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*Sent Via Electronic Mail Only* ([t.monachella@att.net](mailto:t.monachella@att.net))

Board of Park Trustees, Village of Green Trails  
14164 Trailtop Drive  
Chesterfield, MO 63017  
Attn: Mary Monachella, Board President

RE: Our File Name: Village of Green Trails/Sub-Indentures Opinion  
Our File No.: 15647-0317

Dear Ms. Monachella:

At the Board's request, please allow this letter to serve as a summary of the research the Board directed my firm to conduct related to whether an amendment to the Village Indentures would supersede any contravening language found in each Sub-Indenture.

If you would, please disseminate this correspondence to the other Board members of the Park Trustees.

**ISSUE**

The Park Trustees believe it in the best interest of all parties to have the ability to raise assessment as part of the larger project of amending the Village Indenture. The Village Indenture permits the Park Trustees to levy up to a \$50.00 Common Land assessment. Village Sub-Indentures also restrict the Common Land assessment to \$50.00. The Park Trustees are unable to maintain the Common Land with a \$50.00 assessment limit, and desire to amend the Indenture to increase the assessment amount. Can the Park Trustees, among other things, effectuate an assessment increase by amending the Indenture alone notwithstanding the limit imposed by each Sub-Indenture?

**SUMMARY OF ANSWER**

There is legal authority for the Park Trustees to take the position that amendment of the Indenture alone would be sufficient to increase the Common Land assessment (and possibly also require each subdivision Board of Trustees to amend its Sub-Indenture). A reading of Indenture and Sub-Indentures together supports a position that an amendment of the Sub-Indenture is not required

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in order to bind the Village owners to pay an increased assessment upon amendment of the Park Indenture.

### **BACKGROUND**

In 1965 several landowners designed a master plan for the development of their collective properties as the Village of Green Trails (the "Master Plan" and "Village"). The landowners agreed to subject their individual properties to a common set of rules for the purpose of accomplishing the Master Plan. The Indenture of the Restrictions of the Village of Green Trails (the "Indenture") was then recorded with the St. Louis County Recorder of Deeds. The Master Plan envisioned separating the Village out into several subdivisions, but carving out areas from each subdivision for common areas for the use and benefit of all owners of the collective Village. *See Indenture*, Recitals, p. 2. The Indenture then provided that "it is the purpose of this Indenture to provide a plan for acquiring and maintaining the Common Lands for the benefit and behoof of the Owners, their successors, and the subsequent owners being principally the purchasers of lots and areas in" the Village. *See Id.* at p. 3.

The Indenture sets forth various rules and restrictions to be implemented by each subdivision in order to accomplish the Village Master Plan (the "Sub-Indenture(s)"). *See generally Indenture*, § 2. Among the Indenture's requirements was that each "Sub-Indenture" for each subdivision of the Village "shall provide for the establishment and maintenance of a Board of Trustees who shall be charged with the duty of enforcing all of the provisions of the said Indenture and the recorded plat (if any)." *Id.* at §2.2. Also, "[e]ach Sub-Indenture shall contain appropriate provisions for the Park Trustees to assess each lot in a subdivision not more than \$50.00 per improved residential lot..." Further, the Indenture required that "[a]ll Sub-Indentures shall contain such other provisions as may be required elsewhere by other terms of this instrument and in addition thereto may contain such other provisions as the Owner of the Parcel in the Owner's discretion may reasonably require." *Id.* at §2.6.

The Indenture provided a mechanism for the creation of the Park Trustees and charged the Park Trustees with responsibility for fulfilling and accomplishing the terms of the Indenture, including building upon and maintaining the Common Lands and setting rules and regulations governing the Common Lands. *Id.* at §§3.12, 3.14, 3.15. The Indenture permitted modification of its terms "from time to time by a two-thirds vote of the Owners of the lots, parcels, and tracts of the Village of Green Trails." *Id.* at §4.1. After recording of the Indenture, several subdivisions were established and Sub-Indentures were recorded to govern such subdivisions, along with the Indenture. Consistent with the stated requirements of the Indenture, the Sub-Indentures generally included language authorizing the assessment amounts required by the Indenture, up to the amount of \$50.00.

## ANALYSIS

### I. THE VILLAGE IS GOVERNED BY INDEPENDENT SETS OF REAL ESTATE COVENANTS.

In order to determine what effect amendment of the Indenture would have on the Sub-Indentures and individual lots of the subdivisions, it is first necessary to evaluate the nature and interplay of the Indenture and Sub-Indenture covenants. Our Eastern District Court of Appeals has previously evaluated the Village governing documents and found them to constitute distinct sets of covenants, each governing and restricting aspects of the Village real estate. In *Dubail v. Green Trails Plaza, Inc.*, 587 S.W.2d 934 (Mo. App. E.D. 1979), the Court, evaluating commercial development restrictions of a single lot in the Village (Lot 7 of Plat 2 of the Ladue Trails Subdivision), noted that:

All of the lots in the Village of Green Trails, including Lot 7 are governed by an Indenture of Restrictions which provides in part ...

