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May 9, 2025

Ms. Cheryl A. Clark
9948 W. Wilce Street
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Re: Administration of the New Neighborhood Subdivision and Common Areas

Dear Ms. Clark,

You retained me to review your concerns about the manner in which the New Neighborhood Subdivision of Empire is being governed, and concerns over their implementation of Covenants and Restrictions that apply to lands in that development. In order to evaluate your concerns, I have reviewed the following documents regarding the subdivision along with applicable Michigan statutes:

New Neighborhood Planned Unit Development Agreement (PUD)
New Neighborhood Declaration of Covenants and Restrictions (DCR)
New Neighborhood Property Owners' Association Bylaws (#1)
New Neighborhood Common Area Plan (2015, 2025)
McKay & McKay, Attorneys at Law, Opinion Letter dated January 31, 2012
The Michigan Land Division Act, MCL 560.253(1)
Michigan Nonprofit Corporation Act, MCL 450.2408

To begin, it is important to understand that the terms and conditions contained in the Planned Unit Development Agreement, its Landscaping Plan, the Declaration of Covenants and Restrictions, and the Property Owners' Associations Bylaws are binding on the Property Owners' Associations and the owners of all 62 lots in the subdivision. These documents were recorded with the Leelanau County Register of Deeds, including the Bylaws by reference, triggering application of The Michigan Land Division Act, MCL 560.253(1). Namely, the owner of each lot in the subdivision has the legal right to enforce the terms contained in these governing documents because they were recorded and vest in fee simple to each lot. In short, the terms in these documents are not suggestions to be followed based on the whim or caprice of some, or even a majority of the lot owners. Rather, the terms in these documents create legal responsibilities and rights that belong to each lot owner.

I agree with the opinion rendered by the attorneys at McKay & McKay in their letter on this topic to New Neighborhood lot owners, dated January 31, 2012. The attorneys at McKay & McKay state the same thing I am saying now; that persons governing New Neighborhood must do so in accord with the terms and conditions set forth in the documents pertaining to the subdivision filed with the Leelanau County Register of Deeds. A review of provisions set forth in those documents makes this point clear:

New Neighborhood PUD:

P-11: "[A]ll Lot owners . . . shall be bound by the Articles and Bylaws of each respective Association, the Maintenance and Indemnification Agreement Regarding Privately Owned Public Sewers, the Declaration of Covenants and Restrictions, and the New Neighborhood Stormwater Drainage Facilities and Open Space Maintenance Agreement."

(See also, P-5, P-10, and P-19 for other references regarding the enforceability of terms of the subdivision documents filed with Leelanau County.)

New Neighborhood Declaration of Covenants and Restrictions (Exhibit "C")

Section 7.1: "These Declarations of Covenants and Restrictions, New Neighborhood Subdivision Planned Unit Development Agreement, Maintenance and Indemnification Agreement Regarding Privately Owned Public Sewers, New Neighborhood Stormwater Drainage Facilities and Open Space Maintenance Agreement, Articles of Incorporation for Each New Neighborhood, and the Bylaws for each New Neighborhood are attached hereto and hereby incorporated by reference and shall be binding upon [all Property Owners' Associations listed] and equally binding upon the present and future individual Lot owners within each Association."

Section 14.1: "The Covenants and Restrictions set forth in this Declaration shall run with and bind all the Development, shall be perpetual and shall inure to the benefit of and be enforceable by the Developer, the Associations, the Village of Empire, and the Owners of any land subject to this Declaration, their respective successors, assigns, heirs, executors, administrators, and personal representatives."

Given this general oversight of the enforceability of the rules governing your subdivision, I will now turn to the specific legal questions you posed in your inquiry of me.

1. Do all the New Neighborhood lot owners really co-own all the New Neighborhood common areas?

Yes. The McKay & McKay opinion letter located online in the New Neighborhood documents contains an extensive and thorough discussion of the reasons each lot owner is a co-owner of all common areas in New Neighborhood. I agree with the legal reasoning expressed by McKay & McKay.

2. Why would Developer Quercus Alba create one subdivision that is jointly governed by multiple Property Owners' Associations when all 62 property owners jointly own all common areas in the subdivision?

