JAMES H. JONES, JR., PLLC
12019 263rd Ave SE
Monroe, WA 98272
425-343-5463
jim@jimjoneslaw.com

MEMORANDUM

TO: Board of Directors -- Snohomish Cascade Homeowners Association

FROM: James H. Jones, Jr.

DATE: October 7, 2014

RE: Fence replacement

Thank you for the opportunity to provide my input regarding the fence replacement matter.

My input, views, read and analysis expressed in this memorandum are subject to the accuracy of the factual and other assumptions mentioned in endnote A.[A] If any of such assumptions is incorrect, my input, views, read and analysis in this memorandum may change. My input, views, read and analysis expressed in this memorandum are also subject to the various caveats that I mention.

My input, views, read and analysis regarding interpretation and authority are limited to portions of the fence that are located within, or that will be replaced so as to be within, the right-of-way.

I agree with the Team that it would be prudent to obtain an easement or consent from owners of each lot upon which a portion of the fence is located outside the record boundary of the right-of-way.

I agree with the Team that uniform (i.e. equal) assessments among lots are needed unless the CCR ("CCR")[1] is amended.

Need for interpretation

At the Association level, the Board is the final arbiter of the interpretation of the CCR and correlated documents, their proper application, and Association authority. The Board needs to interpret the CCR and "correlated" documents. In the event of a court case, the final court decision will be the final arbiter on these matters and Association authority.[2]

[1] As defined in the attached Team Memorandum dated October 4, 2014.

[2] I understand from discussions that the Association's history does not include involvement in litigation. As a caveat I note the reality of our legal system that resolution of factual and legal issues in litigation is inherently uncertain, i.e., the outcome cannot be predicted with certainty. This caveat applies to my input, views, read and analysis in this memorandum, which are suggestions for the Board's consideration regarding interpretation. As previously mentioned, in the event of a court case the final arbiter will be the final court decision.

In doing so, I recommend that the Board consider and apply principles of covenant interpretation used by the courts. Endnote B is summary of certain covenant interpretation principles that are commonly used by our courts which I commend to the Board's attention.[B] In making its interpretation, it should be noted by the Board that covenant interpretation in court cases commonly include a detailed factual discussion of relevant provisions and admissible facts as part of the decisions.

Interpretation

This is my read and analysis.

The declarant's clear intent that the landscaped areas be maintained was evident from the beginning when the covenant restriction was imposed in the Division I plat, and remained evident throughout the development process. The developer/declarant imposed the same covenant restriction in the Division II and Division III plats: "All landscaped areas in public rights-of-way shall be maintained by the developer and his successor(s)."[C] The declarant provided in the initial CCR for such maintenance, that it would be taken over and done by the HOA,[D] and that each lot would pay its equal share of the cost of the maintenance. The developer carried forward these requirements through the course of development and they are in the current CCR.[E]

The declarant's intent wasn't just a common "plan" of development. This plan was put on the ground in the form of the landscaping all along the gateway entrance road to each division. Both the declarant's assignment and the CCRs required the HOA to take care of it and said that the cost would be allocated equally between the lots. The last paragraph of Article 6.5 of the CCR provides that:

> . . . from time to time as additional divisions . . . are incorporated into the CCR's . . ., the costs of maintenance of the open spaces, common areas, etc. shall be divided equally between the number of lots . . ."

The term "etc." in this provision refers to the overall landscaping including along both sides of 65th.[3] [F]

The Association did take care of the landscaping along 65th including the fence for approximately 20 years and paid for it with homeowner assessments until Board vacillation occurred when hard economic times hit.

The landscaped area to be maintained is not just at the intersection of 132nd[4] and 65th. 65th is the gateway road that serves the side roads that go into each division. The landscaping along both sides of 65th runs through The Falls from 132nd to Puget Park Drive with the lots on each side screened from this main road by the fence that is the visual backdrop to the vegetative part of the landscaping and is an important element of the overall landscaping.[G]

I understand that the beautifully landscaped 65th gateway entrance is an important part of why The Falls

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[3] I.e., 65th Avenue SE. I understand that the name of this right-of-way is now Snohomish Cascade Drive. I refer to the right-of-way in this Memorandum as 65th Avenue SE, the name by which it is identified in the document provisions discussed.

[4] I.e., 132nd Street SE.

is a high class residential community. The fence element enhances the ambiance of The Falls by turning the neighborhoods inward away from the 65th gateway arterial. Homeowners get to their homes from the side roads. Homeowners in The Falls enjoy the sense of living in a private neighborhood because they are screened from the arterial by the fence. Without the fence, that sense of neighborhood would be diminished and 65th would become more like just another string of houses built along a busy road.