A Sub-Indenture of Deed Restrictions, that of Ladue Trails Subdivision, also applies to all of the lots in said subdivision, including Lot 7. ...

*Dubail*, 587 S.W.2d 937 (emphasis added).

Later in its opinion, the Court confirmed its impression that each lot of the Village was subject to *two sets* of real estate covenants, the Indenture and Sub-Indenture, by stating:

It is clear from the evidence that Plat 2 of the Ladue Trails Subdivision is governed by the Indenture of Restrictions of the Village of Green Trails, and this Indenture does not contain any language expressly prohibiting commercial development of the lots in the Village. Other subdivisions in the Village governed by the Indenture, notably Trails West Subdivision, contain lots which have been developed commercially. ...

The Indenture provides that the Village be developed in accord with a Master Plan and that the owners of the property in the Village agree to conform their ownership to the terms of the Indenture in order to fulfill the purposes of the Master Plan. ...

Plat 2 of Ladue Trails Subdivision is also governed by the Sub-Indenture of Plat 1 of the Ladue Trails Subdivision. ...

*Id.* at 942 (emphasis added).

As independent covenants, the inquiry next moves to whether either set was and/or is capable of modifying, restricting, or conflicting with the other.

**II. THE ORIGINAL INTENT OF THE INDENTURE AND SUB-INDENTURES IS TO SUBORDINATE THE SUB-INDENTURES TO THE INDENTURE.**

Whether one set of real estate covenants trumps another is determined by reviewing the plain language of the covenant and attempting to ascertain each document's intent. *See Arbors at Sugar Creek Homeowners Association v. Jefferson Bank & Trust Co., Inc.*, 464 S.W.3d 177, 183 (Mo. banc 2015). Here, the plain and ordinary language of the Indenture and Sub-Indentures subordinated the Sub-Indenture to the Indenture. This intent is evidenced by language in both documents.

Within the section setting forth the minimal requirements for each Sub-Indenture, the Indenture requires that each Sub-Indenture "shall provide for the establishment and maintenance of a Board of Trustees who shall be charged with the duty of enforcing all of the provisions of the said Indenture and the recorded plat (if any)." *See Indenture*, Sec. §2.2. Additionally, the Indenture requires that "[a]ll Sub-Indentures shall contain such other provisions as may be required elsewhere by other terms of this instrument and in addition thereto may contain such other provisions as the Owner of the Parcel in the Owner's discretion may reasonably require." *Id.* at Sec. §2.6.

Each of the Sub-Indentures then declares that the property subject to each Sub-Indenture is also subject to and impressed with the Indenture and that the powers granted to the Park Trustees in said Indenture shall extend to and be applicable to the property within each subdivision. *See Ladue Trails Sub-Indenture*, §1; *South Trails Sub-Indenture*, §1; *Trails West Sub-Indenture*, §1; *Country Club Sub-Indenture*, §12.01. Construed together, the Indenture and Sub-Indentures require each Sub-Indenture mirror the covenants established by the Indenture and, indeed, make such covenants a part of each Sub-Indenture. The analysis above is also consistent with the *Dubail* Court's opinion which found that "the Indenture provides that the Village be developed in accord with a Master Plan and that the owners of the property in the Village agree to conform their ownership to the terms of the Indenture in order to fulfill the purposes of the Master Plan." *Dubail*, 587 S.W.2d at 942.

**III. A HARMONIZATION OF THE INDENTURE AND SUB-INDENTURES SUGGESTS THE SUB-INDENTURES WOULD BE REQUIRED TO REMAIN CONSISTENT WITH THE INDENTURE PROVISIONS.**

While the intent to originally subordinate the Sub-Indenture covenants to the Indenture covenants appears clear, the next issue relates to whether the Sub-Indentures were intended to remain consistent with the Indenture – although that conclusion can be reached by harmonizing the provisions of both documents. *Storey v. RGIS Inventory Specialists, LLC*, 466 S.W.3d 650, 655 (Mo. App. E.D. 2015) (in interpreting contracts, Courts read the document as a whole, attempting to harmonize all provisions).

The main counter-argument against a continuing obligation to remain consistent stems from the way each Sub-Indenture references the Indenture. Each reference, directly or indirectly, references the book and page of the Indenture and does not include language such as "and all

amendments thereto” – raising the possibility one could argue the Sub-Indentures were originally required to conform to only the original Indenture, but not changes thereto. This position inevitably leads to several arbitrary and nonsensical results (described below) and therefore may be disfavored by the Courts in the event litigation unfolds.

Conversely, and in favor of a continued conformance requirement, the Indenture recitals state that the original agreement of the Owners establishing the Village was “to subject their individual properties which comprise The Village to the terms of this Indenture in order to fulfill and accomplish the purposes of the aforesaid Order and Master Plan, as the same is now in force and effect or may hereafter be amended”. The Indenture thereafter permits the provisions thereof to be modified (except as to the title to the Common Lands) from time to time by two-thirds votes of the Owners of the lots, parcels, and tracts of the Village (which at that time had not been established). The Indenture then provides a mechanism by which the Village can terminate the Indenture, but provides until that time, the Park Trustees are vested with authority over the Common Lands, including collecting for and making payment of tax obligations for the Common Lands. *See Indenture*, §4.2.

