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May 23, 1996

Debbie Rand, Treasurer
Lakeside Woods Association, Inc.
1200 Lakeside Woods Drive
Venice, FL 34292

Re: Maintenance Obligations Lakeside Woods Association, Inc.
Our File No. 10558.00

Dear Ms. Rand:

Pursuant to our conversation on May 10, 1996 and confirmed by the Board on May 14, 1996, our office is presenting this legal opinion pertaining to the obligations of owners and Association of Lakeside Woods as to owner changes on the exterior lot.

The Association asked our legal opinion pertaining to lot owner alteration of the exterior portion of lots by planting various plants on the lot. The Declaration of Covenants and Restrictions of Lakeside Woods is the governing document which provides the answers for these questions. Article 3.10.02 of the Declaration provides the landscaping obligation for the Association. This Section reads as follows:

> "Landscaping. In addition to the common areas, the Association shall maintain the grass areas of all of the lots, including mowing, trimming, fertilizing, and insect and disease control. In connection therewith, the Association shall also maintain the sprinkler systems for all lots and common areas. The Association shall be responsible for the common areas' metered sprinkler water cost, and the owners shall be responsible for the metered sprinkler water cost of their lots. The Association shall be responsible for the maintenance of any landscaping upon any lot. If any lot contains landscaping which is substantially more extensive than the landscaping on other lots, the Association may charge the applicable owner an extra fee reasonably related to the extra costs of maintaining such landscaping."

Also of importance in answering this question is Article 5.10 of the Declaration which is a part of the Use Restrictions for the lot owners. The Article provides as follows:

> "Landscaping. The Association shall be required to maintain existing landscaping on each lot, and on any contiguous property between each lot and the pavement edge of any abutting road or the waterline of any abutting lake or canal, all in accordance with landscaping plans approved by the Association. All such landscaping shall be maintained as reasonably required, mowing, watering, trimming, fertilizing, and weed, insect and disease control shall be performed. All landscaped areas shall be primarily sodded with grass, and shall not be paved or covered with gravel or any artificial surface. All dead and diseased sod, plants, shrubs or flowers shall be promptly replaced, and excessive weeds, underbrush or unsightly growth shall be promptly removed. No artificial grass, plants, or other artificial vegetation shall be placed or maintained upon the exterior of any lot. No owner shall install or maintain any landscaping on any portion of his lot to be maintained by the Association pursuant to paragraph 3.10 of this Declaration, without prior written consent of the Board."

Article 5.23.01 also pertains to this question and is a part of the architectural control for exterior changes. The Article states as follows:

> "Owner to Obtain Approval. No owner shall make, install, place, or remove any building, fence, wall, patio area, pool, spa, landscaping, or any other alteration, addition, improvement or change of any kind or nature to, in or upon any portion of the common areas, the owner's lot, or the exterior of the owner's unit, unless the owner first obtains the written approval of the Association or declarant to same, except that such approval shall not be required for any maintenance or repair which does not result in a material change in any improvement including the color of same."

First we shall address the issue of what specific items are included in landscaping and who is financially responsible for maintaining, repairing and replacing the landscaping. Article 5.10 clearly states that the Association is required

to maintain existing landscaping on each lot. This maintenance of landscaping includes the Association's responsibility to mow, water, trim, fertilize, weed, and provide insect and disease control for all landscaping on each lot. The Association will be responsible for removing all dead and diseased sod, plants, shrubs or flowers together with excessive weeds, underbrush or unsightly growth. This provision also states that the owner cannot place any type of landscaping or maintain any kind of landscaping on his lot without the prior written consent of the Board of Directors.

Article 3.10.02 confirms what is stated in Article 5.10. Again, this Article requires the Association to maintain the grass areas. Also, this Article requires the Association to maintain any landscaping upon any lot. This Article does allow the Association, in its discretion, to charge an owner an extra fee reasonably related to the extra costs of maintaining landscaping on that lot. It is our opinion, if the Association is going to charge extra fees for maintaining landscaping which is more extensive than the landscaping on other lots, that it should do so at the time it provides the prior written consent of the Board to the lot owner for the alteration to the landscaping. In addition, a recorded document should be placed in the Public Records of Sarasota County, Florida to alert any future owners of the property to the extra cost. We shall discuss an agreement of this nature at a later time in this opinion letter.

Article 5.23.01 basically does not allow the lot owner to make any kind of changes to the exterior of his lot without the owner first obtaining the written approval of the Board of Directors. If the owner is merely maintaining or repairing a prior change, then he can do so without Board approval.

The question was raised as to what constitutes an alteration, addition or improvement and specifically, whether it is a material change. Reading Article 5.23.01 carefully reveals the material change cannot occur when the owner is maintaining or repairing a prior change. Therefore, for regular maintenance or repair of landscaping already in place, the owner would not need board approval. A material change in the currently approved landscaping while an owner is maintaining or repairing a previously approved alteration is required. A material change is an alteration which was not previously approved. A change in color of landscaping is deemed material. A change in plant type would be deemed material. Any type of landscaping which was not previously in place or not previously approved would be deemed material.

