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November 10, 2008

**VIA ELECTRONIC and REGULAR MAIL**

Board of Directors  
Century Farms Neighborhood Association  
c/o Ken Budnick, President

**Re: Pond Number 3**

Dear Board:

Thank you for the opportunity to provide a legal opinion letter concerning the project proposal of V3 Companies Ltd. (hereinafter referred to as "V3") to redesign Pond Number 3 located in Century Farms Neighborhood. In preparing this opinion, I reviewed the By-Laws of the Century Farms Neighborhood Association (hereinafter referred to as "By-Laws"), the Declaration of Covenants, Conditions, Restrictions and Easements for the Century Farms Neighborhood Association (hereinafter referred to as "Declaration"), the V3 Project Proposal, and relevant Illinois case-law.

According to V3's proposal, the scope of services would include: a new design for Pond Number 3; permit acquisition for the project from DuPage County and the City of Naperville; pond excavation; and creating new construction. The proposed project cost-estimate is of \$118,000 (\$124,620 when including Stormwater Ordinance Permitting). The V3 proposal states that the intention of the project is to minimize the safety and aesthetic problems, such as the algae blooms and foul odors. The project activities include removing approximately 6,000 cubic yards of sediment, the creation of a 10 foot wide safety shelf along the entire shoreline where 1,280 plugs will be planted.

Article V, Section 5 of the Declaration provides, in relevant part:

*"The association, through the Board, shall have the following powers and duties:*

- (a) Own, maintain and otherwise manage the Community Area, including all facilities, all detention areas located in the Community Area, improvements and landscaping thereon and all other property acquired by the Association or which the Association agrees to maintain..."*

In addition, Article V, Section S provides that the Board shall have the power to:

*(h) Make such improvements to the Association property and provide such other facilities and services as may be authorized from time to time by the affirmative vote of 2/3 of the Members of the Association acting in Accordance with the By-Laws, provided, however, that any such action so authorized shall always be for the express purpose of keeping the Property a highly desirable residential community.”*

In short, the Declaration has given the Board power to make any necessary maintenance of the Community Area. In addition, the Board has the authority to improve the Community Area only when two thirds (2/3) of the Members of the Association have voted in the affirmative for the proposed improvements.

Because the Declaration makes a clear distinction between “maintenance” and “improvements”, it is important to determine whether V3’s proposal will be considered maintenance or an improvement. If it is considered a maintenance project, the Declaration gives the Board full discretion when deciding whether or not to start the project, the expenditures, the contract amount, and the nature and scope of the project. In the alternative, if the project is considered an improvement to the community, then the Board must put the project to a vote with the Members of the Association.

The difference between being an “improvement” or “maintenance” to property is not always clear. Such a distinction is very dependant on specific facts. In one case, In re the Marriage of Aird 175 Ill.App.3d 870 (4 Dist.1988), the Court had to determine whether repairs made on a property were improvements or maintenance in nature. The Appellate Court of Illinois determined improvements are, “*betterments of a long lasting nature which add to the capital value of the property, e.g., a new wall rather than a paint job, installation of new windows, rather than repair of the sash cords.*” In another case, Litvak v. Harbor Drive Condominium Association 244 Ill.App.3d 220 (1 Dist.1993), a condominium unit owner filed an action against a the condominium association and the Board alleging they had acted improperly in adopting a budget and authorizing the replacement of an old roof with virtually an identical new roof. The Court here accepted “maintenance” as defined by the Historical and Practice Notes to the Illinois Condominium Property Act (Ill.Stat.Ann., ch30, par. 318.4, Historical and Practice Notes at 251-52 (Smith-Hurd Supp.1992) explaining, “*A well recognize distinction found in many declarations exists between (i) maintenance of current facilities through operating expenses and expenditures for repair and replacement, and (ii) capital expenditures involving expansion or putting in better quality facilities than previously existed.*”

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The plan proposed by V3 would create entirely new features for Pond Number 3. In addition to the approximately 6,000 cubic yards of sediment that would be removed, a ten foot wide shelf along the entire shoreline would be formed. When working with the examples in the above cases, this appears to be similar to building a new wall rather than a paint job. This project more appropriately fits the definition of an “improvement” – an expansion or the putting in of a better quality facility than what currently exists. The construction of a new shelf to the pond would not be construed as mere maintenance. A project of this nature involves the formation of a something that previously did not exist, which is what would qualify as an improvement. The installation of an aerator is a better example of “maintenance” because Pond Number 3 would retain its current design.

In our opinion, based on our interpretations of the Declaration and relevant case-law that touch on the issue, the proposed project is an improvement. Therefore, we recommend the Board place the project up for vote and obtain the 2/3 affirmative votes needed from the Members.

If the Home Owners Association is unable to obtain the necessary votes for passage of the proposal, then we recommend other measures be considered to keep Pond Number 3 in its original condition.

In summary, I am of the opinion that if the Board wishes to move forward with V3’s project proposal for Pond Number 3, it needs to present the project to the Members for a vote. Upon receiving 2/3 of the votes in the affirmative, the project would then be properly approved. Alternatively, the Board may seek to obtain different proposals to address the problems, as long as the means decided upon does not create new construction.

Please feel free to contact me with any questions or concerns.

Sincerely,

Patrick T. Costello  
**KEAY & COSTELLO, P.C.**

PTC:dmp