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Re: New Neighborhood

Dear Randy, Carrie, and Margaret:

The three of you, either individually or on behalf of your respective Owners' Associations, have consulted me with legal questions about the administration of the "New Neighborhood," a subdivision in the Village of Empire, in which you each own a home.

FACTS

The New Neighborhood was created in 2002, by developer Quercus Alba, LLC (QA). It allegedly consists of five phases, although only four are shown on the recorded plat. The plat was recorded on November 27, 2002, after much negotiation with the Village of Empire over ownership and maintenance of the water and sewer systems and the streets and roads. Phase One has 15 lots; 14 of them have been sold. Phase Two has 20 lots; 17 have been sold. Phase Three has 10 lots; 3 lots have been sold. Phase Four has 15 lots; no lots have been sold. Phase Five is apparently not yet platted. The

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Declaration of Covenants and Restrictions (DCR) for the subdivision contemplates creation of five separate Owners Associations, all named the "New Neighborhood Property Owners' Association" (NNPOA) and differentiated by numbers:

NNPOA #1 for the owners of Lots 1 to 15
NNPOA #2 for the owners of Lots 16 to 35
NNPOA #3 for the owners of Lots 36 to 47
NNPOA #4 for the owners of Lots 48 to 62
NNPOA #5 for the owners of Lots 63 to 84

The development is located within the village limits of the Village of Empire, and is connected to the Village's water system. However, each phase of the subdivision has its own common septage system. Associations #1, #2, and #3 each have a septage system serving the lots in its Association, which are located on some, but not all, of the 13 common areas in the subdivision; there are easements throughout the development to connect each lot to the septage system serving its Association. There have been continuing tensions between QA (whose initial manager was Robert Foulkes and whose current manager is Foulkes' wife Robin Johnson) and the Owners' Associations over a number of issues, including ownership and maintenance of the common areas and septage systems. These tensions were brought to a head last summer, when Robin Johnson, as general manager of QA, sent the Owners' Associations letters, stating that QA officially transferred ownership of some of the common areas, along with the duty to maintain them, to each Association.

In these August 10, 2011 letters, Robin Johnson said,

> While the real estate documents could have been clearer, the correct interpretation and the intent of the drafters, the original QA partners, was that the individual association owns and is responsible for the maintenance of a park that is in proximity to the lots allocated to that Association.

Therefore, she said that NNPOA #1 owned Shore to Shore Trail Park, Northeast Park, Earl Park, and Alma Park; NNPOA #2 owned Alvin Park, North Pokagon Park, and Wedge Park; NNPOA #3 owned South Pokagon Park, Kate Park, and Silas Park. Many of the lot owners felt that this position was inconsistent with statements in the subdivision documents, and in statements which had been made by QA over the years. Therefore, you have asked me to discuss ownership of the common areas and various related questions.

LEGAL QUESTIONS

A. Ownership and Maintenance of the Common Areas

1. Who Owns The Common Areas, And How Are They Owned?

The dedication on the recorded New Neighborhood Plat states:

> Shore to Shore Trail Park, North East Park, Earl Park, Alma Park, Alvin Park, North Pokagon Park, South Pokagon Park, Wedge Park, Renee Park, West Alley Park, Silas Park, Kate Park, and Lila Park are private and reserved for the use of the owners of Lots 1 through 62.

The Michigan Land Division Act, MCL 560.253 (1) provides that:

> When a plat is certified, signed, acknowledged and recorded as described in this act, every dedication... to ... any person, society or corporation marked or noted as such on the plat shall be deemed sufficient conveyance to vest the fee simple of all parcels of land so marked and noted...

This means that legal ownership of the parks/common areas is vested in the owners of Lots 1 through 62, with each lot owner owning a 1/62nd undivided interest in **every common area**. When QA gave a purchaser a deed to a lot in the New Neighborhood, that deed included an undivided 1/62 interest in the common areas, without the necessity for specifically stating that interest in the deed. QA still owns an undivided 1/62 interest per lot in all the common areas for each lot that it still owns.

Thus, QA's contention that the Associations hold title is wrong on two counts. First, **it is the lot owners and not the Association** which hold title. This means that QA also holds a 1/62nd interest **as a lot owner** of unsold lots. Second, every lot owner has an interest in every common area. The Plat dedication does not say that the owners of Lots 1 to 15 have the right to use and own only Shore to Shore Trail Park, North East Park, Earl Park, and Alma Park, that the owners of Lots 16 to 35 have the right to use only Alvin Park, North Pokagon Park, and Wedge Park, and so on. Instead, it says that all of these parks are dedicated to the use of all the lot owners. Under Michigan law, this means that each lot owner holds a fractional interest in **all** the parks/common areas.