Article 5.23.01 provides that the owner shall not make any alteration, addition, improvement or change of any kind or nature to the owner's lot without first

obtaining the Board's written approval. If this restriction is strictly construed, it must be construed in such a way that even if the owner would plant seasonal flowers in the landscaping surrounding the lot, the flowers must first be approved by the Board of Directors. Furthermore, extending this further to the Association's obligation regarding those seasonal plants, the Association pursuant to Article 3.10.02 and 5.10 is responsible for fertilizing and insect control of the plants and taking the plants out once they have died. Consequently, that unit owner who has attained approval to place these plants on his lot, may add to the cost of the landscaping contract which would be paid on a pro rata basis by all members of the Association.

An alteration, addition or improvement is legally defined for association purposes as one which alters the appearance of the property in such a way as was not first contemplated for that lot. For instance, if the landscaping for the lots did not include seasonal flower beddings or rose bush beddings, then by providing those plantings, the owner has altered the appearance of his lot. Another example would be the placement of a bird bath as part of the landscaping on the lot. If it was not first considered that a bird bath would be a part of the exterior landscaping on the lots at Lakeside Woods, then to add a bird bath to the landscaping, would be considered an alteration, addition or improvement. Alteration also includes changing the color of landscaping. For instance, if the color of the flowers in the landscaping originally planted was red, and later, the color was changed to white, this would be considered an alteration as the owner contemplated buying the property with red flowers and now the flowers have been changed to white. The thoughts on this concept of alteration are what the property appeared in its original condition and if any changes are made from as it appeared in its original condition, then these changes are deemed an alteration. For example, if bird bathes were permitted in its original condition, then bird bathes can be present on the lot and this would not be considered an alteration. The same would be true with rose beds, if a rose bed was present on the lot in its original condition as purchased from the developer, then rose beds can be extended on the lot and this would not be deemed an alteration.

Nevertheless, the Declaration of Covenants and Restrictions still would require each lot owner who did not have a rose bed to apply to the Board of Directors for written consent to place a rose bed on their property. In this case, the Board of Directors would allow the rose bed as it would not be an alteration to the general landscaping scheme as it is one which had already occurred on the landscaping and therefore, it could not be denied another owner. To deny another owner the planting of a rose bed which was similar in nature to the existing rose bed on another lot, would be deemed discriminatory. The Board of Directors must be consistent in its allowance of variances for alterations, additions or improvements on the lot.

It must always be kept in mind, pursuant to the way the Declaration of Covenants and Restrictions is currently written, that if Association allows an owner to alter his lot either materially or non-materially, by placing additional landscaping on the lot, the Association will be the ultimately responsible for maintaining, repairing and replacing that landscaping. The Declaration of Covenants and Restrictions clearly states in Article 3.10.02 and 5.10 that the Association is the party responsible for caring for the landscaping. Therefore, any type of alteration which the Association permits, will place an additional cost burden on the members of the Association for that maintenance obligation. While the Association may bargain with the current unit owner and require the current unit owner to maintain those plantings, that bargaining agreement will not extend to a future unit owner unless a recorded written agreement is placed in the public records of Sarasota County. Otherwise, the Declaration of Covenants and Restrictions clearly states that the maintenance obligation for those plants is on the Association. We particularly advise the Association to utilize a recorded agreement for those alterations which may require long term, extensive maintenance, such as for trees and large landscaping areas.

A means to place this maintenance obligation and cost on the lot owner is by requiring the lot owner to sign together with the Association a written agreement which will require the lot owner to maintain, repair and replace that alteration on his lot. This recorded document would also act as a covenant which runs with the land and will bind the owner's heirs, successors and assigns, in other words, future lot owners. This document would also place the cost of removal of the alteration on the lot owner if the alteration needs to be removed for any other maintenance obligation which the Association may have. For instance, if the Association must repair its sprinkler system and there are hedges or trees which have been planted by a lot owner whose obligation it is to maintain, repair and replace through the written, recorded agreement, and the sprinkler system must be repaired which will require removal of those objects, then the lot owner will be required to pay for their removal and this cost will not be passed on to the other members of the Association. It is our view as legal counsel for associations, that if the Association allows a unit owner a variance to alter his property, the other unit owners should not have to bear the cost of that privilege. It certainly is a privilege for the lot owner to have a variance and it would not be fair for the other lot owners to pay for that privilege.

If the Association would like our office to prepare a written agreement which would be general in nature regarding plantings and could be filled in by the Association as to specific plantings, which document can then be recorded in the Public Records of the County, please contact our office and we shall prepare such document.

