

Subject: RE: Opinion Needed for Stoneybrook Village Owners Association

From: "Jason L. Grosz" <jlg@vf-law.com>

Date: 3/26/2018 1:31 PM

To: Kurt Powell <kurt@willamettecm.com>

CC: Corissa Meadors <Corissa.Meadors@vf-law.com>

Kurt – I wanted to follow up with you on my review of the Association’s landscape maintenance policy in the context of the CCR restrictions on front and side yard landscaping.

You asked me a couple of questions in your email below. First – you asked me whether the shrub pruning “opt-out” provision in the attached resolution is allowable under sections 6.15 and 6.17 of the Declaration. Next, you asked me whether section 4.5 of the Bylaws require a membership vote before an owner can “opt-out” of pruning. Finally, you wanted an opinion on whether Sections 6.15 and 9.1 of the Declaration preclude Owners from performing additional landscape maintenance than what is covered by the current Association landscaping contractor. I’ll address each of these questions in turn.

1. Is the shrub pruning “opt-out” provision in the Association’s proposed landscape maintenance policy allowable under 6.15 and 6.17 of the Declaration?

I believe that the “opt-out” provision in the resolution is enforceable. I’ll explain below.

As an initial matter – I just want to note that you mentioned 6.15 of the Declaration (insurance) but I think you meant to point me (and the owners) toward section 6.18 (landscaping). This would need to be corrected in the resolution as well.

The Policy proposes that Single-Family Lot Owners be allowed to opt-out of having Stoneybrook’s landscaping contractor maintain and prune the shrubs on their properties. Section 6.18 of the Declaration reads:

6.18 Landscape. All exterior landscape installation and maintenance of front yards of Single-Family Lots and the street side yards of all corner Single-Family Lots will be performed by the Association, except that with the permission of the Architectural Review Committee an Owner may install and maintain additional landscape or flowers in the yard area immediately in front of such Owner’s Living Unit. All Owners shall maintain the remainder of their Lots in a neat and well-kept condition.

Section 9.1 of the Declaration (as amended in 2003) reads:

1. Section 9.1 of the Declaration is hereby amended to read as follows:

“9.1 Maintenance of Single-Family Lots. The Association shall maintain the front yard and corner lot street side yard landscaping on each Single-Family Lot. In addition, the Association may, at the discretion of the Board of Directors, elect to provide window washing, gutter cleaning, or other small services for the Single-Family Lots. The cost of such landscape maintenance and services by the Association shall be assessed to all Single-Family Lots as an Exterior Maintenance Assessment on an equal basis. All other maintenance of the Single-Family Lots shall be the responsibility of the Owner pursuant to Section 9.7 below.”

The governing documents do not define front, street side, or back yards. However, the Board has provided diagrams to Owners in the Policy that seem reasonable and understandable by a Stoneybrook Owner, that demonstrate what each individual type of yard is.

These sections of the Declaration clearly state that the Association is responsible for all landscape maintenance of all the front yards of Single-Family Lots in addition all street side yards of any corner Single-family Lot. The remainder of the lots’

landscape maintenance is the responsibility of each individual Owner. The two (2) Sections basically read the same, except Section 6.18 allows Owners to apply to the Architectural Review Committee (“ARC”) for permission to “install and maintain additional landscape or flowers.” This implies that any additional shrub’s pruning installed by an Owner with ARC approval is the responsibility of that Owner.

Thus, under these Sections of the Declaration Stoneybrook is responsible for the pruning of shrubs in all Single-Family Lot front yards and street side yards of all corner Single-Family Lots. This requirement is exempted when the Owner gets approval from ARC to install additional shrubs or the shrubs are in neither the front yard of a Single-Family Lots or the side street yard of a corner Single-Family Lots. In these situations, the individual Owner is responsible for the pruning of the additional shrub(s).