2. Can "QA" Unilaterally Change The Ownership Of Common Areas So That Each Of The Associations Owns 100% Fee Title To Specified Common Areas?

No. If QA wanted to change the dedication, it would have to file a lawsuit in the Leelanau County Circuit Court, asking to have the Plat amended, and naming each lot owner as a defendant in the lawsuit. The lot owners (or the Associations on behalf of the lot owners) could file answers objecting to any proposal, and the case would then have to be decided by the Circuit Court.

3. Is The Intent Of The Developer As To Ownership Of The Common Areas Relevant?

It might be relevant in a Circuit Court lawsuit, but I would argue that the dedication is clear and unambiguous, and therefore evidence of what the developer intended should not be admitted to vary the terms of the dedication. Furthermore, if the developer's intent is relevant, then so must be the individual lot owners' expectations when they purchased their lots.

4. What Was The Developer's Intent Anyway?

In support of her contention that each of the Associations was intended to own one set of common areas, Johnson cited a number of provisions from the Declaration of

Covenants and Restrictions. Her first argument was that when Section 10.1 of the DCR stated that each Association "shall hold title to **a portion** of the parks and greenways of the New Neighborhood," "a portion" meant 100% ownership in some but not all of the common areas. But it is equally logical that the words "a portion" should be interpreted to mean a fractional interest in all the common areas, and this is consistent with the dedication. (Besides, as discussed earlier, the Associations don't hold title at all, title is held by the lot owners.)

Her second argument was that because Section 10.7 of the DCR says that Associations must establish a schedule to maintain the **respective** common areas, some Associations must own some and some own others. But because there is no antecedent for the word "respective", it is meaningless.

Her third argument involves the Section 10.5 requirement that common areas be maintained by the Associations and the respective members "jointly and severally", and that the use of the words "jointly and severally" imply that some of the Associations owned some of the common areas and others owned others. The common interpretation of this language is that neither lot owners nor an Association can evade responsibility because someone else hasn't done their job.

Moreover, there are a number of other statements in the New Neighborhood documents which support an inference that all the Associations participate in ownership and maintenance of all the common areas. First, Section 9.1 of the DCR says that "every member and their invitees shall have the right and easement of enjoyment to the common areas." It does not say "to the common areas to which the member's Association holds title." Second, Paragraph 4 of the New Neighborhood design guidelines, attached to the Planned Unit Development Agreement states:

> **All** residential lot owners will be members of a homeowners association and therefore owners of a portion of the parks and greenways. The homeowners association will also own and pay their portion of the taxes on the commonly held land (parks and greenways)..."

Substitute the phrase "Everybody who has an ownership interest in a lot", for the first four words, and the meaning becomes clear as a bell.

Third, the New Neighborhood landscaping plan, also attached to the PUD Agreement as Exhibit E, refers to "the Park" as "the central public space of the neighborhood." This presumably means what is shown on the Plat as North and South Pokagon Park. If this is the central public space, and all owners have a right to use it, it makes no sense to maintain that it is divided in two and owned by two different Associations, with the other two not having any ownership at all. And finally, in the Stormwater Drainage and Open Space Management Agreement, the responsibility for maintenance of the drainage facilities and the open spaces is given to the "Association/Developer", which is defined **to include "all present or future lot owners within the development."** There is absolutely no indication that the responsibility for any particular area is allocated to certain Associations.

5. What Documentation Is Required To Accomplish Transfer Of Legal Title To Common Areas?

Each deed from QA conveying a lot included a 1/62 interest in all the common areas, without specific mention of that interest. (See P. 3 of this Opinion.) The 1/62 interest for lots which are not sold still belongs to QA. Simply put, when lots are sold, the undivided 1/62 interest in the common areas goes with the lot without the necessity of granting it separately.[1]

The fact that the Leelanau County Department of Equalization has listed certain Associations as the owners of a certain tax parcels comprising certain common areas does not create a change of ownership. It simply reflects that someone asked them to change the tax bills. The Equalization Department's records merely establish to whom the tax bills should be sent. They are not evidence of who holds title to property.

