

JAMES M. BARRONS
TODD A. BAXTER
GARY L. BIRNBAUM
FREDDA J. BISMAN
JAMES T. BRASELTON
DAVID G. BRAY
ROBERT C. BROWN
DAVID V. BURKETT
J. GREGORY CAHILL
SPENCER W. CASHDAN
JASON B. CASTLE
SCOT L. CLAUS
D. SAMUEL COFFMAN
ROBIN L. DE RESPINO
DONALD E. DYCKMAN
FRED C. FATHE
GLENN M. FELDMAN
RICHARD A. FRIEDLANDER
JERRY GAFFANEY
KENNETH A. HODSON
SCOTT A. HOLCOMB
DAVID L. LANSKY
DANA M. LEVY
KELLY W. LEWIS
CLIFFORD L. MATTICE
BRIAN M. MUELLER
WILLIAM NOVOTNY
CHARLES H. OLDHAM

RUSSELL PICCOLI (OF COUNSEL)

DAVID J. QUIMETTE
JEFF C. PADDEN
JAMES H. PATTERSON
MICHAEL J. PLATI
MARLENE A. PONIRELLI
CHARLES S. PRICE
ANDREW L. PRINGLE
LES RAATZ
LEONCE A. RICHARD III
STEPHEN E. RICHMAN
JAMES S. RIGBERG
MICHAEL S. RUBIN
PAUL RUDERMAN
BARRY R. SANDERS
TRICIA SCHAFER
MICHAEL R. SCHEURICH
ROBERT L. SCHWARTZ
ROBERT A. SHULL
GARY J. SOSINSKY
TERRY L. TEDESCO
TIMOTHY J. THOMPSON
DAVID I. THOMPSON
ANNE L. TIFFEN
DENISE H. TROY
SOPHIA VARMA
PETER A. WINKLER
STEVEN D. WOLFSON
CLAUDIA D. WORK

LAW OFFICES

MARISCAL, WEEKS, McINTYRE & FRIEDLANDER, P.A.

**2901 NORTH CENTRAL AVENUE
SUITE 200
PHOENIX, ARIZONA 85012-2705**

TELEPHONE: 602.285.5000
FACSIMILE: 602.285.5100
WEBSITE: <http://www.mwmf.com>

WRITER'S DIRECT LINE: (602) 285-5019
E-MAIL: anne.tiffen@mwmf.com
OUR FILE NO.: 14543.1

PHILLIP WEEKS (1936-1996)
DONALD N. MCINTYRE (1932-1998)

March 21, 2007

VIA FACSIMILE AND U.S. MAIL

Stephanie Wilson
STOOPS, DENIOUS, WILSON & MURRAY
350 E. Virginia Ave., Ste. 100
Phoenix, AZ 85004-1316

Re: Sunburst Farms East

Dear Ms. Wilson:

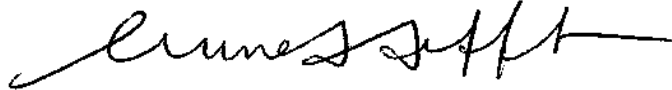
This Firm represents a group of homeowners in Sunburst Farms East ("SBFE"), who are non-members in Sunburst Farms East, Inc. ("the Association"). I understand you are the new attorney for the Board of Directors. It appears that the Board of Directors continues to work on Covenants, Conditions and Restrictions ("CC&R's").

Please see the enclosed copy of a letter that I sent to the previous attorney, cautioning against the inclusion of mandatory assessments to non-members in any new CC&R's. Regrettably, the previous attorney did not appear to take the enclosed cautions to heart. I hope that you will advise the Board appropriately based on the enclosed, and to avoid further litigation in this neighborhood.

Stephanie Wilson
Re: Sunburst Farms East
March 21, 2007
Page 2

Should you have any questions, please feel free to call.

