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WRITER'S DIRECT EXTENSION

x208

June 27, 2011

Mr. Lee Giacomino
5885 Teal Lane
Long Grove, IL 60047

Re: Lee Giacomino
Herons Landing Homeowners Association
Our File No. 210081.001

Dear Mr. Giacomino:

You have requested us to provide you with our opinions regarding certain matters involving the Herons Landing Homeowners Association. We understand that you own a lot and a home in the Association and that you are a member of the Association. We understand that you may disclose or provide a copy of this letter to other persons, and this letter is prepared accordingly for that purpose. However, whether or not this letter is disclosed to others, we understand that you intend to otherwise maintain the attorney-client privilege with us, and you do not waive the attorney-client privilege to the extent this letter is disclosed to other persons.

You have informed me that the Association Board has embarked on a project whereby the Board approached the Village of Long Grove with a request to implement systems to provide Lake Michigan water to the homes in the Association. Each home is on a lot owned by the respective lot owner. Presently, all lots and homes are served by their own wells. If the Village approves this project, it will create an SSA, so that all costs are passed on to the owners served by the system through property taxes. If installed, the system will provide installation of pipes through each lot and to and up to each home, whether or not a particular homeowner wants to connect. There will be significant costs imposed on each homeowner whether or not they want to connect. As we understand, a homeowner will not be required to connect, and may continue to use their respective well. You informed me that while many homeowners may be in favor of the project, there are many homeowners who are not in favor. In connection with this, the Association Board allegedly adopted an initial special assessment to be charged to each lot owner, for the purpose of covering initial legal fees and start up costs for the Board's work with the Village on the project. The Board did not notice or call any special meeting for the purpose of obtaining owner's approval for the special assessment.

You have specifically asked for an opinion whether: (1) the Board has authority to take action to require this water system, and require homeowners to accept the system and to require

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construction of the water system on privately owned lots in the Association; and (2) whether the purported special assessment was properly adopted. In our opinion, as set forth in this letter, (1) the board has no authority to require that such improvements and additions be made upon each private homeowner's lot; and (2) the special assessment was not properly adopted.

We note that an SSA can only be created upon certain procedures followed by the Village. We have not been asked to comment on those matters.

New Capital Improvements Upon Lots

In our opinion, the Board does not have the authority to authorize or require construction of the water system on the individual lots or to service the individual lots and homes. It does not have authority to authorize the Village to have a referendum on the issue. We reviewed the copy of the Declaration of Covenants, Conditions and Restrictions For Herons Landing which you provided to us. Article VI, entitled "Board of Directors - Powers and Duties", sets forth the Board's powers, duties and authority. Section 1 of Article VI states that "the purpose of the Herons Landing Association is to maintain, repair and replace certain improvements at the Heron's Landing subdivision". These improvements are referred to in the Declaration as the "Common Improvements". Section 1 further identifies specifically the items constituting the "Common Improvement", including the private streets, the entrance landscaping, common mailbox structure, common street lighting, monument signs at subdivision entrances, and other improvement installed by the Declarant, Developer of Association for the mutual benefit of the Lot Owners.

Section 1 limits the Association's authority to "repair, maintenance and replacement" to "Common Improvements" that were installed. It only relates to common improvements. Those are common property of the Association (if any) or those areas where the Association has been given some responsibility. It does not authorize any additions, alterations or improvements to individual lots or homes. In our opinion, nothing in Section 1, or Article VI, or the Declaration, gives the Board any authority to make or install any new capital improvements on any individual lots or elsewhere, nor authority to require individual homeowners to make or pay for new capital improvements upon any lot. Installing new capital improvements, on the individual lots or elsewhere, is beyond the Board's duties and authority for "maintenance, repair and replacement" of the common improvements. If the Board's position that it has authority to require new additions and capital improvement upon the individual lots was accepted as correct, then the Association would have authority to require almost any new capital improvements to be installed upon the individual lots such as solar panels, windmills, garages, outbuildings, sheds, awnings, and other improvement. This does not appear to be a power or authority granted to the Association Board in the Declaration.

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In our opinion, any such improvements within or on the individual lots are not common improvements and do not serve the subdivision generally as a common facility, as each proposed improvement serves only that lot or to force an owner to make such an addition or improvement. We note that, even if installed, a homeowner is not required to hook up to the water system. The lots are private lots owned by the lot owners. Nothing in the Declaration gives the Board authority to make capital improvements on any individual's lot. The Association's action in forcing homeowners to install a very expensive capital improvement on their lot, which the owner is not even required to utilize, is clearly beyond the Association's authority to simply maintain, repair and replace existing common facilities.

The Association has no authority in our opinion under the Declaration to force homeowners to install these improvements on their lots. Imposing such a requirement would require, at the very least, an amendment to the Declaration. An amendment would require following the procedures set forth in the Declaration. These procedures include that any amendment to the Covenants must be signed by the record owner of ninety (90) lots in the Association. The Declaration cannot be changed without following that procedure.

Special Assessment

In our opinion the Board did not properly pass the special assessment. Initially, the special assessment is for a purported capital improvement which the board has no authority to install in the first place. Notwithstanding, it is clear that the Board failed to follow the procedures for adopting a special assessment. We have reviewed an attorney opinion that the Board President forwarded to you. We do not agree with the conclusions made by the attorney.