I do not want to speak for Quercus Alba. However, by creating four property Owners' Associations, it appears that Quercus Alba intended to have each Association govern a subset of common areas, not co-govern all of them. The McKay & McKay opinion letter, page 4, describes the flaw in this approach.

If this was the intent of Quercus Alba, then the structure they created is at odds with the rights of the lot owners set forth in the documents filed with the Leelanau County Register of Deeds. All 62 lot owners own all of the common areas in New Neighborhood. Each of the Property Owners' Associations have the legal duty to take actions that comport with the requirements of the PUD, the Covenants and Restrictions, the Bylaws, and the Open Space Maintenance Agreement. Each lot owner is allowed to enforce those rights against any of the governing Associations for a violation of the terms of these documents. As set forth in The Declaration of Covenants and

Restrictions, Section 14.4: "The Covenants and Restrictions set forth in this Declaration shall run with and bind all the Development, shall be perpetual and shall inure to the benefit of and be enforceable by the Developer, the Associations, the Village of Empire, and the Owners of any land subject to this Declaration, their respective successors, assigns, heirs, executors, administrators, and personal representatives."

3. Are the Property Owners' Associations required to follow their Bylaws, the PUD, the Landscaping Plan, and the Declaration of Covenants and Restrictions?
What happens if they don't?

Yes, the Property Owners' Associations are required to follow their Bylaws, the PUD, the Landscaping Plan and the Declaration of Covenants and Restrictions. The entire purpose of the subdivision corporation, in part, is "to provide for maintenance and upkeep and to administer the open space and common areas . . ." Bylaws, Article III, Section 1(A). The Board of Directors exists, in part, to exercise administrative powers in order to enforce the terms of these documents . Id., Section 1(D).

Property Owners' Associations that don't follow these documents are subject to a lawsuit by any lot owner. A lot owner may pursue any violation of terms and covenants set forth in any of the documents filed with the Leelanau County Register of Deeds. Jurisdiction for a lawsuit lies with the Leelanau County courts as the principal office of New Neighborhood is in Leelanau County. Bylaws, Article II.

A lot owner that is successful in a lawsuit against one or more of the Property Owners' Associations may obtain an order from the court against New Neighborhood and/or an offending member of the subdivision for payment of reasonable attorney fees. If seeking attorney fees, I suggest clearly documenting any violations with offending officers or parties in New Neighborhood. Put those officers or parties on notice of their violations and provide them a reasonable opportunity to rectify the transgression(s). Courts in general want to avoid unnecessary, vexatious or harassing litigation. A court is more likely to award attorney fees when it sees that a prevailing party acted in a reasonable and proactive manner to avoid unnecessary litigation.

It was interesting to note that New Neighborhood has a provision to indemnify parties in New Neighborhood that are sued in their official capacity. Bylaws, Article XV. However, indemnification is not guaranteed. The Bylaws are written in such a way that an individual can be liable without indemnification to cover their own expenses and attorneys' fees, plus those of the successful opposing party. However, if the Association exercises its discretion to indemnify the officeholder being sued, then all the other members of the Association would have to pay a pro-rata share of costs awarded by the court to the lot owner that was successful in the lawsuit.

4. Do annual meetings have to be held on the date specified in the New Neighborhood Property Owners' Association 1 Bylaws?

Yes. Article IX, Section 2 of the Bylaws is clear on this issue: "The annual meeting of Members of the Corporation ***shall*** be held on the third Monday in March of each year, if not a legal holiday, and if a legal holiday, then on the succeeding business day." Use of the word "shall" means that the terms that follow are not negotiable or discretionary, and must be adhered to.

5. Does anyone have authority, including the President of the Property Owners' Association, to change the date of the annual meeting?

No. Article VII, Section 2 of the Bylaws prohibits such conduct by stating the following: "The restrictions upon use and the agreements made within these documents were a prerequisite and necessary to obtain approval for the New Neighborhood; and the Village of Empire and the

Developer relied upon those agreements prior to and in consideration of the establishment of the New Neighborhood. Therefore, the restrictions and agreements contained therein are not subject to amendment, modification, or revocation, unless specifically permitted within the respective document or agreement, or with prior written consent of the Village."

Nothing in the Bylaws gives the President, or any other person, authority to unilaterally change the date of the annual meeting.