The next question placed before our attention is to whom and for what does the Board have the authority to delegate. The Association references Section 11.02 of the Declaration of Covenants and Restrictions. This Section provides as follows:

> "Authority of Association and Delegation. Nothing contained in this Declaration shall be deemed to prohibit the Board from delegating to any one of its members, or to any officer, or to any committee or to any other person, any power or right granted to the Board by this Declaration including, but not limited to, the right to exercise architectural control and to approve any deviation from any use restriction, and the Board is expressly authorized to so delegate any power or right granted by this Declaration."

It is our opinion, the right to delegate the powers or rights granted to the Board by the Declaration to its members, an officer, committee or an outside person is a broad power which the Board should use in a restricted manner. Even if the Board delegates its power to one of these entities or persons, the Board is still ultimately responsible to its membership for strict and consistent enforcement of all provisions in the Declaration of Covenants and Restrictions.

The question was raised whether the Board can delegate to each owner the ability to place plantings on their lots and thereby, remove this approval process from the Board of Directors. It is our opinion, if a delegation is to occur, that the Board delegate to each of the members the power to approve their own alteration of their lot by placing plantings on their lot. The delegation would be the power to approve and not the power to make the alteration. The Association cannot delegate the power to make the alteration, in our opinion, since the owner cannot pursuant to the Declaration of Covenants and Restrictions make this alteration without approval of the Board. We do not advise a Board of Directors to delegate the power to approve alterations by placing plantings on the lots to the lot owners. We caution the Association in doing an action of this nature as it will incur costs of maintenance on these plantings and it will loose control of the type of plantings which may appear on the properties. Normally, the right to delegate the power granted the Board is delegated to certain committees. Committees such as an approval committee for purchase or rent of properties in the subdivision is a proper committee, also, a committee which would make decisions pertaining to architectural control. These committees normally are a stand-alone committee which has been delegated the decision making power by the Board of Directors. Most other committees are committees which are directly responsible to the Board of Directors and must obtain

Board approval prior to taking any action. Even if a committee is a stand-alone committee, its decisions remain the liability of the Board of Directors. Therefore, if a committee would take action in violation of the law or the Association's documents, and the Association would be sued because of the action, the Association is the party ultimately responsible and liable for damages. Thus, we caution the Association in any delegation of power which it grants to any person or entity. Furthermore, while delegating a power or right to a person or entity may be permitted under the documents, that person or entity to whom the power was delegated cannot violate any provisions of the Declaration of Covenants and Restrictions. If it would do so, then other members of the Association or the Association itself could file legal action against that owner for the violation.

The last question asked to our office regards amending the Declaration of Covenants and Restrictions. Article 9 of the Declaration outlines the amendment procedure. The Declaration can be amended upon approval of not less than two-thirds of the owners. Therefore, an affirmative vote of at least two-thirds of the membership must be attained in order to amend the Declaration. Although it is not stated in the provision for amending the Declaration, this must be done at either a properly noticed annual or special members' meeting. The Declaration is required to be amended in such a manner that the lot owner can clearly see those items which are added and those items which are deleted in the current Declaration. Normally, added items are underlined and deleted items and struck through. Nevertheless, the lot owner must be allowed to see the entire paragraph which is being amended in order to make a decision pertaining to his vote. As stated in the last sentence of Section 9.01, once the vote is attained at the members' meeting, then the amendment must be recorded in the Public Records of Sarasota County, Florida. Upon recording, the amendment becomes effective. The amendment must be recorded in a certificate form and signed by the President and Secretary of the Association.

The question was specifically asked whether the Association must gain the consent of institutional lenders to an amendment. Article 9.02 has a limited condition for requiring the consent of institutional lenders. Institutional lenders must consent to an amendment if the amendment prejudices or impairs the priority of the lender's rights under the Declaration of Covenants and Restrictions. If the amendment does prejudice or impair the priority of the lender's rights, then the lender is required to consent to the amendment. Otherwise, the vote of the unit owners is sufficient to amend the Declaration of Covenants and Restrictions. The question was asked whether Article 10.02, Consent of Institutional Lenders, has any effect upon the amendment procedure outlined in Article 9. It is our opinion, that Article 10.02 only comes into effect if in the Declaration the specific Article being amended requires

consent of institutional lenders. Such a consent would be as in Article 9.02, discussed above wherein the document requires an consent of lenders if the amendment may prejudice or impair the priorities of institutional lenders. In that case, then Article 10.02 would come into play and the Association would follow the requirements of Article 10.02 in obtaining consent of the lender.

The above is our opinion based upon the questions presented our office regarding landscaping, financial responsibility for landscaping alterations, Board approval for landscaping, authority to delegate and the requirements to amend the Declaration of Covenants and Restrictions. We base this opinion upon the provisions of the Declaration of Covenants and Restrictions, general Florida law pertaining to homeowners associations and Chapter 617, the provisions pertaining to the Homeowners Association Act. If you have any questions regarding the contents of this opinion, please do not hesitate to contact our office.

Very truly yours,

Sharon S. Vander Wulp

Sharon S. Vander Wulp

SVW/ja