

The Johnson Law Firm, L.L.C.
220 Salt Lick Road
St. Peters, MO 63376
(636) 970-3700
fax: (636) 970-9070

Dwayne A. Johnson
dwayne@johnsonlawfirm.net

Vincent L. Johnson
vince@johnsonlawfirm.net

February 29, 2016

Attn: James Fischer – Trustee
Stonecroft Homeowners Association
4431 Millcroft Drive
St. Charles, MO 63304

Re: Stonecroft Homeowners Association Opinion Letter

Mr. Fischer:

On January 20, 2016, we met in my conference room along with Mr. Tom Wilhelm, a fellow Trustee, and Mr. Bob Stout, a homeowner in Stonecroft Subdivision, (the “Subdivision”). Mr. Stout indicated he was present representing the interests of ten homeowners who have portions of a white vinyl fence located on each of their respective lots, said fence being part of a larger fence that separates Kisker Road from rear of said lots and certain Subdivision common ground.

The Stonecroft Homeowners Association (HOA) has requested that I offer a legal opinion on the following issues:

1. What interest does the HOA have in certain fencing that separates Subdivision common ground and private lots from Kisker Road, hereinafter collectively the “Fence”?
2. Does the HOA have an obligation to maintain, repair, and replace the Fence if the Fence is located on private homeowner lots?
3. What obligation, if any, does the HOA have to insure the Fence, both on Subdivision common ground and private homeowner lots?

February 29, 2016

Page Two

For purposes of my analysis:

1. The Stonecroft subdivision lots are subject to the "Indenture of Trust and Restrictions for Stonecroft", as recorded in Book 2835 Page 683 of the St. Charles County Records, hereinafter the "Declaration". I have a complete copy bearing the recording information and have fully reviewed same.

2. I assume to be true that the Fence in question, along its length, is located partially on Subdivision common ground, (as that term is defined in the Declaration) and also within the bounds of certain private homeowner lots which generally border Kisker Road.

Common Ground is defined in the Declaration as "all real property *and the improvements thereon* owned by the Association...." (Article I, Paragraph 8 of the Declaration). In light of this definition, the Fence, as located within the bounds of the Subdivision Common Ground, is part of the Common Ground itself and when the Declaration references "Common Ground", it is making reference to the Fence as well, at least so far as the Fence is located within the bounds of the Common Ground.

In that same Article I, Paragraph 13, of the Declaration, "Lot" is defined as "any plot of land, with the exception of the Common Ground, shown on the recorded subdivision plat(s) of the Property". This distinction is important as it specifically sets forth the premise that there is a clear line between that which is private and that which is common, i.e. that which is located within the Common Ground cannot also be part of a Lot and vice versa. As such, portions of the Fence located within the Common Ground cannot be owned privately as they are part of the Common Ground and or owned by the HOA just as portions of the Fence located on private property cannot be owned by the HOA as they are an improvement located upon a Lot and are therefore the property of the Lot Owner.

The powers and responsibilities of the Association, and specifically, what defines the scope of those powers and responsibilities, can be found in Article V of the Declaration. Simply put, this Article tells the HOA what acts it is empowered to perform. If an act is not listed therein, then the HOA is not empowered to perform such act(s). Article V, Paragraph 1(c) recites that the Association is obligated "to manage, operate, and control the Common Ground". Article V, Paragraph 2 recites that the Association is obligated to "maintain, repair, and replace the Common Ground, the cost of which shall be a Common Expense." As the definition of Common Ground includes the improvements located thereon, the Association is therefore obligated to manage, operate, and control the Fence (those portions located within the Common Ground) and to maintain, repair, and replace the Fence (again, those portions located within the Common Ground). It is most notable that the cost and expense incurred by the Association in performing such acts is a "Common Expense", meaning that the HOA may then assess all of the owners for said costs and expense as part of its power to assess described within Article IX of the Declaration.

February 29, 2016

Page Three

There is an important omission in Article IX, Paragraph 2, which sets forth the specific purpose of the Assessment, in relevant part, "...maintenance and operation of the Common Ground...". The lack of any reference in this section of the Declaration to a part purpose of an Assessment being to fund the performance of maintenance to improvements located on private property, i.e. a Lot, means that the Association is precluded from assessing Subdivision owners where such assessment, in whole or in part, would pay the cost or expense to the Association of maintaining, repairing, or replacing that portion of the Fence located within the bounds of a Lot. Any attempt by the HOA to assess the Subdivision owners for the cost to maintain, repair, or replace that portion of the Fence located within the bounds of a Lot would constitute and invalid assessment and subject to the HOA to litigation.