6. Can any President or other member of the Board create a ballot and submit it to members for voting without first holding a Board meeting for approval of the ballot measures? Further, can measures be put to members for a vote using an electronic ballot instead of voting at a member meeting? (Examples include use of an electronic ballot for members to vote on actions involving common area maintenance, expenditures, or other matters.)

No, for several reasons. First, any officer that bypasses the Board of Directors in order to bring a matter directly to the members for a vote subverts the governing structure set forth in the Bylaws. The Board of Directors conducts Business of the New Neighborhood Corporation according to Article VIII, Section 1 of the Bylaws, not one individual. Article VIII describes the composition of the Board of Directors, establishes their selection by election of the members, and defines a one-year term of office for each position on the Board. Unilateral action by the President without involving the Board of Directors renders the governing structure set forth in Article VIII of the Bylaws a nullity, which violates the express purpose of having Bylaws.

Secondly, unilateral action by the President or any other Board member without involving the entire Board of Directors violates the procedures for decision-making set forth in Article IX of the Bylaws. The Bylaws are designed to have decisions that affect members made in a democratic manner, which involves an opportunity for discussion and debate for proposals involving expenditures, common area maintenance and the like. Simply putting matters before members for a vote eliminates the democratic processes that are mandated by the procedures set forth in the Bylaws.

Lastly, using electronic ballots for member voting without a meeting violates the Michigan Nonprofit Corporation Act, MCL 450.2408. That statute provides: *"A corporation may provide in its articles of incorporation or in bylaws that are approved by the shareholders or members that any action the shareholders or members are required or permitted to take at an annual or special meeting . . . may be taken without a meeting if the corporation provides a ballot to each shareholder or member that is entitled to vote on this action."*

The New Neighborhood Bylaws do not allow for electronic voting. Rather, the Bylaws require that "voting rights are governed by Article XII of the Declaration of Covenants and Restrictions." Article XII, Section 12.3 states that "Members of the Associations . . . shall be entitled to vote [at meetings] in person or by proxy." The Declaration of Covenants and Restrictions further states that assessments "shall be fixed by a majority vote of the members present and voting as provided in Section 13.5 of this Article [XIII]." The Declaration of Covenants and Restrictions establish meeting notice and quorum requirements for assessment determinations, and that those assessments can only be imposed for a maximum 3-year term. Article 13.5. None of these provisions allow for electronic voting. Therefore, electronic voting violates the voting structure established for members of New Neighborhood and is not allowed.

7. Can a President count electronic votes on matters put forth to members without involvement by the Secretary and the other members of the Board?

No. As stated above, the matters to be put before members for a vote must be decided by the Board of Directors and voting must comply with the procedures set forth in the Bylaws and the

Declaration of Covenants and Restrictions. Further, it is the duty of the Secretary to count and record votes according to the mandate in Article XI, Section 10 of the Bylaws.

8. Are members allowed to vote by proxy?

Yes. A limited directed proxy allows members to have someone else vote for them when they cannot attend the meeting. A limited directed proxy specifies how a member wants to vote on specific actions and directs their proxy person to vote for them in the meeting. A member can communicate a limited directed proxy for another member to act upon at a meeting by paper, electronically or both. Property Owners' Associations may use other types of proxies, like unlimited non-directed proxies or quorum proxies. Proxy forms must identify the proxy type.

Although a member may electronically communicate permission for their vote to be cast by proxy, it does not mean that voting may be done electronically. Voting on ballot measures may only be done in person or by proxy at a member meeting. A quorum is required for a member meeting to occur. An opportunity for discussion on ballot measures must be provided before voting takes place. A proxy is simply the manner in which the vote by a member is cast after all of the other prerequisites are satisfied.

9. Can the presidents of the four New Neighborhood Property Owners' Associations have president-only meetings to discuss issues, make decisions about matters of the subdivision, and take action without their boards?

No. As stated above, such actions are contrary to the intent, structure and procedures for decision-making at New Neighborhood as set forth in the Bylaws and The Declaration of Covenants and Restrictions.

10. Can Property Owners' Association meetings be held virtually by technologies such as Zoom?

Yes. The Michigan Nonprofit Corporations Act, MCL 450.2405 states that *"unless otherwise restricted by the articles of incorporation or bylaws, a shareholder, member, or proxy holder may participate in a meeting of shareholders or members by a conference telephone or other means of remote communication that permits all persons that participate in the meeting to communicate with all the other participants . . ."* and that *"participation in a meeting under this section constitutes presence in person at the meeting."* The Bylaws and the New Neighborhood PUD do not restrict remote communication by members at Property Owners' Association meetings.