Very truly yours,

A handwritten signature in black ink, appearing to read "Anne L. Tiffen". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Anne L. Tiffen
For the Firm

ALT/gsh

Enclosure

U:\ATTORNEYS\ALT\Sunburst Farms East - Mandatory membership\Correspondence\Wilson 3 19 07.doc

JAMES P. ABDO
JAMES M. BARRONS
GARY L. BIRNBAUM
FREDDA J. BISHMAN
JAMES T. BRASELTON
DAVID G. BRAY
ROBERT C. BROWN
DAVID V. BURKETT
J. GREGORY CAHILL
SPENCER W. CASHDAN
SCOT L. CLAUS
D. SAMUEL COFFMAN
ROBIN L. DE RESPINO
DONALD E. DYKMAN
JOSHUA A. EDELSTEIN
WILLIAM E. FARRELL
FRED C. FATHE
GLENN M. FELDMAN
RICHARD A. FRIEDLANDER
JERRY GAFFANEY
KENNETH A. HODSON
SCOTT A. HOLCOMB
DAVID L. LANSKY
DANA M. LEVY
KELLY W. LEWIS
ROBERT P. MAJERUS
MYRON F. MLACHAK
BRIAN M. MUELLER
WILLIAM NOVOTNY

CHARLES H. OLDHAM
DAVID J. OUMETTE
JEFF C. PADDEN
JAMES H. PATTERSON
MICHAEL J. PLATI
CHARLES S. PRICE
ANDREW L. PRINGLE
LES RAATZ
LEDNCE A. RICHARD III
STEPHEN E. RICHMAN
JAMES S. RIGBERG
MICHAEL S. RUBIN
PAUL RUDERMAN
BARRY R. SANDERS
TRICIA SCHAFER
MICHAEL R. SCHEURICH
ROBERT L. SCHWARTZ
ROBERT A. SHULL
GARY J. SOSINSKY
TERRY L. TEDESCO
TIMOTHY J. THOMASON
DAVID I. THOMPSON
ANNE L. TIPPEN
DENISE H. TROY
SOPHIA VARMA
PETER A. WINKLER
STEVEN D. WOLFSON
MICHAEL E. WOOLF
CLAUDIA D. WORK

LAW OFFICES

MARISCAL, WEEKS, McINTYRE & FRIEDLANDER, P.A.

2901 NORTH CENTRAL AVENUE
SUITE 200
PHOENIX, ARIZONA 85012-2705

TELEPHONE: 602.285.5000
FACSIMILE: 602.285.5100
WEBSITE: <http://www.mwmmf.com>

WRITER'S DIRECT LINE: (602) 285-5019

RUSSELL PICCOLI (OF COUNSEL)

PHILLIP WEEKS (1938-1999)
DONALD N. MCINTYRE (1932-1998)

May 8, 2006

VIA FACSIMILE AND U.S. MAIL

Jonathan J. Olcott, Esq.
Olcott & Shore
3401 N 32nd Street
Phoenix, Arizona 85018

Re: Sunburst Farms East

Dear Mr. Olcott:

This Firm represents a group of homeowners in Sunburst Farms East ("SBFE"), who are non-members in Sunburst Farms East, Inc. ("the Association"). This letter is directed to you based on our understanding that you are actively engaged in consulting to and representing the Board of Directors of the Association ("Board").

It is our understanding that the Board has engaged you to draft a set of Covenants, Conditions and Restrictions ("CC&R's") for SBFE that will include mandatory assessments from non-members for repair and maintenance of the irrigation delivery system that they do not use.

THE NON-MEMBERS DO NOT WANT LITIGATION, BUT IF THE ASSOCIATION INSISTS ON FORCING THE NON-MEMBERS TO SUBSIDIZE MEMBERS' USE OF WATER THAT NON-MEMBERS DO NOT NEED, WANT, OR USE, THEN LITIGATION IS CERTAIN TO RESULT.

We do not understand why the Board wants to spoil the peace that was precariously (and laboriously) bought through three prior lawsuits, including the recent Settlement Agreement; why the Board wants to pit neighbor against neighbor once again; and why the Board wants to guarantee more divisive litigation (the fourth round of litigation involving this neighborhood) – just, apparently, to force a very small minority of persons to subsidize benefits that inure to the large majority. The marginal additional benefit to be gained does not appear to be worth the economic, or the psychic, cost to the entire neighborhood.¹

Please encourage the Association to consider the following, and stop pursuing a course of action that will bring yet another round of litigation to this neighborhood.

I. Mandatory Assessments Will Not Withstand Legal Challenge.

For the following four separate and distinct reasons, any provision in amended CC&R's for mandatory assessments will not withstand legal challenge, and passing CC&R's with mandatory assessments will only result in more money wasted in the unsuccessful defense of litigation.

