

## Memorandum

### Attorney - Client Privileged

From: Gary A. Braun  
To: Board of Directors  
Long Hill Estates at Peterborough  
Date: 8/12/07  
RE: Driveway and External Shut Off Valve

I have been asked to provide an opinion as to the 2 following issues. I have based the opinion on Glen Swanson's initial email to me dated July 11, 2007, as well as a follow up email from Greg Lawn dated July 24, 2007. In reaching the opinions below, I have reviewed the Declaration, Bylaws and Rules, as amended, of the condominium association. The version of the Rules I have reviewed is dated November 10, 2004.

#### 1. Driveway and Garage Flooding

In the first instance, one must determine whether the driveway, garage (generally), and the garage door, are part of a unit or part of the common area. The foundation of the garage (including its slab floor) is part of the common area up to the "unfinished interior surface" of the slab floor. See Declaration at Section 3 (e). To the contrary, the interior space within garages at the condominium is part of the unit and not the common area. The unit would also include any finish element (such as paint) on the floor of the garage. See the Declaration at Section 3 (d) (iii).

It would appear that garage doors are part of the unit, though such doors are not dealt with expressly by name in the Declaration. See definition of "vertical boundary" of units at Declaration at Section 3 (d) (iii) (the vertical/perimeter boundaries of units shall include the vertical plane of the "... exterior unfinished surfaces of the ... doors ..."). See also Declaration at same section indicating that the owner of a unit "... owns the ... entrance doors and window frames (to the unfinished exterior surfaces thereof)." I therefore conclude that the garage doors are part of the units.

The driveways are common area of the condominium. See the Declaration at Section 3 (d) (iii). However, the driveways are also deemed to be limited common area ("LCA") because they are reserved for the exclusive use of the units to which they appertain. See Declaration at Section 3 (e) (ii). I would note also that certain parts of the land surrounding a unit where such elements as patios, walkways and front entries are located, is also considered to be part of the LCA.

The land remainder of the land on which the condominium is sited is part of the common area. See Declaration at Section 3 (e) (i).

Article V, Section 4 of the Bylaws of the condominium sets forth the respective maintenance, repair and replacement obligations of the association and the unit owners with respect to the various parts of the condominium. As a general rule, the association is responsible for maintenance, repair and replacement of all of the common area except in those cases where such activities are necessitated by the "negligence, misuse or neglect of an Owner, or a person gaining access with such Owner's actual or implied consent ...." See Bylaws at Article V, Section 4 (a). If the maintenance, etc. obligations of the association arise with respect to the common area because of the neglect, etc. of an owner, the owner is obligated to pay for such maintenance, repairs or replacements.

It does not appear that the unit owner has been neglectful in this instance based upon the facts presented to me.

Unit owners are responsible for "... performing the normal maintenance for any Limited Common Area which is appurtenant to his Unit, including keeping it in clean and sanitary condition and free and clear of snow, ice and any accumulation of water, and shall make, at his own expense, all repairs thereto, beyond normal maintenance, caused or necessitated by negligence, misuse or neglect." Bylaws at Article V, Section 4 (b). See my comments below as to the "accumulation of water" issue.

Typically, I would construe the provisions of Article V, Section 4 (b) of the Bylaws to impose the following, respective obligations on the association and the owners relative to LCA consisting of driveways at the condominium:

a. Unit owners are responsible for such activities as plowing, salting and sanding driveways; sweeping and cleaning driveways, dealing with normal accumulations of snow, water and ice on driveways; and (perhaps) resealing driveways. In this regard, I really do not believe that the language about "any accumulations of water" is designed or intended to cover situations like these, thereby making the owner responsible for correcting this type of issue with a driveway.

b. The association is responsible for all other maintenance, repair and replacement activities associated with driveways including repaving; replacing entirely; and repairing including by correcting any defects or deficiencies in the driveways, including design and construction defects.

Another factor to consider is the source or origin of the water which is flooding the garage in question. If the flow of water originates in the street or on the common area lawn or other portions of the land, an argument can be made that the common area itself is causing or contributing to cause the water flow into the garage and attendant flooding issues. Responsibility for any water originating in the streets, lawn or other common area grounds of the condo property is likely that of the association as all of these areas are part of the common area. Note, however, my comments above concerning LCA consisting of walkways, entries and patios. Is water originating from these LCA areas and contributing to the flow of water entering the garage via the driveway? If so, an argument might be made that the owner's failure to carry out "normal

maintenance" associated with these areas is contributing to the flooding problem. On the other hand, the association might be responsible to correct such contributing runoff from patios, etc. if the need to correct that runoff constitutes a repair, replacement or anything other than normal maintenance.

Conclusion as to Garage-Related Issues:

- The garage door is part of the unit. It is therefore the unit owner's exclusive responsibility to maintain, repair and replace ("M, R & R") the door.
- The slab floor and foundation inside the garage is part of the common area and the association bears all M, R & R activities associated with the same unless caused by the neglect of any owner.
- The surface coating or finish on the garage floor, if any, is part of the unit and is therefore sole responsibility for M, R & R of such coating or finish resides with the owner.
- If the driveway problem is construed to be a result of its design, configuration and/or construction, or, if common area elements of the condo property cause the flooding, I would conclude that the association is responsible to repair the problem. This conclusion would hold true with respect to other driveways at the condo that have the same or similar problems, for the same reasons.

2. Responsibility for Outside Utility Element Serving Single Unit

Section 3 (e) (i) of the Declaration provides that systems relating to water supply, sewerage disposal, gas, electrical, cable TV and telephone systems which are "contained within" and which serve only a single unit, " ... shall be part of the Unit." The same section excludes from the definition of "units" such things as pipes, ducts, etc. which are " ... not located within a Unit and such facilities located within a Unit, which serve parts of the Condominium other than the Unit within which they are located." However, I construe this latter provision standing alone to require that the element in question must serve multiple units in order to be considered part of the common area and not part of a unit. This is so because of the placement of the comma after the word "Unit" and before "which".

At the same time, there is no language in the Declaration, including in Section 3 (e), which seems to provide that a utility element which is located outside of a unit and which serves only that unit, is part of the unit and not part of the common area. Absent such language, I would conclude that the water shut off valve in question is probably part of the common area, and therefore is the association's responsibility to M, R & R.

I note also that Section 3 (d) (iii) of the Declaration relating to unit boundaries was amended in October 2001, though I do not believe such amendment has bearing on this particular issue.

Typically, a utility element such as a petcock or water shut off that serves only one unit, even if located outside the usual boundaries of the unit, is considered part of the unit and not the common area. However, that does not appear to be the case here. Unfortunately, it would appear that other utility elements that serve a single unit only, but which are located outside the boundaries of that unit, are also part of the common area and therefore lie within the responsibility of the association and not the unit owners.