The declarant recognized the significance of the landscaping appearance along the 65th gateway entrance to the community and provided that it would be permanently maintained. Common sense would seem to dictate that maintenance of a wooden fence with a finite useful life includes its replacement when necessary.

While the "Common Area" definition in the CCR includes common property owned by the Association, the declarant recognized the landscaped areas also needed Association care to benefit The Falls community and to protect the homeowners' collective interests.

Such other property is the landscaping within the rights-of-way that the Association is required to maintain.

The declarant wisely recognized this reality and realized that the landscaping along 65th on right-of-way is also of common benefit and also needs Association care. The declarant's intent that the landscaping in the rights-of-way would be maintained, and the cost of maintenance be apportioned equally among the lots, is beyond legitimate dispute.

Later, the Washington legislature exhibited similar wisdom and recognized the same reality when it defined "common areas" in the Homeowners' Association Act as including both property that is owned by an association or that it otherwise maintains, repairs, or administers.[H]

CCR 7.2 requires the Association to assess and collect from every owner, and for every owner to pay, an annual maintenance assessment sufficient to pay common expenses. The declarant's intent that the required landscape maintenance be a common expense is shown by the requirement of the last paragraph of CCR 6.5 that such expense be shared equally among the lots.

The declarant's intent in this regard is entirely consistent with the similar intent expressed by the Washington legislature in its definition of "common expense"[I] in the Homeowners' Association Act which also recognizes that such expenses may arise in the case of property an association owns or otherwise maintains, repairs or administers.[J]

The Tracts in The Falls owned by the Association and the landscaping in the rights-of-way which it maintains are both of common benefit to The Falls community and subject to an obligation of common responsibility of the homeowners to fund their care.

The principles of interpretation require that the documents be considered in their entirety to ascertain the declarant's intent and to give effect to their provisions with special emphasis to be placed on protection of the collective interest of the homeowners. The goal of the interpretation is to ascertain and give effect to the purposes intended. An interpretation that gives effect to all provisions is favored over an interpretation that renders a provision ineffective. A term is not to be construed in such a way so as to defeat the plain and obvious meaning. Where one construction would make a contract unreasonable, and another, equally consistent with its language, would make it reasonable, the latter

more rational construction must prevail. Consideration of subsequent conduct of the parties and the reasonableness of the parties' respective interpretations is appropriate in the interpretation. Forced or strained interpretations of covenant language that lead to absurd results should be rejected. The provisions I have discussed requiring maintenance of the landscaping and that the maintenance cost be apportioned equally among the lots thus should not be read out of the governing documents but should be given effect.

The provision of CCR 7.3 that homeowner assessments are to be spent "only for the following purposes" should thus be interpreted in a manner that the purposes indicated in CCR 7.3 include the payment for the landscaping maintenance. If the interpretation were otherwise, the interpretation should still give effect to the provisions of CCR 6.5 which indicate intent and require that the cost of such maintenance be shared equally among the lots. While the CCR "Common Area" definition refers to the Tracts, the obligation of common responsibility to maintain the landscaping and fund its maintenance nevertheless remains. The developer also indicated his intent elsewhere in the CCR that the landscaped areas be treated as common areas. CCR 3.23 indicates:

> The cost related to the maintenance of the landscaping of the entry and other common areas and open spaces shall be paid for from the dues paid by each member of the Homeowners Association. (emphasis added)[K]

This is a pretty good clue as to what the declarant was thinking and should be given effect.

An interpretation which gives effect to declarant intent that the Association take care of the important landscaping and all lot owners equally share the costs does no violence to legitimate expectations. The governing documents indicate that the Association would be taking care of the landscaping and that lot owners would have to pay their equal share of the costs.

The fact that the Association took care of the fence element of the landscaping for approximately 20 years and the lot owners shared the costs should be regarded as strong "subsequent conduct" evidence as to the understood meaning of the governing documents in this regard and that legitimate expectations were not to the contrary.

In my view, an "unfunded mandate" interpretation that the declarant intended on one hand to obligate the Association to perform the landscape maintenance, and on the other hand to deny the Association the financial means to do so, would be absurd.

Authority

This is my read and analysis.

The Association is given broad authority by the CCR and by its amended Articles of Incorporation, which, in my read, shows declarant intent and provides that the Association would not only have the obligations set forth in the CCR but also the power to fulfill such obligations.[L]

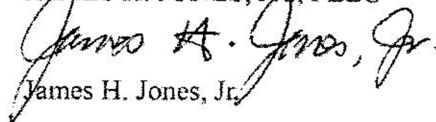
Given the breadth of this governing document authority, resorting to Washington statutes as an additional basis for authority almost seems like "piling on."

