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REPLY TO: **Minnesota Office**

November 18, 2020

SENT VIA EMAIL

mdl Larson5@comcast.net

Seven Ponds Homeowners Association, Inc.
Board of Directors
c/o Michael Larson, Board President
3300 Plymouth Boulevard
P.O. Box 47892
Plymouth, MN 55447

Re: Legal Opinion
Seven Ponds Homeowners Association, Inc.
Our File No.: SPHA-0001

Dear Board of Directors:

Thank you for asking us to provide Seven Ponds Homeowners Association, Inc. (the "Association") with a legal opinion regarding fences at Seven Ponds (the "Property"). This letter sets forth our opinions and recommendations on these topics.

Our opinions and recommendations are based on the facts you provided to us; our review of the Association's Articles of Incorporation, Declaration, and Bylaws (collectively, the "Governing Documents"); and applicable Minnesota law, including the Minnesota Nonprofit Corporation Act, Minn. Stat. § 317A ("the Act"). We reserve the right to revise, supplement, or retract our opinions and recommendations if we discover additional information that materially affects our analysis.

The Property was built in or around 1991 by Hans Hagen Homes, Inc. ("HHH"). At that time, HHH was also building a commercial development near the Property. In order to appease Association Owners whose Lots were closest to the commercial development, HHH agreed to install a fence within the Property's Landscape Easement Area (the "LEA") to block some of the traffic and noise that would inevitably occur (the "Fence"). At that time, the Association agreed to be responsible for all future maintenance of the Fence, and HHH provided the Association with a maintenance fund to pay for such maintenance moving forward.

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The Association's Declaration has been supplemented nine times, each of which added property to the LEA, and as we understand, there is no question that the Fence is located within the LEA.

The Declaration assigns the exclusive management and control of the LEA to the Association, including maintenance and preservation of the same. *Declaration*, Art. IV, § 8; Art. VI, § 1. While the Association is obligated to properly maintain the Fence, the manner of maintenance, repair, and replacement within the LEA is within the Association's sole discretion. *Declaration*, Art. IV, § 8. That means that while the Board may choose to repair and replace the Fence here, it may also choose to remove the Fence without replacing it. *Id.*

There are a number of options for dealing with the Fence, each of which comes with its own pros and cons, as outlined more fully below. In all scenarios, the Board has the legal authority to maintain the fence as it deems appropriate, including removing it. In our opinion, Option 4 is the most comprehensive resolution to the problem, and has the most lasting, permanent effect. However, even if we started today, a full governing document revision would not be fully approved and recorded for at least six months. Thus, in the shorter term, we recommend either Option 2 or Option 3, depending whether the Board wishes to remove or repair the existing fence.

1. Repair the Fence, Cover the Cost as a Common Expense

The first option would be for the Association to continue to operate as it has been, with the Association responsible for all costs related to the Fence. In this scenario, the Board would use common assessment funds to pay for repairs or replacements necessary to fully return the Fence to a "uniform and high standard[] of landscaping and appearance." *See Declaration*, Art. IV, § 8.

The attorneys fees and costs related to this option would be minimal, although the repair and replacement costs could be significant, depending on the scope of repair required.

2. Remove the Fence, Cover the Cost as a Common Expense

Similar to Option 1, this option would have the Association remain fully responsible for the maintenance and repair of the Fence, with all costs borne as a common expense. However, in this scenario, the Fence would be removed, and no further maintenance or repair would be necessary.

In this scenario, you could also allow any Owners wishing to install their own fence within the LEA to do so by submitting a request to the Board. *See Declaration*, Art. IV, § 8 (permitting, among other things, erection of fences within LEA upon written Board approval). Such written approval could include explicit requirements regarding the style and appearance of the new fences, along with a requirement that all maintenance, repair, and replacement be the sole obligation of the Owners.

Again, here, the attorneys' fees and costs would be minimal. The Board may need our assistance in corresponding with the affected Owners to explain the Board's decision and their options to rebuild a fence moving forward.

3. Repair the Fence, Assess the Cost Solely Against the Benefitted Lots

A third option is for the Association to repair or replace the Fence, but to assess all related costs solely against the Lots benefitted by the Fence. The Declaration specifically allows the Association to "add to the assessments for a particular Parcel a surcharge for maintenance or utility expenses benefiting that Parcel but less than all of the Parcel [sic]." *Declaration*, Art. V, § 7. This option is a good choice if the Board wishes to keep the Fence but would like to change the obligation for who pays for its maintenance and repair.

In this scenario, it would be very important for the Board to be transparent with the Owners regarding how Fence maintenance and repair will be paid for moving forward. Although the Board certainly has the authority to assess the costs in this manner, Owners may be angry at a change they were not expecting. Instead, we recommend discussing this issue with the affected Owners in order to gain their input on the best way to move forward.

Similar to Option 2, the attorneys' fees and costs here would be minimal, although the Board may need our assistance in explaining the limited assessment to the affected Owners.

4. Amend and Restate the Association's Governing Documents

The Association's Governing Documents, including the Declaration and all supplements, Bylaws, and Articles of Incorporation, are now almost thirty years old. Many of the provisions contained therein are out of date or do not reflect current best practices. Also, the sheer number and complexity of the supplemental declarations make reading and understanding the documents difficult, particularly for a prospective buyer or Owner wishing to understand their rights and obligations.

Additionally, because the Association was created before 1994, it is not bound by or subject to the Minnesota Common Interest Ownership Act, Minn. Stat. § 515B et seq. ("MCIOA"). Amending and restating the Governing Documents would allow the Association to opt in to MCIOA. In general, we recommend that Associations opt in to MCIOA because it creates a clear, straightforward structure for CIC governance that lenders and others in the industry understand. Banks know the statutory language and know what they're getting into if and when they provide a mortgage for a buyer, and that can help prospective buyers obtain financing more easily, in addition to loans and other financial products for the Associations themselves. Specifically, MCIOA contains provisions relating to liens that make collection and actual recovery of funds easier, and language making limited assessments against fewer than all Units more straightforward.

Here, amending and restating the Governing Documents would also allow the Board to make any changes it would like, including re-assigning the Fence obligations to the Owners. Overall, now might be a great time to do a full re-drafting project, as it would consolidate the costs for updating the Association into one project, which would then save the Association money over the long term.

We offer flat rates for Governing Document redrafting projects, depending on the needs of the Association, that range from \$5,000 to \$7,000 total. That flat rate includes all stages of drafting, approval, and recording of the new documents. If the Association would like us to provide a written proposal regarding this project, we would be happy to do so.

Thank you for the opportunity to serve the Association. Please feel free to contact us at any time if you have any additional questions or concerns, or if we can assist further in this matter. We look forward to working with you and the Board again in the future.

Very truly yours,

SMITH JADIN JOHNSON, PLLC

A handwritten signature in black ink, appearing to read 'K. Kauf', with a stylized flourish at the end.

Karly A. Kauf
Attorney at Law