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Joe Piekirski  
President of Tropical Bay HOA  
PO Box 430522  
Big Pine Key, FL 33043

RE: Boat lifts/elevators/davits within Tropical Bay Subdivision

Dear President Piekirski,

You have asked me to summarize our discussion regarding the boat lifts in Tropical Bay. The issue is the proposed installation of boat lifts/elevators behind some of the residences in Tropical Bay canals.

The Amended Deed Restrictions say: "*no wharf, pier or other type of construction shall extend over the water of any canal. Slips may be constructed within property lines. Boats and other vessels may not be docked or tied to any canal in this subdivision or hung on davits in such a manner to interfere with navigation in any canal*". It is my understanding that there is concern as to where or not a boat lift/elevator could be construed as extending over the water in violation of the Deed Restrictions. It is also my understanding that there are, at present, six (6) such boatlifts constructed and in use within Tropical Bay Subdivision canals.

Deed Restrictions are restrictions on the right to use one's property. They are lawful, as long as they are reasonable, and carry out the intentions of creating a common scheme or plan for a specific development. However, because they are restrictions on the use of private property, they are strictly construed against their enforcement. If the Homeowner's Association tolerates a violation of a restrictive covenant by one property owner, that deed restriction is generally considered to have been waived and the Association has lost their right to enforce that covenant as to other property owner's use of their property in the same manner. See *Siering v. Bronson* 564 So.2<sup>nd</sup> 247 (5<sup>th</sup> DCA 1990).

In addition to the issue of waiver, there is a questionable factual distinction between the use of a boat elevator or davits which are specifically referenced in the Deed Restrictions, and simply tying a boat to the sea wall in the canal in the back of one's property, which is

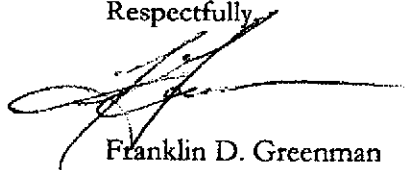
otherwise acceptable, and a boat lift/elevator. If the boatlift does not substantially increase the surface water area that would be used by a boat tying up to the seawall, then the factual distinction between the use of a boat lift and simply tying a boat up would seem to be of little concern. Such a distinction might be considered 'unreasonable' and therefore unenforceable.

The other issue is navigability. Tropical Bay's canals are quite narrow. There is a general rule of thumb, but not a law, that no boat should encroach more than 25% of the width of a canal. In Tropical Bay's situation that may be difficult. If there are 2 boats with wide beam tied up on opposite sides of a canal, it is conceivable that those 2 boats could obstruct navigation. Nevertheless, if both boats were tied to the seawall, that activity would seem to be lawful as to each property owner. It is for this reason that I suggest that Board of Directors adopt a policy of requiring Board approval before any boat docks/elevator/davits are built. The policy would be to insure that no boatlift/elevator/davit extends excessively into a canal, but more importantly, to try to regulate the installation of boat lifts/davits/or even the mooring of vessels in the narrow canals to one side of each residential lot, so that the boats are not directly across from each other, but rather staggered up and down a canal to reduce obstructions in navigability.

That policy also allows the Association to assure that the boat lift is a structure that meets current building codes, has appropriate permits from County and State agencies and that the contractor is insured as required by law. <sup>1</sup> This policy will also allow you to prohibit, or regulate, excessively large boats or boat placement that may obstruct navigation.

I hope this is a sufficient answer to your inquiry. If you have any further questions or concerns please do not hesitate to contact me.

Respectfully,



Franklin D. Greenman

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<sup>1</sup> This can be determined by calling the Monroe County Building Department (305-289-2500 or 2501) and giving the address of the work, and the name of the contractor. The building department will advise if a permit has been applied for or issued, and the contractor licensing office will advise if the contractor is properly licensed and insured to do the work.