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Via Email: swra@swra.net

Sportsman's World Recreational Association, Inc.
ATTN: Board of Directors
6020 Hells Gate Loop
Strawn, Texas 76475

Re: Opinion Letter Regarding Dedicatory Instruments of Sportsman's World Recreational Association, Inc. and Sportsman's World Ranch Owner's Association, Inc.

Dear Board Members:

The Board of Directors ("Board") of the Sportsman's World Recreational Association, Inc. ("SWRA") has requested me to issue this opinion letter regarding questions posed by the Board regarding SWRA and Sportsman's World Ranch Owners' Association, Inc. ("SWROA") dedicatory instruments impacting owners, directors, and committee members of both the SWRA and SWROA. The term "dedicatory instrument" used herein means each governing instrument I have reviewed, as listed in detail below, covering the establishment, maintenance, and operation of Sportsman's World Section 11-12 and Sections 15-16[1] by the SWRA and SWROA including restrictions, restrictive covenants, bylaws, rules, regulations, or similar instruments governing the administration or operation of either the SWRA or SWPOA[2] Specifically, the Board has requested an opinion as to the following matters:

1. Are owners of undeveloped lots in the Property required to pay regular assessments or, alternatively, the road use assessments to the SWRA?

2. If a single owner purchases two separate lots subject to the SWRA and then combines those two lots into one contiguous lot via a replat, is the owner required to pay the assessments for each lot as originally platted, although the lots are now merged into one continuous tract, or is the new, re-platted lot considered only one lot for purposes of assessments?

[1] For ease of communication, Sportsman's World Sections 11-12 and Sections 15-16 will be collectively referred to as the "Property" in this letter, and reference to the Property only refers to the foregoing sections and no other section of the Sportsman's World subdivision or any other real property.
[2] *See* TEX. PROP. CODE § 209.002.

3. If yes to question two above, how does this affect owners who have previously combined two or more lots into a single lot but have only been required to pay assessments for one lot in the past up to this point?

4. If SWRA permits a replat of two or more lots into a single lot, is SWRA required to charge the owner assessments pursuant to the original number of lots as developed?

5. If SWRA desired to amend SWRA's governing documents to modify assessments with regard to original lots, re-platted lots, or road use fees, what is required to do so?

The opinions and conclusions herein are based on analysis of SWRA and SWROA dedicatory instrument and other documents as follows:

1. Declaration of Covenants, Conditions, and Restrictions Sportsman's World (Recreational Facilities) and any supplements or amendments thereto filed in the Official Public Records ("SWRA Declaration");[3]

2. Declaration of Covenants, Conditions and Restrictions for Sportsman's World, Section Eleven (Ranch Estates) and any supplements or amendments thereto filed in the Official Public Records ("SWROA Declaration");[4] and

3. The original plats for the Property.[5]

Please note that the above-listed instruments relied upon in rendering the opinions below were obtained via a comprehensive title search for SWRA filings in the Official Public Records and SWROA dedicatory instruments provided by the Board. There is a possibility that other filed instruments were not obtained if they have been mis-filed or mis-named in the county filing system, although this is unlikely. Further, it is likely that any instrument, rule, regulation, bylaw, policy, or regulation which either the SWRA or SWROA has purportedly adopted but has not filed in the Official Public Records is invalid and non-binding, as all homeowner association governing documents are required to be filed in the Official Public Records before they are enforceable pursuant to the Texas Property Code.[6]

All land within the Property is subject to *both* the SWRA and SWROA pursuant to their respective dedicatory instruments and, therefore, owners of such land are required to abide by the governing documents for both associations. Because both associations are closely intertwined and govern the Property, I will address the impact of both SWRA and SWROA dedicatory instruments in relation to each question posed by the Board.

Question 1: Assessments for Undeveloped/Unused Lots to SWRA

The SWRA Declaration requires that regular SWRA assessments be levied on a uniform, equal basis per lot and/or living unit.[7] A "lot" means any residential plot of land located within

[3] *See* Instruments V530, P249; V535, P230; V537, P397, V547, P819; V556, P283; and V556, P291.
[4] *See* Instruments V537, 412; V671, P153; V547, P823; and V556, P287.
[5] *See* Plat Records V6, P10; V6, P17 and V6, P18. Note: Section 11 was un-platted but each tract of land thereon is considered an individual tract/lot.
[6] TEX. PROP. CODE § 202.006.
[7] SWRA Declaration Article III § 3.

the Property that has been specifically identified in the Property plats filed in the Official Public Records.[8] A "living unit" means any structures which are designed and intended as a single residence including condos, apartments, townhomes, and the like, and each individual condo, apartment, and townhome is considered a separate living unit.[9] SWRA regular assessments are straightforward – the same amount is charged across the board for each lot and living unit. If an owner owns more than one lot or living unit, they pay the amount for each of those lots/units owned.