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[1] There is no statutory requirement that a developer record a master deed for a subdivision, as there is for a condominium project. But plat itself, including its dedication, the Declaration of Restrictive Covenants, the by-laws of the various associations, and other legal agreements such as those signed by the Village of Empire, govern administration of the subdivision.

6. Who Is Responsible For Upkeep And Maintenance Of The Common Areas?

At one time, QA apparently intended that responsibility for upkeep and maintenance of the common areas was based on proportional use. (See, for example, an August 2006 letter from the developer's attorney). However, in her August 2011 letters, Robin Johnson stated that each Association would be entirely responsible for the maintenance of each park to which she claimed each Association had been given title. But there is nothing in any of the New Neighborhood documents to support this contention. Section 10.5 of the Declaration of Covenants and Restrictions says, "The common areas shall be maintained by the Property Owners Associations and their respective present and future members, jointly and severally, in perpetuity." Section 10.6 repeats that "the Property Owners' Associations shall be responsible for the 'dedication' (whatever that means, as the dedication was accomplished when the Plat was recorded) and maintenance of the common areas." And as noted before, the Storm Water Drainage and Open Space Maintenance Agreement assigns the responsibility of maintenance to "Association/Developer," with no allocation to any particular Association. Therefore, all the Associations are responsible for maintenance of all common areas.

7. In What Proportions Should The Maintenance Costs Be Paid?

The Associations do not have an equal number of lots. NNPOA #1 has 15 lots; NNPOA #2 has 20 lots; NNPOA #3 has 12 lots; NNPOA #4 has 15 lots. But nowhere in the Declaration or in the Open Space Maintenance Agreement does it say that the Associations are responsible for the costs in proportion to the number of lots in the Association. That is a logical assumption, but it is an assumption. However, it is possible for the Associations to agree among themselves to share the costs in whatever manner is equitable. This would require approval of the Boards of Directors of all the Associations.

In summary, the dedication in the Plat establishes that each owner of a lot in the New Neighborhood subdivision has an undivided 1/62nd interest in **all** the common areas. QA does not have the right to unilaterally change that dedication. And so, unless the dedication is changed or the Associations agree differently, each owner is equally liable for the costs of maintenance and repair of all common areas.

B. **Ownership and Maintenance of Septage Systems**

8. Who Owns The Septage Systems?

There are at least three septage systems, one serving the lots in NNPOA #1, one serving lots in NNPOA #2, and one serving lots in NNPOA #3. (I don't know if there's a system installed for Association #4, and because Phase Five hasn't even been platted, presumably there is no system for it). As noted above, the lot owners own the common areas in which the septage systems are installed. But those common areas are subject to easements to the respective Association for its particular system. The systems were installed by QA at its expense, as required by the Maintenance and Indemnification Agreement, which says, "Community Sewers servicing the projects are to be constructed by the Developer on the Real Property, and each Community Sewer will be turned over to the Association responsible for those lots." Because QA constructed these systems, it is my opinion that they remain owned by QA until they are "turned over" to the respective Associations. This could be accomplished by a Quitclaim Deed, the terms of which might be subject to some negotiation.

9. Who Is Responsible For Maintenance And Repair Of The Septage Systems?

The DCR is silent on the obligation for maintenance of the septic systems, except for a sentence in Section 10.1, obligating the Developer to establish, and the Association to fund and maintain, an escrow account for the "operation, maintenance, repair and/or replacement of the septage systems," with a reference to the Maintenance and Indemnification Agreement. Paragraph 1a of that Agreement specifically states that each Association is responsible for maintaining the Community Sewer serving the lots in its Association. Paragraph 1e says that "each Community Sewer shall be maintained by its Association pursuant to the terms of this Agreement." So the Associations are responsible for maintenance and repair, once the systems have been turned over to them.

10. What Does The Escrow Fund Have To Do With Anything?

The Maintenance and Indemnification Agreement with the Village required the Developer to establish an escrow fund from which repairs to the system could be made if the Associations or Developer did not make the required repairs. However, if any of the money in the escrow fund is used for this purpose, it has to be replaced by the

Developer or the Associations. It's only there only to protect the Village from having to pay taxpayer money to maintain the systems. (See paragraphs 5-10 of the Agreement.)