However, Section 9.7 of the Declaration reads:

9.7 Owner's Responsibility. Except as otherwise provided in this Declaration or by written agreement with the Association, all maintenance of the Lots and all structures, landscaping, Living Units, and other improvements thereon, shall be the sole responsibility of the Owner thereof, who shall maintain such Lot in accordance with the community-wide standard of Stoneybrook Village. The Association shall, in the discretion of the Board of Directors, assume the maintenance responsibilities of such Owner if, in the opinion of the Board of Directors, the level and quality of maintenance being provided by such Owner does not satisfy such standard. Before assuming the maintenance responsibilities, the Board of Directors shall notify the Owner in writing of its intention to do so, and if such Owner has not commenced and diligently pursued remedial action within thirty (30) days after mailing of such written notice, then the Association may proceed. The expenses of such maintenance by the Association shall be reimbursed to the Association by the Owner, together with interest as provided in Section 11.6 below. Such charges shall be an Individual Assessment and lien on the Lot as provided in Sections 10.10 and 10.14 below.

This Section requires an Owner to maintain all landscaping on their respective lots unless otherwise provided in the “Declaration or by written agreement” between the Owner and Stoneybrook. The Declaration provides in Sections 6.18 and 9.1, that Stoneybrook will maintain the landscaping of all Single-Family Lot front yards and all corner Single-Family Lot street side yards.

The language regarding “written agreement” is ambiguous. This could be interpreted to mean the ARC approval of additional landscaping stated in Section 6.18. In addition, this could also be interpreted to mean that an Owner and Stoneybrook could agree in writing that the Owner would be responsible for all the pruning of shrubs in yards that would normally be the responsibility of Stoneybrook. The interpretation regarding this language of Section 9.7 is key to determining whether the shrub pruning opt-out provision of the Policy is enforceable or not. If the language of Section 9.7 is interpreted to refer only to the additional landscaping allowed by ARC application, then the opt-out provision is unenforceable. However, if the language in Section 9.7 is interpreted to mean that an Owner and Stoneybrook can by written agreement allow an Owner to maintain landscaping in yards that are the responsibility of Stoneybrook, the opt-out provision in the Policy is enforceable.

My opinion in reading all these sections together is that the opt-out provision of the Policy is enforceable and allowed under Stoneybrook’s governing documents. I read Section 9.7 as a standalone provision of the Declaration and to mean that Stoneybrook may enter into a written agreement with an individual Owner allowing that Owner to maintain any landscaping within a portion of a yard that would normally be under the responsibility of Stoneybrook. This written agreement could include ARC approved additional landscaping and current landscaping already in the yards. Thus, the shrub pruning opt-out provision in the Policy is legal and enforceable under Stoneybrook’s governing documents.

2. Is the Association required to conduct a membership vote pursuant to Section 4.5 of the Bylaws prior to allowing an owner to “opt-out” of pruning?

No. I’ll explain below.

As you know, the basic rule in a Homeowners Association in Oregon is that the duly elected Board of Directors is legally authorized to make all decisions by or on behalf of the Association except those decisions that are specifically reserved for a vote of the homeowners. Examples of situations where the governing documents or state statute specifically reserve a decision for a membership vote are (1) amending the governing documents and (2) electing members to the Board of Directors in an annual meeting. But the basic rule is that the elected Board gets to make all decisions unless specifically reserved for a membership vote.

This basic rule is laid out in the Oregon Planned Community Act in ORS 94.630:

94.640 Association board of directors; powers and duties; removal of director; meetings; executive sessions. (1) The board of directors of an association may act on behalf of the association except as limited by the declaration and the bylaws.

It is also laid out in Section 4.5 of the Amended and Restated Bylaws:

Next, the Board has requested my legal opinion regarding whether Section 4.5 of Stoneybrook's Bylaws requires Stoneybrook to hold a vote of Owners to approve the shrub pruning opt-out provision within the Policy. The applicable portions of Section 4.5 of the Bylaws read as follows:

4.5 Powers. The Board of Directors shall have all of the powers and duties necessary for the administration of the affairs of the Association, except such powers and duties as by law or by the Declaration or by these Bylaws may not be delegated to the Board of Directors by the Owners. The powers and duties to be exercised by the Board of Directors shall include, but not be limited to those set forth in Section 8.5 of the Declaration and the following:

(a) **Maintenance Program.** Carrying out the maintenance program described in the Declaration and these Bylaws.