The SWROA Declaration provides that regular SWROA assessments are to be levied on a uniform basis per acreage owned by each owner.[10] The SWROA Declaration further states that any tract of land within the Property which has not been devoted exclusively to other than residential use shall be deemed, for purposes of the SWRA Declaration, a 'lot' as defined in the SWRA Declaration (and as described above) and shall be subject to SWRA assessments.[11] Any tract which has been devoted exclusively to other than residential use shall *not* be subject to SWRA regular assessments because the SWRA assessments are applicable only to residential lots.[12] In lieu of the regular assessments levied by the SWRA Declaration, each lot which has been devoted exclusively to a use other than residential shall be subject to an annual assessment based on a per acre basis which shall be payable to the SWRA and used exclusively for repair, improvement, and maintenance of certain roads within the Sportsman's World subdivision.[13] Each owner by accepting a deed for lot devoted for use other than residential, whether or not it shall be so expressed in such deed, is deemed to agree to pay SWRA for such annual road assessments or charges.[14] "Lot" and "tract" are used interchangeably in the two declarations but mean the same thing – a contiguous unit of property described by metes and bounds within the Property.

In sum, any tract used for residential purposes on the Property is required to pay the regular SWRA assessments ($ per lot/tract) and regular SWROA assessments ($ per acre). The exception – any tract that has been devoted exclusively for non-residential use is still required to pay the regular per-acre assessment to the SWROA but pays the road maintenance assessment ($ per acre) to the SWRA instead of the regular, per-lot SWRA assessments. All the tracts and lots on the Property are still required to pay some type of assessment to the SWRA and, although the assessments are for different purposes (regular assessment for normal HOA operation versus assessments specifically for roads), the main difference in the eyes of a tract owner on the Property is whether they are charged on a per-lot or per-acreage basis by the SWRA.

It appears that at some point in the past, a prior board made the determination that a lot qualifies as a 'non-residential lot' if it did not have any development on it. There is no definition of what constitutes a 'non-residential' versus 'residential' lot in either the SWRA Declaration or SWROA Declaration.

However, per *both* declarations, all tracts depicted on the Property plats <u>are residential tracts unless devoted exclusively to other use</u>. The mere fact that a tract does not have any structure on it does not mean it has been devoted exclusively for 'non-residential' use – it is still a residential

[8] SWRA Declaration Article I § 4.
[9] SWRA Declaration Article I § 5.
[10] SWROA Declaration Article III § 3.
[11] SWROA Declaration Article III § 3.
[12] Same.
[13] Same.
14 Same

tract, just undeveloped. Per the declarations, the Property plats will specifically denote any tract that was designated as devoted for non-residential use at the time of development by the original developer, easily answering the question of classification of those tracts so denoted at the time of development. A prime example would be a tract designated as "common property" by the developer.

The ultimate question: what activity by an owner on a lot, if that lot is not specifically noted as devoted for other than residential use on the plat, is considered activity that then turns the lot into being devoted exclusively to other than residential use? The explanation can be found in the name of the SWROA itself – ranching. An owner who uses a tract specifically for ranching has devoted that tract for use other than residential. To be clear, if an owner uses a tract for ranching but *also* has a home thereon, it is not devoted *exclusively* to other than residential use. In my opinion, the purpose of this delineation was intended specifically for those ranchers who have land devoted exclusively for their livestock within the Property. The difference in how SWRA assessments (regular versus road only) are applied makes perfect sense when viewed in this manner. Logically it makes sense – a rancher who does not live on a tract in the Property probably only uses the roads and no other SWRA amenities, at least not regularly, because they do not live there.

Naturally, a creative owner may say "I do not have a home on my land so how can it be residential! I am not paying the per-lot SWRA assessments." This argument has no merit, as the question is not whether there is a structure or any type of development on the land or not, it is whether the owner has devoted its use *exclusively* to something else. Critically, all the Property is presumed residential until devoted by the owner for other use. The hypothetical homeowner in the above example has *not* devoted the land exclusively for other than residential use – they are just simply not using the land which is residential by default.

In my opinion, the prior board's basis for using developed v. undeveloped to determine the proper assessment is incorrect. The proper analysis is whether the land has been devoted exclusively to other than residential use or not.

Any tract/lot that is used in any manner as residential, whether that be full time, part time, a vacation home, etc. should be charged the regular per-lot assessment by the SWRA. Any tract that sits as empty pasture that is not being used should also be charged the standard per-lot SWRA assessments. Only if a tract has been devoted exclusively to ranching, or some other non-residential purpose, should the road per-acre assessment be charged to the owner.

