

Pamela J. Hensler  
Attorney at Law

phensler@lawmg.com

February 11, 2021

David L. Ferguson  
FERGUSON LAW  
403 East Sixth Street  
Bloomington, Indiana 47408 -4098

**Re: Winslow Farm Pond Maintenance**

Dear Mr. Ferguson:

The Board of Directors of the Moss Creek at Winslow Farm Homeowners, Inc. ("Moss Creek Association") asked me to respond to the letter dated October 27, 2020 that you sent on behalf of your client, Winslow Farm Community Association, Inc. ("WFCA"). You argue that the WFCA is only responsible for maintaining a small portion of the ponds located in the Winslow Farm community. The Moss Creek Association disagrees with your assessment and has asked me to outline our opinion regarding this issue.

The crux of WFCA's argument that it bears little responsibility for Pond 3 appears to stem from a failure to consider the provisions of its own *Declaration of Covenants, Conditions and Restrictions of Winslow Farm* (the "WF Covenants") dated September 9, 1992, including its amendments and a misguided or limited reading of Moss Creek's *Declaration of Covenants, Conditions and Restrictions of Moss Creek at Winslow Farm* ("Moss Creek Covenants") dated September 10, 1992 and its subsequent amendments.

**The relevant portions of the WF Covenants**

The original WF Covenants dated September 9, 1992 were amended twice in 1998. The *First Amendment to the Declarations of Covenants, Conditions and Restrictions of Winslow Farm* ("First Amendment to WF Covenants") was signed on June 6, 1998 and recorded on June 10, 1998. The *Second Amendment to the Declaration of Covenants, Conditions and Restrictions of Winslow Farm* (the "Second Amendment to WF Covenants") was September 30, 1998 and recorded on October 9, 1998<sup>1</sup>.

The Relevant portions of the original WF Covenants are as follows:

**Section 1. DEFINITIONS.** The following terms used in this Declaration shall have the following meanings:

---

<sup>1</sup> A third Amendment to the WF Covenants was recorded on February 13, 2018 but does not affect this analysis.

[...]

1.4. Community Association. “Community Association” means the Winslow Farm Community Association, Inc., its successors and assigns, an Indiana not-for-profit corporation which is the incorporated association of Owners of Residences in Winslow Farm.

[...]

1.7. Community Maintenance Area. “Community Maintenance Area” means the Entrance Signage, the ponds and pumping equipment; and the pedestrian walkways to Winslow Woods Park located within Winslow Farm.

1.8. Community Expenses. “Community Expenses” means the expenses of administration of the Community Association, expenses for the upkeep, maintenance, repair, utilities, pesticide treatment and replacement of the Community Area and all other costs and expenses incurred by the Community Association for the common benefit of all Owners.

[...]

**Section 8. COMMUNITY AREAS.**

[...]

8.2. Ponds and Pumping Equipment. The ponds and pumping equipment located within Winslow Farm are Community Areas. The Community Association shall insure, maintain, repair and replace the ponds and pumping equipment to keep the waterscapes in a first-class condition. The Community Association will apply pesticides to the ponds if necessary to eradicate undesirable insects and weeds using commercially accepted treatments. All costs incurred by the Community Association in discharging its duties under this Section will be a Community Expense.

The First Amendment to WF Covenants replaced the original definition of “Community Maintenance Area” with the following definition:

1.7. Community Maintenance Area. “Community Maintenance Area” means the Entrance Signage; the ponds and pumping equipment; any fencing originally constructed by *Declarant* including but not limited to the stone stacked fence erected by *Declarant* within the Neighborhoods; any sidewalk entrance not constructed with concrete; any woodlands or undeveloped areas deeded to the Community Association by the *Declarant*; any area dedicated for the use of all Owners in Winslow Farm as a Community Area in any subsequent Deed or Plat; and, in the pedestrian walkways to Winslow Woods Park located within Winslow Farm.

