be concerned with how they represent the shares of the corporation as being restricted or not. Representing that shares of stock as restricted when they are not places WSC at risk of a derivative action or to a direct action if the aggrieved shareholders are able to demonstrate some level of harm from the misrepresentation.

4. What if shares are in a shareholder's estate?

In North Carolina, restrictions on transfers of shares are strictly construed. Even if an enforceable general restriction exists, such as the type imposed by WSC, it is not sufficient to prohibit involuntary transfers including transfers due to death, divorce or operation of law. NCCLP §9:29; Crowder Const. Co. v. Kiser, 134 N.C. App. 190 (1999), citing Averett and Ledbetter Roofing and Heating Company v. Phillips, 85 N.C. App. 248 (1987) and N.C. Gen. Stat. § 55-6-27. Unrestricted certificated issued prior to 2002 will pass in accordance with the shareholder's will or to his/her heirs at law if the shareholder died without a will.

Please let us know if you have any further questions.

Very sincerely,

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David M. Rooks, III