11. Do members have the right to vote on matters concerning maintenance of the New Neighborhood common areas, such as a mowing schedule?

Yes. Article III of the Bylaws specifically states that the purpose of the corporation, in part, is to provide for the maintenance and upkeep and to administer the open space and common areas. Further, Article III of the Bylaws states it is designed to implement the administrative powers set forth in the Declaration of Covenants and Restrictions. Lot members have both a financial and aesthetic interest in the maintenance and upkeep of the common areas in their neighborhood and a right guaranteed in the Bylaws and Declaration of Covenants and Restrictions to a vote on the manner in which those areas are maintained and the cost to do so. This would include a right to vote on matters such as the mowing schedule for common areas.

12. Do members have the right to all information on how other Property Owners' Associations voted on co-owned common area property?

Yes. As I stated at the beginning of this letter, all 62-lot owners have a legal interest in all of the common areas of New Neighborhood. Again, the attorneys at McKay & McKay have written a thorough analysis on this topic. Decisions made by each Property Owners' Association regarding any common areas affects the legal interest in property owned by all lot owners. As such, each lot owner has the right to minutes, the specific voting results by member and any other records from the other Property Owners' Associations. I recommend that you request in writing such documents from each of the respective Associations and give them a reasonable time to comply. If the records are not provided, we can seek the necessary legal recourse.

13. Is the New Neighborhood Common Area Plan legally binding?

No.

It is my understanding that the New Neighborhood Associations created a landscaping committee that authored a Common Area Plan in 2015. The Plan sets forth the manner in which common areas will be maintained, including a mowing schedule.

It is further my understanding that the landscaping committee has claimed that their Common Area Plan controls the terms and conditions for maintaining the common areas until such time as a new Common Area Plan is developed, and that a new 2025 Common Area Plan has recently been proposed. Both the 2015 Common Area Plan and proposed 2025 Common Area Plan are large multi-page complex documents that contain elements that are in conflict with the New Neighborhood governing documents, and they are therefore non-binding on lot owners, regardless of whether lot owners have voted or will vote to approve the Common Area Plan(s). One clear example of several conflicting governing elements is in the current 2015 Common Area Plan, which states that the New Neighborhood PUD "does not appear to bind the New Neighborhood to follow [the PUD's landscaping] plan . . . [but the plan] serves as a good reference document." See, page 2. The proposed 2025 Common Area Plan is a cumbersome 16-pages that contains language that is both redundant with, and conflicting, with the recorded PUD, the Landscaping Plan and other proper governance documents of the New Neighborhood. The proposed 2025 Common Area Plan also attempts to add new governance process requirements for the New Neighborhood that belong in Bylaws, not common area landscaping plans.

I will reiterate what I have noted earlier; the documents filed with the Leelanau County Register of Deeds govern the terms and conditions for administering the function of the New Neighborhood and provide the basis for lot owners to enforce those rights. The New Neighborhood Landscaping Plan governs the manner in which landscaping is to be conducted in the New Neighborhood. (Attached as Exhibit "E" to the New Neighborhood PUD Agreement, filed with the Leelanau County Register of Deeds on 8/22/02, 11/27/02 and 9/11/03, respectively). The PUD and the Bylaws govern the right of lot owners to participate in decisions concerning the management and implementation of landscaping. As clearly described in the Landscaping Plan, that includes decisions concerning "mowing."

The 2015 Common Area Plan has no legal binding effect on the lot owners. You will notice that the Common Area Plan is not a part of any documents filed with the Leelanau County Register of Deeds by Quercus Alba, The Village of Empire, or any other entity with standing to do so. As a result, the Common Area Plan has no binding legal effect. Those who argue that the terms set forth in the Common Area Plan are binding, are wrong. The Common Area Plan cannot be used as a means to change the terms of the New Neighborhood Plan and other documents filed with Leelanau County, and cannot be used to suppress the right of all present lot owners to vote to determine the manner in which to implement a mowing schedule.

It is my pleasure to serve you in this matter. Let me know if further action is needed.

Sincerely,

Daniel W. Rose
Attorney at Law