The Second Amendment to WF Covenants deleted the then-current definition of “Community Maintenance Area” and replaced it with the following, still-current definition:

1.7. Community Maintenance Area. "Community Maintenance Area" means the Entrance Signage; the ponds and pumping equipment; any fencing originally constructed by *Declarant* including, but not limited to, the stone stacked fence erected by *Declarant* within the Neighborhood; any sidewalk entrance not constructed with concrete; any woodlands or undeveloped areas deed to the Community Association by the *Declarant*; any areas dedicated for the use of all Owners in Winslow Farm as Community Area in any subsequent Deed or Plat; the pedestrian walkways to Winslow Woods Park located within Windsor Farms; the landscaped islands in the streets of Winslow Farm; and the right-of-way owned by the City of Bloomington, Indiana along Henderson Street. The Community Maintenance Area is depicted on the map attached and labeled as Exhibit F.

***The relevant portions of the Moss Creek Covenants<sup>2</sup>***

**Section 1. Definitions.** The following terms used in this Declaration shall have the following meanings:

[...]

1.3. Association. "Association" means Moss Creek at Winslow Farm Homeowners' Association, Inc., its successors and assigns, an Indiana not-for-profit corporation which is the incorporated association of Owners, more particularly described in Section 10.

[...]

1.6. Common Area. "Common Area" means all the area in Moss Creek outside the boundaries of any Lot."

1.7. Common Expenses. "Common Expenses" means the expenses of administration of the Association, expenses for the upkeep, maintenance, repair and replacement of the Common Area and other costs and expenses incurred by the Association for the common benefit of all Owners; provided, however, that Common Expenses shall not include any costs of initial construction of any Patio Home or any expenses assumed or incurred by the Community Association.

1.8. Community Association. "Community Association" means Winslow Farm Community Association, Inc., its successors and assigns, an Indiana not-for-profit corporation which is the incorporated Association of all Owners in Winslow Farms.

[...]

1.16. Moss Creek. "Moss Creek" means all phases of Moss Creek, as platted

[...]

1.19. The Winslow Farm Declaration. "The Winslow Farm Declaration"

---

<sup>2</sup> While the Moss Creek Covenants have been amended twice, those minor amendments do not affect the analysis herein.

means the Declaration of Covenants, Conditions and Restrictions of Winslow Farm.

[...]

**Section 5. Common Area.** Common Area includes all area within Moss Creek, except the Lots, including but not limited to the interior roads, sidewalks, parking areas, entrance signage and ponds....

[...]

**Section 9. Easement for Utilities and Public and Quasi- Public Vehicles.**

[...]

An easement is also granted to the Community Association, its officers, agents and employees and to any management company, if any, selected by the Community Association to enter in or to cross over the Common Area *to perform its duties of maintenance, repair or replacement of the ponds* and entrance signage located within Moss Creek. (emphasis added).

[...]

**Section 14. Maintenance, Repairs and Replacements.**

[...]

... Maintenance, repairs, replacements and upkeep of the Common Area shall be furnished by the Association, as a part of the Common Expense.

### **Analysis**

1. *The WFCA Covenants require the WFCA to maintain the ponds.*

While WFCA Covenants have changed over the years, they have consistently and uniformly provided that for the WFCA to maintain all ponds within the Winslow Farm community. Section 1.8 of the WF Covenants require the WFCA to maintain the Community Areas. The ponds are and have *always* been included as part of the “Community Area” as explained in Section 8.2 of the Covenants, “The ponds and pumping equipment located within Winslow Farm are Community Areas.” Section 8.2 also states that “All costs incurred by the Community Association in discharging its duties under this Section [8.2] will be a Community Expense.”

Additionally, the WF Covenants include a definition of the “Community Maintenance Area” that has changed with the various amendments to the WF covenants. However, the terms “ponds and pumping equipment” have always been included as part of the definition of Community Maintenance in each version. See WF Covenants, § 1.7; First Amendment to WF

Covenants, § 1.7; Second Amendment to WF Covenants § 1.7. The WF Covenants are clear: the WFCA has assumed the duty to pay for and maintain all of the ponds in the Winslow Farm community, and this duty falls solely upon the WFCA.