And, pursuant to that authority, the Board has authority to adopt, modify or revoke rules and regulations like the Landscape Maintenance Policy:

(l) **Rules and Regulations.** From time to time adopt, modify, or revoke such Rules and Regulations governing the conduct of persons and the operation and use of the Lots and the Common Areas as the Board of Directors may deem necessary or appropriate in order to assure the peaceful and orderly use and enjoyment of the Property. Such action may be modified by vote of not less than seventy-five percent (75%) of the voting rights of members present, in person or by proxy, at any meeting, the notice of which shall have stated that such modification or revocation of Rules and Regulations will be under consideration.

Under Subsection (a) of Section 4.5 of the Bylaws, the Board has the power to "carry out the maintenance program in the Declaration and these Bylaws." The Declaration requires Stoneybrook to maintain the landscaping in the front yards of all Single-Family Lots and the street side yards of all corner Single-Family Lots. *See* Sections 6.18 and 9.1 of the Declaration above. In addition, the Declaration allows Stoneybrook by written agreement with an individual Owner to allow that Owner to maintain the landscaping in the portions of the Single-Family Lot that would normally be under the responsibility of Stoneybrook. *See* Section 9.7 of the Declaration above.

Because the Board already has the power to enter into written agreements with individual Owners under Section 9.7 of the Declaration, Owner approval by vote is not required under Subsection (l) of Section 4.5 of the Bylaws to allow Owners to opt-out of Stoneybrook pruning the shrubs on their lots. The Board is not issuing a new rule or regulation regarding the shrub pruning opt-out provision. Instead, the Board is issuing a procedure to streamline the process for entering into a written agreement with an individual Owner regarding shrub pruning on their respective Single-Family Lots.

No Owner vote is required to approve the shrub pruning opt-out provision of the Policy.

3. Do Sections 6.18 and 9.1 of the Declaration preclude Owners from performing additional landscape

maintenance than what is covered by the current Association landscaping contractor?

Sections 6.18 and 9.7 of the Declaration require Stoneybrook to maintain the landscaping in all front yards of Single-Family Lots and all street side yards of all corner Single-Family Lots. In addition, Section 9.7 of the Declaration allows the Board to enter into written agreements regarding landscape maintenance to shift the maintenance responsibility from Stoneybrook to that Owner. As discussed above, these written agreements are enforceable and allowable under Stoneybrook's governing documents.

The Declaration clearly states that Stoneybrook must maintain all landscaping in the front yards of all Single-Family Lots and the street side yards of all corner Single-Family Lots. There is no ambiguity in this language, therefore, making the complete maintenance of the landscaping in these areas the responsibility of Stoneybrook. However, because the Board can enter into written agreements with individual owners regarding landscape maintenance, it may allow Owners to maintain their own lots in accordance with community standards. *See* Section 9.7 of the Declaration above.

Now – a practical word of advice. If owners choose to “opt-out” we have to have some sort of method for memorializing their decision to opt-out, requiring that they conduct the maintenance and tracking which owners have opted out. We would also need to sort out what happens when a home sells. Does the Association then take over front and side yard maintenance anew? What happens if the previous owner has control of the gang-timer, but then the new owner wants the Association to pay for watering and maintenance? Who pays to transfer back control to the Association?

I generally deal with that situation by recording a license or written maintenance agreement in the chain of title for the lot. I give you this advice because if you suspect you may have several owners opting out – you might want us to prepare a maintenance agreement or at least some sort of written document memorializing the Board's permission to opt-out.

Anyway, I hope this is a helpful analysis and opinion. If the Board has any follow up questions, please don't hesitate to call or write.

Sincerely,

Jason



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From: Kurt Powell <kurt@willamettecm.com>

Sent: Wednesday, March 14, 2018 3:56 PM

To: Jason L. Grosz <jlg@vf-law.com>

Subject: Opinion Needed for Stoneybrook Village Owners Association

The Board would like to hire you to give an opinion whether the current opt out provision for shrub pruning within the landscape policy (attached) is legal within the current governing documents. (see CC&R 6.15, 6.17). Additionally, the Board wishes to know whether the adoption of the rule (the opt out provision for shrub pruning) is required to follow section 4.5 of the Bylaws necessitating a membership vote. What other decisions of the Board must follow the membership vote of 4.5?

Additionally, the Board requests an opinion from you to determine whether the covenant regarding landscape maintenance preclude owners from performing additional landscape maintenance from what's already indicated in the contract such as mowing, shrub pruning, etc.

Thanks!

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Kurt Powell

Community Manager

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