The Washington non-profit corporation statute, which not only applies by law but appears to be

incorporated by CCR 6.6(b) as authority under the governing documents, empowers a non-profit corporation to, among other things, have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized.[M] The Homeowners' Association Act, unless otherwise provided in the governing documents,[N] empowers an association to, among other things, regulate the use, maintenance, repair, replacement and modification of, and make additional improvements to common areas, and to exercise any other powers (i.e. other than those enumerated in the Act) necessary and proper for the governance and operation of the association.[O]

The final arbiter of Association authority in a court case will of course be the final decision of the court.

JAMES H. JONES, JR., PLLC



James H. Jones, Jr.

Endnotes

[A] **Assumptions:** I have made the following assumptions based upon discussions as to the scope of my undertaking:

The factual information provided in the attached Team Memorandum dated October 4, 2014, and the additional factual information and understandings (based on discussions) and the factual conclusions expressed in this memorandum, are accurate and the complete relevant factual history. I have not independently conducted a factual investigation.

The conclusion in the Team Memorandum that the covenants, conditions and restrictions recorded under AFN 9010250531 ("CCR") supersede the earlier covenants, conditions and restrictions and amendments thereto mentioned in the Team Memorandum, is correct. I have not independently analyzed or addressed this point.

The covenants, conditions and restrictions in the CCR are the complete current controlling covenants, conditions and restrictions (with the exception of the Restriction in the Plats) and applicable to Divisions I, II and III, and also (by virtue of note 5 of the Division IIIA Plat (AFN 9210125001)) to Division IIIA.

The Association's Articles of Incorporation provided to me are the current Articles of the Association, including all amendments, and have been properly adopted.

The Association's Bylaws which I obtained from the Association's website are the current Bylaws of the Association, including all amendments, and have been properly adopted.

The recorded documents mentioned in the Team Memorandum constitute the "relevant universe" of recorded documents. I have not conducted any title research, or had a title search performed and a title report prepared, to determine whether there are other matters of record that may be pertinent to analysis of the questions presented.

Based upon discussions, I understand, and have assumed, that there are no judicial decisions in cases to which the Association was a party that are relevant to the points I have addressed. I have not independently researched for any such decisions.

[B] **Certain Interpretation Principles:**

Place special emphasis on arriving at an interpretation that protects the homeowners' collective interests.

Articles of incorporation, by-laws, and covenants may be considered and construed together as "correlated documents." Covenants in a Plat may also correlate with governing documents of an Association. In construing "correlated documents,"

the scope of an association's authority is not determined solely upon one such document; rather, such a determination requires analyzing the documents as a whole.

Where one construction would make a contract unreasonable, and another, equally consistent with its language, would make it reasonable, the latter more rational construction must prevail.

Rules of contract interpretation apply to interpretation of covenants. The primary objective in contract interpretation is determining the drafter's intent. The goal is to ascertain and give effect to those purposes intended by the documents.

In determining the drafter's intent, one must construe the documents in their entirety and give covenant language its ordinary and common use. Do not construe a term in such a way so as to defeat the plain and obvious meaning.

An interpretation that gives effect to all provisions is favored over an interpretation that renders a provision ineffective.

Extrinsic evidence may be used to illuminate what was written, not what was intended to be written. Do not consider extrinsic evidence that would vary, contradict or modify the written word or show an intention independent of the documents.

The context rule of contract interpretation applies in ascertaining the parties' intent. This rule allows, while viewing the documents as a whole, consideration of extrinsic evidence, such as the circumstances leading to the execution of the documents, the subsequent conduct of the parties and the reasonableness of the parties' respective interpretations. The context rule applies even when the provision is unambiguous. Ambiguity as to the intent of those establishing the covenants may be resolved by considering evidence of the surrounding circumstances.

Forced or strained interpretations of covenant language that lead to absurd results should be rejected.

[C] In my view, these restrictions indicate declarant intent to assure that such landscaping will be maintained by the declarant and the Association as successor.

[D] CCR 6.5 also provides that the declarant may make an assignment and delegation of declarant powers and obligations under the CCR. The declarant Assignment (AFN 9202040184) indicates that the declarant delegates and assigns all of the declarant's duties, powers and obligations under the CCR to the Association.

[E] CCR 7.1 requires, among other things, the developer to provide for maintenance of the common area and the entrance landscaping, and requires the developer to delegate this responsibility to the Association. The declarant did so. See. endnote D.