WFCA's own governing documents do not support its argument that it is only responsible for those portions of the ponds that have been deeded to it. Nothing in the WF Covenants conditions the WFCA's responsibilities for pond maintenance upon the WFCA owning the ponds or any part of the Community Maintenance Areas.

Further, an additional change in the Second Amendment to WF Covenants supports the conclusion that the WFCA must maintain all of the ponds. "The Community Maintenance Area is depicted on the map attached and labeled as Exhibit F." Exhibit F is a basic drawing of the WFCA's Community Maintenance Area. Even the most rudimentary review of Exhibit F shows that it does not distinguish between those areas in which WFCA has been deeded the common area and those in which it has not. Additionally, the shaded areas of Exhibit 7 depicting the Community Maintenance Area includes the entirety of the ponds within the Winslow Farm community.

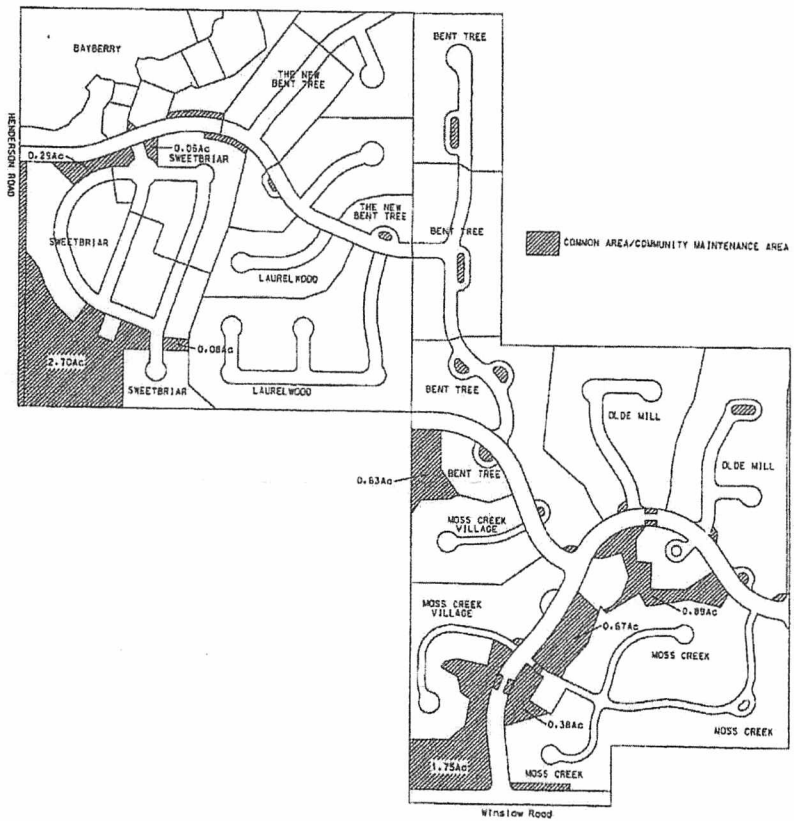


Exhibit 7 and the rest of the provisions in the WF Covenants provide that the WFCA is responsible for the upkeep, maintenance and repair of the ponds in Winslow Farm.

2. *The Moss Creek Covenants likewise require the WFCA to maintain the ponds.*

The actual definition of “Common Area” within the original Moss Creek Covenants recorded in 1992 has not been changed. It defines “Common Area” as “all areas in Moss Creek outside the boundaries of any Lot.” Moss Creek Covenants, § 1.6. This broad definition of “Common Area” includes those ponds geographically located within the Moss Creek neighborhood. Further, you correctly noted that Section 5 of the Moss Creek Covenants specifically includes “ponds” as part of the Common Area when it states, “Common Area includes all area within Moss Creek, except the Lots, including but not limited to the interior roads, sidewalks, parking areas, entrance signage and ponds.” Moss Creek Covenant, Section 5. However, the mere fact that Moss Creek Common Area includes the ponds does not mean the Moss Creek Association is responsible for maintaining them.