D. Assessments

11. Is Quercus Alba Required To Pay Assessments On The Lots That It Owns?

Yes. Section 12.1 of the DCR states that each lot owner is a member of the Association designated for that lot. Section 10.9 gives each Association the ability to levy assessments against lots to cover maintenance expenses, with all assessments apportioned equally among lots. Section 10.10 says, "Each lot owner shall be obligated to pay all assessments levied on the lot during the period of time in which the lot owner owns the lot. No lot owner may be exempted from liability from contribution toward maintenance by waiver or abandonment, or any other means."

I can find nothing in any of the other documents exempting the Developer, **as a lot owner,** from liability for assessments for maintenance. Therefore, if the Associations are levying assessments (or dues) on each lot owner, QA must pay its share for each lot it still owns, regardless of whether it has turned over administrative obligations to the Association. It is also subject to the same collection remedies as any other lot owner.

12. What Are The Remedies For Failure To Pay Assessments?

Unpaid assessments are a lien on a lot, although in order to make this lien enforceable against a subsequent purchaser, a document must be recorded with the Register of Deeds. Then, anyone who purchases the lot is considered to have notice of the fact that there are unpaid assessments, and so would be liable for those assessments if the person purchased the property without insisting that the seller pay the past due amounts. (The reference in Section 10.10 to this lien having priority over all other liens, except State or Federal tax liens and "sums unpaid on a prior recorded first mortgage" simply means that those three items have priority over a lien for assessments. So if someone sells a lot, any State or Federal tax liens and any balance due on a recorded mortgage must be paid before the lien for unpaid assessments is paid.)

Article XIII of the DCR specifies the procedures for levying and collecting assessments. Section 13.9 provides that if assessments are not paid on the due date, they become delinquent and bear interest at the rate equal to the rate of interest on unpaid and past due county real property taxes. The owner is also liable for the costs of collection, which would include attorney fees.

The Association may simply record a lien for unpaid assessments against any particular lot, and wait for the lot to be sold before trying to collect. Or it may file a lawsuit to collect the past due amounts directly from an owner of a lot. If the amount due is less than $2,000 the suit may be filed in Small Claims Court; if it is more than $2,000, but less than $20,000, it must be filed in District Court. There is no provision in the Declaration of Covenants and Restrictions or in the By-laws for suspension of voting rights if the assessments are delinquent.

E. Indemnification Liability Issues

13. Is The Indemnification Language in the By-Laws Something Special?

No. Article XV of the NNPOA#1 By-laws contains extensive language about indemnification of officers and directors. This language is almost verbatim from the Michigan Non-Profit Corporation Act. Essentially, if a director or agent of the Association is sued for acts done in the course of his or her work for the Association, the Association can indemnify that person, i.e. agree to pay their legal bills and any liability they might have in the lawsuit. This is standard Michigan law. (I have a copy only of NNPOA#1 By-laws. I assume the others are identical, but this should be confirmed.)

14. Should The Associations Carry Liability Insurance?

Yes. They should carry premises liability insurance for the common areas, and also what is called "officers and directors insurance" in case anyone files a lawsuit against the Association.

15. If The Associations Give An Easement To The Sleeping Bear Heritage Bike Trail Through The Common Areas, Do They Have Any Potential Liability?

No. The Recreational Trespass Act, (MCL 324.73107) provides that no one who is injured in a recreational activity on another person's land **cannot** bring a claim against the owner, unless they actually paid for the privilege to carry on that activity. However, it is a good idea to include language in any easement agreement language that the organizers of the bike trail will indemnify the Associations in case they are sued for something which happens on the trail.

F. Miscellaneous Questions

16. Is Quercus Alba Obligated To Provide All The New Neighborhood Documents To Each Purchaser?

There is no statutory obligation to do so, although it would be prudent. At common law, if an owner did not receive those documents, and then was unhappy with the development, the owner might have the right to rescind the purchase.

17. What Are The Powers Granted To The Developer Which Are Mentioned in Section 14.5 of the DCR?

I don't know. I can't find any section of the DCR or the By-laws which gives the developer any special powers.

18. As Long As Quercus Alba (Or Another Developer) Owns A Lot, Must They Adhere To The Development Documents, Just Like Any Other Lot Owner?

Yes. There is no provision giving the developer an exemption from anything. And if QA sells to another developer, that developer would also still be bound by the restrictions as long as it owns any lots.

I hope I have answered your questions. Please feel free to contact me if there is further assistance which you need.

Sincerely,

Joan Swartz McKay

JSM/nac