Question 2: Replat and Combination of Lots

Both the SWRA and SWROA dedicatory instruments are wholly silent as to the impact on assessments due to the combination of two or more lots or tracts via replat or otherwise. This issue does not impact any assessment charged on a per-acre basis, such as the SWROA regular assessment and SWRA road assessments. Thus, the issue of tract combination only impacts the levying of the SWRA per-lot assessments.

The Eastland Court of Appeals has specifically addressed this issue in the case of *Walton v. Midland Mira Vista Homeowners' Ass'n*.[15] In *Walton*, an owner purchased two adjacent lots

[15] 2014 WL 4662325 (Tex. App. – Eastland 2014).

within the subdivision, combined them into one lot via replat, and then claimed he only was obligated to pay HOA assessments for one lot on a per-lot-assessment basis instead of two. The Court held that the owner could not avoid the assessments for two lots by combining them, as the developer obviously intended the lots to be assessed on a per-lot basis and allowing an owner to bypass this, and pay less than the developer contemplated, frustrates the purpose and intent of the declaration.

The above case provides a precise answer to the Board's posed question. Like the developer in *Walton*, the SWRA developer clearly intended for assessments to be levied on a per-lot basis. In my opinion and based on the case law authority, any SWRA owner who combines two or more lots is still required to pay the SWRA per-lot assessment for the number of original lots that make up the new, re-platted single lot.

Question Three: If yes to question two, what is the impact of SWRA's past failure to charge owners who have combined lots for the number of original lots that were combined?

Both declarations are clear regarding the SWRA per-lot assessment and failure by SWRA to properly charge combined-lot owners amounts to, bluntly, an error by SWRA. The Board has a duty to implement and follow SWRA Declaration requirements. The Board realizing that certain owners have not previously paid their required assessments triggers the Board's duty to attempt and rectify that issue and ensure the dedicatory instruments are followed moving forward. This is where the reasonable business judgment rule that the Board has comes into play, and, so long as the Board's decision on how to fix the issue has a reasonable basis and is in the best interest of SWRA as a whole, then the course of action by the Board should not be able to be attacked. Note, however, the Board must still ensure the Declaration is followed moving forward when addressing the issue. In my opinion, the most equitable resolution is to not seek 'back-owed' assessments from owners of combined lots but, instead, ensure those owners are properly charged moving forward. It is not fair for the Board to suddenly claim years of unpaid assessments from a combined-lot owner who was previously told that only one lot assessment was required. Conversely, it is not fair to the rest of the SWRA members for these combined-lot owners to keep only paying one lot assessment in the future because, in realty, these combined-lot owners have been paying less than their fair share, and their required share per the SWRA Declaration, to the detriment of other owners.

A combined-lot owner may make the argument that they purchased the previously combined lots with no notice of the per-lot (regardless of combination) SWRA assessments and were falsely told that they were only required to pay one lot assessment. This appears as a good argument on its face. However, Texas law provides that, because the declaration, plat, and other dedicatory instruments are publicly filed records, the purchaser is charged with having actual knowledge of those documents, including the total number of original lots and the SWRA Declaration assessment requirements, whether the owner in reality had actual knowledge or not. Further, as stated by the *Walton* Court, the public records (i.e., the SWRA Declaration) have the clear intent that assessments should be charged based on the number of original lots regardless of combination. Because the dedicatory instruments are public records, the purchaser had the knowledge of the SWRA developer's intent.

Question Four: If SWRA permits lot combination moving forward, must a combined-lot owner pay for the number of original lots making up the new, combined lot?

Yes, SWRA must do so. The SWRA Declaration leaves no room for the Board itself to make changes to assessment requirements, and the SWRA Declaration and case law above state that combination of lots does not forgive the obligation for a combined-lot owner to pay the proper amount. Failure by the Board to implement the proper per-lot assessment amount on lots that are combined in the future would amount to a breach of the Board's duty to implement and enforce the SWRA Declaration requirements.

Question 5: What is required to modify the assessment requirements if SWRA desires to do so?

Both declarations do not provide for the Board itself to make any unilateral amendments to assessment requirements. Any alterations to assessment requirements must be done by receiving approval of at least 2/3rds of the members upon a vote.[16]

The foregoing opinions and conclusions are based on the information reviewed as described above, and I reserve the right to revise these opinions if new information is discovered. The opinions herein are to provide the Board with a legal opinion regarding the questions posed and are not to be relied upon by any third party.

Please do not hesitate to contact me with any questions or concerns regarding the contents of this letter.

Sincerely,

_____
Benjamin C. Sauer
Attorney at Law

cc: *none*

encl.: *none*

[16] SWRA Declaration Article VIII § 4; SWROA Declaration Article IX § 4.