CCR 6.5 also indicates declarant intent that such landscaping obligations include the portions of landscaping along 65th by its reference to:

> . . . the obligation of the maintenance of the common areas, open space, trail system, picnic areas, waterfall and the overall landscaping including but not limited to both sides of the County Right of Way (commonly known as 132nd Street S.E) to the extent of that portion of the County Right of Way which had previously been improved and landscaped by Declarant and the maintenance of the planter islands on 65th Avenue S.E. <u>and any other landscaped portions of 65th Ave. SE</u> . . . (emphasis added)

[F] In my view, when read in context, the term "etc." in this quoted provision from CCR 6.5 clearly refers to the remainder of the preceding longer declarant maintenance list earlier in CCR 6.5, i.e., the trail system, picnic areas, waterfall and the "overall landscaping, including but not limited to" prior improvements and landscaping by the developer on both sides of "132nd Avenue," planter islands on 65th Avenue SE, "and any other landscaped portions of 65th Ave. SE."

This quoted provision also shows developer intent that cost of the landscaping maintenance obligation be equally divided between the lots and not an "unfunded mandate." The Maintenance Assessment provisions of Article 7.2 of the CCR require that the Association shall assess and collect from every owner, and every owner shall pay,"an annual maintenance assessment sufficient to pay to common expenses. . .."

[G] Fencing can be an element of landscaping design. See, e.g., http://www.architecture-student.com/landscape/fences-drainage-and-lighting-elements-of-landscape-architecture.

[H] "'Common areas' means property owned, or otherwise maintained, repaired or administered by the association." RCW 64.38.101(4).

[I] "'Common expense' means the costs incurred by the association to exercise any of the powers provided for in this chapter." RCW 64.38.010(5).

[J] This is the legislature's intent because several of the "powers provided for in this chapter" referred to in the HOA Act's definition of "common expense" include the power to: "[r]egulate the use, maintenance, repair and replacement, and modification of common areas" and to "Cause additional improvements to be made as part of the common areas" (RCW 64.38.020(6) and (7)), which "common areas," as discussed above, are defined to include both HOA owned property and property which it otherwise maintains, repairs or administers.

[K] Given that the CCR does not have a provision for payment of "dues" by members, the reference to dues in this provision seems likely to have been intended by the declarant to instead mean homeowner assessments.

[L] CCR Article VI broadly indicates that the Association "shall have . . . powers and obligations as set forth in these Covenants for the benefit of SNOHOMISH CASCADE DIVISIONS I. II & III, and all owners of property located therein." CCR 6.6 provides, in part, that the Association shall have, exercise and perform any or all of the powers, duties and obligations (a) granted directly to the Association by these Covenants, or granted by these Covenants to Declarant and in turn delegated, conveyed or otherwise assigned by Declarant to the Association; (b) of a nonprofit organization pursuant to the general nonprofit corporation laws of the State of Washington; and (c) any additional or different powers, duties and obligations necessary or desirable for the purpose of carrying out the functions of the association pursuant to these Covenants or otherwise promoting the general benefit of the Owners within SNOHOMISH CASCADE DIVISION I, II, & III. Article III of the Association's Amended Articles of Incorporation (entitled Purposes and Powers of Corporation) provides that the powers of the Association include the exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in the CCR, and to have and to exercise any and all powers, rights, privileges which a Washington non-profit corporation by law may now or hereafter have or exercise.

[M] RCW 24.03.035(20).

[N] There is a petition for review of a Washington Court of Appeals decision which has been presented to the Washington Supreme Court in which it could become necessary for the Supreme Court to interpret and apply the "unless otherwise provided" language which appears several places in the statute. The petition was apparently over length under court rules. I understand that a request to file the over length petition was denied by the Supreme Court with a deadline for filing a revised petition that satisfies the length limitation.

In my view, a court should not find the Association's governing documents to "otherwise provide." I base this view upon my reading and analysis that the developer intended that both property owned by the Association, and the landscaping that it is otherwise required to maintain, are to be maintained utilizing funds from lot owners. I thus do not read the HOA Act powers that I mention, which apply to property owned by an Association and that it otherwise maintains, repairs or administers, as being in conflict with The Falls governing documents.

My reaction to the possible argument mentioned by the Team that the difference between the CCR definition of "Common Area" and the HOA Act definition of "common areas" somehow makes the Association documents "otherwise provide," is that such an argument would properly be classified by a court as a "red herring" if it agrees that the HOA Act and the governing documents are not in substantive conflict. In my view and I would advocate, they are not. For the reasons discussed, the governing documents require Association maintenance of both the Tracts and the landscaping, and the cost of both is to be apportioned among the lots. In my view, I fail to see a substantive difference.

[O] RCW 64.38.020(6), (7), and (14).