A. The Amendment Provision in SBFE's CC&R's Does Not Permit the Addition of Assessments by Amendment.

The current CC&R's for SBFE do not create any power of the Association to impose dues, assessments, or any financial obligations on members or homeowners. Instead, the CC&R's simply list a number of restrictions and conditions regarding the use and maintenance of properties in SBFE. The CC&R's then provide that "[t]he foregoing restrictions and covenants" are automatically extended for successive ten-year periods, unless by majority vote "it is agreed to change the said covenants and restrictions in whole or in part."

An identical provision for amendment of CC&R's was held not to allow the addition of assessments in *Lakeland Property Owners Association v. Larson*, 121 Ill. App. 3d 805, 459 N.E.2d 1164 (Ill. App. 1984). The court there held that the amendment provision did not allow the addition of provisions that were "new and different from those covenants delineated in" the CC&R's. 459 N.E.2d at 1166. The court observed that the amendment provision there did not give "proper notice that a majority of the lot owners may impose an assessment upon [plaintiff's] property at some future time." 459 N.E.2d at 1170.

The *Lakeland* court's reasoning has been followed in other states. See, e.g., *Caughlin Ranch Homeowners Association v. Caughlin Club*, 109 Nev. 264, 849 P.2d 310 (1993); *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994); also see *Hill v. Palm Beach Polo, Inc.*, 717 So. 2d 1080 (Fla. App. 1998) (assessments were not restrictive covenants governing the use of land and therefore could not be amended through the provision for amendment of restrictive covenants).

¹ By way of example, if an assessment totaling \$25,000 is needed, it breaks down as follows. If paid only by the approximately 250 members, the share is \$100 each. If paid by all 280 homeowners, the share is not quite \$90 each. Have the members been asked whether saving \$10 each is worth a lawsuit?

We are aware that there is a contrary line of cases. See, e.g., *Evergreen Highlands Association v. West*, 73 P.3d 1 (Colo. 2003) and cases cited therein.

However, we believe that Arizona will follow the *Lakeland* reasoning, and reject the addition of assessments by amendment, at least in this case, for the following reasons.

First, the Arizona courts have already reached a result similar to *Lakeland* on an analogous issue. In *Catalina Foothills Estates, Inc., v. Shull*, 126 Ariz. 484, 616 P.2d 944 (App. 1980), the CC&R's contained a termination clause providing that "the aforesaid conditions and restrictions" would terminate on a date certain. The CC&R's also contained a modification clause permitting amendment of "these conditions and restrictions." Strictly applying the terms of the modification clause, the court held that the modification clause did not permit modification of the termination clause, and the termination clause became effective and the CC&R's were terminated. The court's reasoning echoes that of *Lakeland*:

Here the termination clause is clearly not a "condition or restriction." By its very terms it refers to "the aforesaid conditions and restrictions." Words in a restrictive covenant ... must be given their ordinary meaning. The ordinary meaning of "aforesaid" is something previously mentioned; therefore, the "conditions and restrictions" referred to in the 1930 restrictions are those contained in the first eleven paragraphs.

126 Ariz. at 485, 616 P.2d at 945. We believe that, applying the rationale of this precedent, an Arizona court would hold that a provision permitting "change" to the "foregoing restrictions and covenants," as ours does, would not permit adding an entirely new and different obligation to pay assessments.

Second, the Arizona courts have also already interpreted our precise modification clause in a manner consistent with *Lakeland*. In *Duffy v. Sunburst Farms East Mutual Water & Agricultural Company, Inc.*, 124 Ariz. 413, 604 P.2d 1124 (1979), the court stated that previous CC&R's for SBFE, with the same amendment provision, meant that the "restrictions embodied within the Declaration may be revoked or amended by vote" – not that new provisions could be added. This statement was not the holding of the case, but we believe that, combined with *Catalina Foothills*, this statement will compel a result similar to *Lakeland* in our case.

Third, the cases that permitted the imposition of assessment by amendment all involved assessments for the maintenance of common areas that all properties used and enjoyed. In contrast, in the instant case, the proposed assessments would be intended to force persons who do not use the irrigation to pay for it.

Finally, a thirty-plus year custom and practice in this neighborhood holds that the persons who use water pay for it and that those who do not use it do not pay for it. Nothing in the CC&R's or any other recorded document gives notice to any purchaser of property in SBFE that this custom and practice may change.