We are informed, and the attorney's opinion states, that at some time the Board sent out some sort of "consent" form to homeowners for the purposes of notifying the Board of the individual homeowners' "consent" to the water system, and which purportedly also referenced the imposition of a \$500 per lot special assessment. (Note, we have not seen this alleged consent form and make no comment on the form).

It is our understanding that no meeting of the Association members, or even the board, was ever called for the purpose of adopting a special assessment. There was never any notice sent to the members of any meeting being called for this purpose. These are fatal flaws.

We note that the attorney's opinion made a comment that, notwithstanding any provisions in the Declaration, the new Common Interest Community Association Act (the "Act") which was effective July 29, 2010, now controls and sets forth a procedure for adopting special, or "separate" assessments. While we agree that the new Act applies, we do not agree with the attorney's conclusion that Board complied with the Act's provisions. There was no compliance as there was no properly called meeting.

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Section 1-45(c) provides that if an adopted budget or any separate assessment "adopted by the board" would result in the sum of all regular and separate assessments payable in the current year exceeding 115% of the sum of all regular and special assessments during preceding year, then, upon written petition by unit owners with 20% of the votes of the association delivered to the board within 14 days "of board action", the board shall call a meeting of the owners within 30 days of the date of delivery of the petition to consider the budget or separate assessment. The owners then vote at the meeting, and unless a majority of the total number of votes in the Association rejects the assessment, it is deemed ratified. Further, we note that Section 1-40(b)(4)(iii) specifically provides that the board shall give unit owners, by mail or personal delivery, notice of any board meeting concerning the adoption of a separate or special assessment within 10 to 30 days prior to the meeting.

The attorney's opinion letter stated that the Board adopted the special assessment at its board meeting (which may not be a correct fact) and simply stated that, since no petition was provided to the Board, any right by homeowners to vote on the special assessment was waived. In our opinion, this is not correct. Even assuming that the Board had a board meeting in November 2010 whereby it took action to adopt a special assessment (and it may not have even done that), it is clear that notice of any proposed special assessment was not mailed or personally delivered to all homeowners within 10 to 30 days prior to the meeting. There was no notice that the purpose of the meeting would be to adopt a proposed special assessment. Accordingly, since there was no proper notice, in our opinion, the alleged meeting was not proper and the purported special assessment was not properly adopted. The homeowners, such as yourself, had no notice of the proposed meeting of the proposed board action, and no notice of the vote or that it occurred and the opportunity to exercise your right to petition the board to vote to reject the special assessment.

Further, even assuming, for the sake of argument, that even if this special assessment related to expenditures for "common improvements," the Act at Section 1-45(f) provides that assessments for additions or alterations to common area or association owned property not included in the adopted annual budget shall be separately assessed and require the approval of two-thirds of the total votes of all owners. Thus, any special assessment relating to the addition of the water system, even if the Board could do that, requires approval of two-thirds of the homeowners.

Based upon the foregoing, including lack of notice of any meeting to adopt a special assessment, and, further, the fact that there was no meeting called to vote on the special assessment (needing 2/3 owner approval), in our opinion the special assessment was not properly adopted.

Although the foregoing law controls regarding adopting a special assessment, we also do not agree with the other statements contained in attorney's letter, which purports to first apply a provision of the Not For Profit Corporation Act (the "NFP") to conclude that under the special

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assessment was properly approved by homeowners pursuant to the Declaration, even though there was no notice, meeting or vote taken at a meeting by the homeowners. The opinion stated that the "consent" forms were sufficient. We do not agree with this conclusion if the Declaration provisions apply (although, we again note the Act controls).

The Declaration provides, at Article VII, Section 12, that special assessments for all or part of a capital improvement must receive sixty-one (61) votes by Lot Owners at a regular annual or a special meeting of the Association. Again, we note that there was no meeting of owners called, much less notice of a meeting.

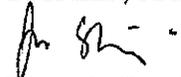
The opinion obtained by the Board states that a meeting was not required pursuant to Section 107.10 of the NFP, which, according to the opinion, allows for a vote to be taken by ballot without a meeting in writing, where members are given the opportunity to "vote" for or against the proposed action, provided that the members casting votes would constitute a quorum. First, in our opinion, sending out "consent" forms hardly constitutes a ballot or a proper voting procedure, nor complies with the procedures required by this statute. Notwithstanding, this "mail in procedure" of the NFP would not apply here. We note that the Declaration requires the approval of a special assessment by the homeowners, at a special meeting. The mail in procedure set forth in Section 107.10 provides that it applies to "any action required by this Act" (being the NFP). The adoption of a special assessment is not required by the NFP, but is required by the Declaration. Thus, this provision of the NFP would not and does not apply to the circumstance of calling a meeting to adopt a special assessment which is required by the Declaration. Moreover, it would conflict with the Declaration and the Common Interest Community Association Act that requires a properly noticed meeting be called to adopt a special assessment.

Thus, in our opinion, the "consent" forms would not be sufficient under the NFP mail in ballot procedure, but it does not matter. The recently adopted Common Interest Community Association Act controls and, based upon the information provided to us, the procedures for adopting a special assessment were not followed, so that there was no properly adopted special assessment.

We trust this responds to your inquiry. Our opinions are based upon facts provided to us and as set forth herein, and other unknown facts could change an opinion.

Very truly yours,

DICKLER, KAHN, SLOWIKOWSKI & ZAVELL, LTD.



James A. Slowikowski