GARGANESE, WEISS, DAGRESTA & SALZMAN, P.A.

*Attorneys at Law*

111 N. Orange Ave., Suite 2000

P.O. Box 2873

Orlando, Florida 32802-2873

Phone (407) 425-9566

Fax (407) 425-9596

**Theresa McDowell**

*Senior Attorney*

***tmcdowell@orlandolaw.net***

August 3, 2021

TO: Membership of Glenwood Reserve Homeowners Association, Inc.

RE: Amendment to the Covenants and Restrictions

The Association’s Board of Directors has requested that our Firm provide additional context to the current proposed amendment to the Association’s Covenants and Restrictions to remove existing covenant Article VI, Section 6.23, which states “Before a Certificate of Occupancy is issued, each home shall be provided with a fire sprinkler system which meets the requirements of NFPA 13D.”

The Board of Directors asks that you consider certain factors, specifically, clarity, cost, and the risk of litigation, when making a decision about the proposed amendment to eliminate Section 6.23. Further explanation of each factor is described below.

**Clarity**:

The amendment, as written, lacks clarity. For example, currently, the language of the amendment states that “each home shall be provided with a fire sprinkler”, however, as the membership is aware, the Association has not provided fire sprinklers in each home, rather homeowners themselves have purchased the sprinklers and had them installed during construction. If the Association leaves the covenant as is, they may be responsible for the considerable cost of providing sprinkler systems to each additional home built. Further, the amendment, as written, imposes no clear responsibility. Rather, it states that the entity enforcing the covenant is Volusia County, and the enforcement mechanism is the denial of a request for issuance of a certificate of occupancy. The Association has no power over the issuance of permits or certificates. This covenant, as written, does not allow for the Association to take appropriate action, even in the event an owner fails to install a sprinkler system. And, importantly, the County does not currently require these systems to be installed in order to issue a Certificate of Occupancy. The covenant, as written, is misleading, does not properly authorize the Association to take action, and is unnecessary, per County requirements.

**Risk of Litigation**:

The proposed amendment is aimed at reducing the risk of litigation. Per Florida Statutes, and the Association’s Governing Documents, the Board of Directors is required to enforce the Covenants and Restrictions. For the reasons stated above, the Board cannot properly enforce this Covenant, and therefore, there is a risk that the Board and the Association could get sued for failure to enforce the covenants, and, because of prior inconsistent application, for selective enforcement of the Covenants.

At the outset of construction of this community, the installation of fire safety systems made practical sense. However, as the area around the community grew, the systems became less necessary as fire and public safety services replaced the need for home installations. It appears that during and after the growth of public services, and prior to the installation of the owner controlled Board of Directors, this covenant was inconsistently applied. This resulted in some owners having installed the sprinkler systems and some having not installed the sprinkler systems. As this covenant remains, some owners could take action against the Association for failing to enforce the Covenant, even though the County’s clarification that the systems are not required.

Currently, Maronda Homes, who has purchased 11 Lots, has already stated that they will take legal action if necessary to enforce their right to build previously approved homes on their purchased Lots (without these systems). The developer of the Association approved the plans of the pending 11 homes without the sprinkler system. If this amendment is not approved, and the Board moves forward with requiring the sprinkler system, Maronda has indicated that it will move to initiate legal action. A lawsuit against the Association can impact the ability of prospective owners to purchase in the community, and pending litigation can impact lender and funding decisions.

**Costs**:

Litigation also brings additional costs. If the Covenant remains, the Association may be forced to litigate certain claims (failure to enforce the covenants, selective enforcement, and breach of contract). Litigation comes with certain risks and costs that affect the entire membership of the Association. If the Association is sued, the lawsuit might be handled by an Attorney provided by the Association’s insurance carrier. However, policies often don’t cover any damages or a plaintiff’s attorney’s fees. For example, if an owner or a builder is successful in suing the Association, the Association may have to charge a special assessment or raise assessments in order to pay a judgment amount, and/or the attorney’s fees of the prevailing party. If the Association is not assigned an attorney by insurance, the cost is significantly higher, as the Association would be paying its own legal fees, most certainly causing higher or special assessments. Even currently, the Association has retained this Firm, which is incurring legal fees in the assistance of this particular matter. If the Covenants remain as they are, and the Association attempts enforcement by requiring the sprinkler systems, it is likely that the Association will be sued, and all lawsuits incur fees, which are then passed on to you, the Owners.

**Conclusion**:

The Board of Directors is attempting to pass this amendment via the method provided in Chapter 720.306, Florida Statues, which requires a 2/3 affirmative vote of the membership. Although certain sections of the Declaration must be amended via an instrument signed by not less than 90% of the community, the Declaration provides an exception for amendments to the provisions of Article IV from the 90% rule. However, the Declaration is silent as to how to amend the Article VI provisions. When a Declaration is silent as to amendments, the statute will control, thus the Association must approve this Amendment by a 2/3rds vote.

Although this particular Covenant was well intended when it was drafted, it is now unnecessary to achieve its purpose. Certificates of Occupancy are issued without sprinklers. The covenant itself lacks clarity and places the Association at high risk of litigation which could result in higher or special assessments to fund legal fees, and could stall development of the community by deterring lenders and builders.

Garganese Weiss D’Agresta & Salzman, PA

Theresa M. McDowell

William E. Reischmann, Jr.

CC: Board of Directors