We are also aware that there is some case law supporting an implied authority to make assessments for common area expenses. However, those cases do not apply for two reasons. First, the rationale for such implied authority includes the notion that all properties benefit from the common areas for which assessments are made. *See, e.g., Miles v. Carolina Forest Association*, 167 N.C. App. 28, 604 S.E.2d 327 (2004). Cases have rejected implied authority to make assessments against properties that do not use the amenities for which assessments are made. *See, e.g., Popponesset Beach Association, Inc. v. Marchillo*, 39 Mass. App. Ct. 586, 658 N.E.2d 983 (1996).

Second, the rationale for such implied authority includes the notion that, without assessments, there will be no way to pay the expenses of maintaining common areas. In the instant case, in contrast, there is no need for an implied authority to make assessments because, under the Bylaws, the Association already has the explicit authority to impose special assessments on members, and therefore already has the ability to pay expenses for maintenance of common areas.

B. Unanimous Consent Is Required to Change the Allocation of Expenses.

Unanimous consent is required before changing the basis for allocation of common area expenses in a common interest community.² *See Restatement of the Law Third, Property – Servitudes* (hereafter, the “Restatement”), section 6.10(3)(b) (1998) (“Except as otherwise expressly authorized by the declaration, ... unanimous approval is required ... to change the basis for allocating voting rights or assessments among community members.”); *Accord Hyatt, Condominium and Homeowner Association Practice: Community Association Law* (3d Ed.) at section 9.05.

As explained in the Reporter’s Note to the Restatement, “The rule limiting amendment powers to prevent unfair imposition on the minority of members who cannot protect themselves politically finds support in the case law that invalidates nonuniform amendments and other amendments that unfairly burden or advantage one group of members over another.”³ This language applies precisely to the instant circumstances, where apparently the CC&R’s you are drafting will force non-members, who do not receive water, to subsidize the lower cost of water for members who do receive water. Such a change would represent a dramatic departure from the way SBFE has operated for thirty years, and changing the basis for allocation of the cost of maintaining the irrigation system therefore requires unanimous consent.

Indeed, a very similar fact pattern was involved in *Buckingham v. Weston Village Homeowners Association*, 571 N.W.2d 842 (N.D. 1997). In that case, the CC&R’s provided that

² SBFE may be a common-interest community, because the Settlement Agreement imposed a requirement for all homeowners to pay for the grading of bridle paths, either as part of their membership dues or, for non-members, when invoiced at year-end. Even if the grading expenses do not make SBFE a common-interest community, the changes to CC&R’s currently being proposed will apparently do so, thus triggering this limitation in any event.

³ The term “member” when used in the Restatement means a member of the community, not a member of any Association in the community. *See Restatement section 6.2, Comment d.*

special assessments would be in proportion to the benefit that each property received from the assessment. The CC&R's were amended to make assessments even as to all homeowners, which had the effect of forcing some homeowners to pay for a street improvement project that did not benefit their properties. The Court held that this amendment was unreasonable and unenforceable.

Currently, under the CC&R's, the Bylaws, and thirty years of custom and practice, those who use water pay for it, and those who do not use it do not pay for it. Recently, the non-members agreed in the Settlement Agreement to pay for their share of bridle path grading, and to the best of our knowledge every member of the group we currently represent has paid that amount as invoiced for 2005.

Changing the above basis for the allocation of common area expenses requires unanimous consent, and any change with less than unanimous consent will be invalid.

C. Imposing Assessments on Homeowners Who Do Not Use the Irrigation System Would Not Pass the Required Reasonableness Test.

Amendments to CC&R's "must be exercised in a reasonable manner so as not to destroy the general plan of development." See, e.g., *Holiday Pines Property Owners Association, Inc. v. Wetherington*, 596 So. 2d 84, 87 (Fla. App. 1992) (amendment imposing mandatory membership in association was not enforceable because it was not reasonable and it changed the plan of development); *Hutchens v. Bella Vista Village Property Owners' Association, Inc.*, 82 Ark. App. 28, 110 S.W. 3d 325 (2003) (amendment to create two levels of assessments was reasonable, because of respective unequal use of the common areas by the two groups of owners); *Sanderson v. Hidden Valley Fishing Club, Inc.*, 743 S.W.2d 486 (Mo. App. 1987) ("An increased assessment for those who use the facilities full-time rather than part-time is reasonable and would have been proper in the original covenant.").