Other Moss Creek Covenants' provisions confirm that the WFCA bears responsibility for the pond maintenance in the Winslow Farm community. The Moss Creek Covenants exclude certain maintenance obligations. Section Fourteen of the Moss Creek Covenants states that the Moss Creek Association shall furnish the “maintenance, repairs, replacements and upkeep of the Common Area.” Moss Creek Covenants, § 14. That broad statement of responsibility is qualified by a statement noting that the maintenance of such Common Areas shall be provided “as a part of the **Common Expense**.” Moss Creek Covenants, § 14 (emphasis added).

The definition of “Common Expense” though in the Moss Creek Covenants excludes those expenses that are assumed and incurred by the WFCA. “Common Expenses ... shall not include...any expenses assumed or incurred by the Community Association.” Moss Creek Covenants § 1.7. Thus, if an expense in the Moss Creek Common Area arises from an expense assumed or incurred by the WFCA, the WFCA is responsible for those expenses instead of the Moss Cross Association.

As discussed above, the WFCA assumed responsibility and expense for maintaining all of the ponds within Winslow Farm. Thus, pond maintenance expenses are excluded from Moss Creek’s “Common Expenses,” confirming that Moss Creek bears no responsibility for maintaining these ponds.

Additionally, another section of the Moss Creek Covenants supports the conclusion that WFCA must maintain all of the ponds. Section 9 generally provides easements to public utilities to enter upon the Common Area of Moss Creek to perform their duties. However, the last paragraph grants an easement to the WFCA, including its agents “to enter in or to cross over the Common Area *to perform its duties of maintenance, repair or replacement of the ponds* and entrance signage located within Moss Creek.” Moss Creek Covenants § 9 (emphasis added). If the WFCA’s opinion that its pond maintenance duties are limited to only those ponds for which it has received a deed is correct, then this language drafted by the declarant for both Moss Creek and Winslow Farms and signed on the same day would be extraneous. Why would they need an easement if they only could work on land they have been deeded?

The governing documents of both the WFCA and the Moss Creek Association are clear. Pond maintenance for all ponds within the Winslow Farm community falls to the WFCA.

3. *The Deckard Survey likewise requires the WFCA to maintain the ponds.*

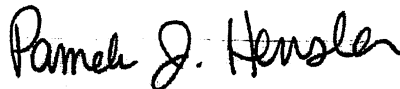
The WFCA retained Eric Deckard to complete a survey of the "Unplatted Common Areas of Moss Creek," a copy of which you provided in your letter. The survey purports to reveal unplatted areas within Moss Creek that fall outside of the common area that the developer had previously deeded to WFCA. To the extent that these unplatted areas exist, those areas might be considered as part of the Moss Creek Common Area. Yet, the clear, unequivocal language the WFCA Covenants expressly provides that the WFCA is responsible for any and all maintenance of the ponds despite whether any of these ponds are located in the Moss Creek Common Area.

Further, it bears mentioning that no unplatted area actually exists near Terry Halloran's Lot, Lot 62. The Deckard survey shows that the boundary line between the eastern edge of Lot 62 and the western edge of parcel owned by WFCA is several feet within Pond 3. In this area of Pond 3, no unplatted common area exists that Moss Creek could somehow still own. Of course, even if an unplatted area existed, the WFCA Covenants still require the WFCA to repair and maintain the ponds, including this area of Pond 3.

The Winslow Farm Community Association remains solely responsible for pond maintenance for all of the ponds located within Winslow Farm, including those located in the Moss Creek neighborhood.

I will reach out to you in two weeks or so discuss the issue and how to move forward. In the interim, though, please contact me if you have any questions.

Sincerely,



Pamela J. Hensler

cc: Hallmark Rentals and Management, Inc.  
Moss Creek Home Owners Association Board of Directors