Article V, Paragraph 8, of the Declaration sets forth the type and nature of insurance coverages the HOA is to maintain. Paragraph 8(a)(i) recites that "Blanket property insurance covering "risks of physical loss".....for all insurable improvements on the Common Ground." is to be maintained. In light thereof, in that the HOA owns the Common Ground and the Fence (at least within the Common Ground), the HOA then has an insurable interest in that portion of the Fence and an obligation to attempt to secure insurance that insures not just the Common Ground, but the Fence located within the Common Ground as well. If the coverage is not available at a reasonable cost, then "broad form" coverage may be substituted. The same analysis applies to Commercial general liability insurance, Paragraph 8(a)(ii), in that since the HOA owns the Common Ground, and by extension, that portion of the Fence located thereon, it has a duty to insure the Common Ground Fence against claims of liability as well.

It would be remiss if I did not address the question: "If the HOA does not take control over the entire Fence, could a Subdivision Owner could erect a fence of a color or character not consistent with the existing Fence?"

Article VII, Paragraph 1 of the Declaration, provides that an Owner may not commence, erect, or maintain a fencenor enact any exterior change or alterations in any improvement on such Lot, without the express prior consent of the Architectural Control Committee. In other words, if that portion of the Fence located on a Lot were damaged or in need of maintenance, and an Owner wanted to change any aspect of look, character, or composition of the Fence, the Owner would have to get prior permission from the Architectural Control Committee which, without question, would be denied. This process provides the checks and balances necessary to assure future uniformity in the look and composition of the Fence, whether located on Common Ground or a Lot.

In addition thereto, in the event that a Lot Owner shall fail to maintain his/her portion of the Fence, the HOA may perform such acts of Fence maintenance as may be necessary and charge the Owner for the cost of such repair. (See Article VI, Paragraph 2(a)(b), "Neglected Property").

Mr. Stout suggested at our meeting that there are owners within the Subdivision that were in favor of voting to amend the Declaration in such manner as would confer upon the HOA the obligation to maintain, repair, and replace the Fence, regardless of location. It is possible, but not probable, that a vote held for such purpose would be successful as to legally have such a vote would require 100% of the Subdivision owners to vote in favor of such an amendment.

Currently, Article XV, Paragraph 2, of the Declaration allows the Owners (referred to as "Members") to amend the Declaration upon the affirmative vote of 75% of the Owners. However, that would be a vote of the Owners for an amendment that does not affirmatively increase the burden of ownership to a given Owner. Missouri law holds that in the event that ownership is desirous of amending the Declaration, and such amendment will increase the burden of ownership in any way, then 100% of the ownership must consent to such amendment. If the consent of 100% of the ownership is not obtained, then the amendment is invalid.

In the instant case, empowering the HOA to maintain, repair, and replace the Fence on private property would broaden the scope of the HOA's current responsibilities. The broadening of the scope of the HOA's current responsibilities would have the net result of increasing annual assessments since the funding of these "new" responsibilities would be through the process of assessment. Since the then proposed amendment would result in an individual owner's annual assessment being increased (at least potentially during any given year), the "burden" to each owner of simply living in the Subdivision has now been increased as compared to the time prior to the amendment being enacted. As such, amending the Declaration in the manner proposed would require 100% consent of the owners, as opposed to 75% consent of the owners, for a Declaration amendment which does not increase the burden of ownership. The only way an amendment is valid under Missouri law which increases the burden of ownership but for which less than 100% consent of the ownership is necessary, is if the Declaration itself expressly recites that an amendment to the Declaration may increase the burden of ownership with less than unanimous consent. The Stonecroft Declaration simply does not have such a provision.

For the reasons stated afore, those portions of the Fence located within the Common Ground are owned by the HOA, are to be maintained, repaired, and replaced by the HOA, and are to be insured by the HOA, and such acts being then funded by common assessments. In contrast, those portions of the Fence located within a Lot, are owned by the Lot Owner, are therefore to be maintained, repaired, and replaced by the Lot Owner, are to be insured by the Lot Owner, all at the sole cost and expense of the Lot Owner, but subject to any restrictions as may be contained within the Declaration.

February 29, 2016
Page Five

Please let me know if I can be of further assistance.

Sincerely yours,

Dwayne A. Johnson

Dwayne A. Johnson

DAJ/kjw