We believe that a court would find an amendment, to assess homeowners who do not use irrigation for the cost of maintaining the irrigation system, would be found unreasonable by a court. See, e.g., *Tosney v. Chelmsford Village Condominium Association*, 397 Mass. 683, 493 N.E.2d 488 (1986) (permitting assessments only against those persons who used the common areas and facilities, because "It does not seem either equitable or logical that townhouse unit owners should be required to pay a portion of the expenses for facilities from which they receive no benefit.").

D. Mandatory Assessments is a Violation of the Settlement Agreement.

The Settlement Agreement explicitly provides that "Persons who have opted out of membership in SBFE shall not be liable for any sums to SBFE other than the payment of bridle path grading expenses as set forth herein." The Settlement Agreement also provides that it "shall be binding on SBFE and its current Board of Directors, and all successors in interest, including all future Boards of Directors of SBFE."

Mandatory assessments violate these terms of the Settlement Agreement. We believe that the Settlement Agreement creates a bar to mandatory assessments for this reason. However, if an argument is successfully made that the Settlement Agreement does not bind the homeowners who vote for mandatory assessments in new CC&R's (as opposed to the Board), then we will argue that the members of the Board who sponsored, and promoted, such new CC&R's are personally liable in damages for breach of the Settlement Agreement.

II. Consequences of Forcing Non-Members to Become Financially Involved.

If the non-members are forced to become more financially involved in the Association, such as by the imposition of mandatory assessments, then the non-members plan to take a close look at a number of additional issues affecting their resulting financial liability, including: whether the Board acted ultra vires in paying a law firm to draft CC&R's, a power not even remotely granted to the Board by the CC&R's or the Bylaws; whether the Board acted ultra vires in paying a management company (if such occurs), a power not even remotely granted to the Board by the CC&R's or the Bylaws; whether the annual meeting was conducted in accordance with the Bylaws; whether the Board breached its fiduciary duty to the members by actively seeking to retard the work of a legitimate committee formed to look into new CC&R's; and other issues.

III. Conclusion.

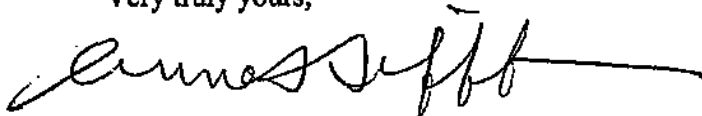
Before the last round of costly litigation, we wrote a letter to the Board's then-counsel dated November 21, 2003, outlining why our position was correct and we would prevail in any litigation, and urging that litigation be avoided. The Association ignored our letter and proceeded to incur \$17,000 in attorneys' fees only to prove that our position was correct.

We urge the Association not to make the same mistake again.

Please counsel the Association not to lead the neighborhood into another round of litigation.

Let's maintain the status quo which has worked fine for thirty years.

Very truly yours,



Anne L. Tiffen
For the Firm

ALT/jkr
cc: Members

TIME IN:

MARISCAL, WEEKS, MCINTYRE & FRIEDLANDER, P.A.

2901 North Central, Suite 200

Phoenix, Arizona 85012-2705

Phone: (602) 285-5000

Fax: (602) 285-5100

PLEASE DELIVER THE FOLLOWING MATERIAL AS SOON AS POSSIBLE

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED BELOW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.

RECEIVING PARTY

**Stephanie Wilson
602-274-7700**

FIRM NAME

**STOOOPS, DENIOUS,
WILSON & MURRAY**

FAX NUMBER

602-274-6708

CONFIRM NO.:

FROM: Anne L. Tiffen (Direct Line: 602-285-5019)

NUMBER OF PAGES: 8 - INCLUDING COVER PAGE

***** REMARKS *****

Re: sunburst Farms East

**IF YOU HAVE NOT PROPERLY RECEIVED THIS FACSIMILE
PLEASE CALL US AT (602) 285-5113
OUR FAX NUMBER IS (602) 285-5100**

DATE: **March 19, 2007**
REQUESTER: ALT/gsh

FILE NUMBER: 14543.1
USER NO: 5019