Thus, it could be argued that by subjecting the Sub-Indenture to the Indenture which itself could be amended by its explicit terms, the Sub-Indentures implicitly subjected themselves to all amendments of the Indenture. This argument would also give effect to the overall apparent purpose of each Sub-Indenture – to oversee development of a subdivision within the Village within the overall plan and restrictions of the Master Plan (to which the Indenture seeks to enforce). Notably, neither the Indenture, nor Sub-Indenture ever expressly permit the Sub-Indenture to conflict with the Indenture (rather the Indenture just permits the Sub-Indenture to enact restrictions *in addition to* those stated in the Indenture). Also notable, the Indenture requirement charges each subdivision Board of Trustees with the duty of enforcing the Indenture provisions, but does not limit or qualify such duty based upon time or other factor. Harmonizing all of these provisions (and silences) together, it would appear that the Sub-Indentures were intended to remain consistent with the Indenture, including amendment thereto, at least until such time as the Indenture was terminated.

**IV. BECAUSE THE SUB-INDENTURES MUST REMAIN CONSISTENT WITH THE INDENTURE, THE SUB-INDENTURES LACK AUTHORITY TO RESTRICT THE INDENTURE AND THE BOARDS OF TRUSTEES WOULD BE REQUIRED TO BRING EACH SUB-INDENTURE INTO COMPLIANCE WITH THE INDENTURE UPON AMENDMENT OF INDENTURE.**

The requirement to comply with covenants of an indenture only flows in one direction. Here, that means from the Indenture to the Sub-Indentures, and not vice versa. Where one set of real estate restrictions is subordinated to another and required to maintain consistency therewith, no enactment or amendment of the subordinated restrictions (the Sub-Indentures) would appear to have any effect on the governing set of restrictions (the Indenture). *See e.g. Kehrs Mill Trails Associates v. Kingspointe Homeowner's Ass'n*, 251 S.W.3d 391 (Mo. App. E.D. 2008). This concept was well-illustrated in the *Kehrs Mill* case.

In *Kehrs Mill*, a developer established the Kehrs Mill Trails subdivision with the Kehrs Mill Trails trust indenture (“KMT Indenture”) which established a lake maintenance fund requiring an annual assessment of \$50.00 per lot. One of the parties to the KMT Indenture was the owner of a contiguous parcel of land known as the Gabrielle Tract, which itself was part of the Kingspointe subdivision and subject to the separate Kingspointe Indenture. The KMT Indenture provided that the lot owners of the Gabrielle Tract had the right to use the lake (in common with the lot owners of the Kehrs Mill Trails subdivision) only if they subjected their lots to the KMT Indenture for lake maintenance assessments.

The Kingspointe Indenture initially subjected the Gabrielle Tract lots to the KMT Indenture maintenance assessments, explicitly authorized the trustees to set aside \$50.00 per lot from its assessments for the lake maintenance fund, and further stated that the Kingspointe Indenture “must at all times remain consistent with the provisions of The Kehrs Mill Trails Trust Indenture ... with regard to the lake in Article VII ..., however all other provisions of the” Kingspointe Indenture could be amended by two-thirds vote of the owners.

The Kingspointe Indenture was later amended to eliminate the requirement to contribute to the lake fund. The Kehrs Mill Trails subdivision sued the Kingspointe subdivision for specific performance to contribute to the lake fund. Kingspointe argued it was authorized to amend its indenture to cease contributing to the lake fund if it simultaneously stopped using the lake. The Court rejected this argument. Interpreting the Kingspointe Indenture according to its plain, usual, and ordinary meaning, the Court reasoned that since the Kingspointe Indenture subjected its lots to the KMT Indenture and mandated that the Kingspointe Indenture remain consistent with the KMT Indenture with respect to lake maintenance fund assessments and only authorized amendment as to other provisions of the Kingspointe Indenture (not the lake), Kingspointe lacked authority to eliminate its indenture requirement to contribute to the lake fund as it would render the Kingspointe Indenture inconsistent with the KMT Indenture.

In the Village’s case, the \$50.00 assessment limit enacted by each Sub-Indenture was permitted and in fact required by the Indenture in the same manner that Kingspointe enacted the \$50.00 assessment for the lake maintenance fund, as required by the KMT Indenture. The enactment simply brought the subordinated document into compliance with the governing set of covenants. It did not act as a permanent restriction thereon because of the subordinated document’s requirement to remain consistent with covenants set forth in the governing set. In *Kehrs Mill*, the Court rejected Kingspointe’s attempt to modify the requirements of the Kingspointe Indenture because the KMT Indenture language set forth different requirements. It therefore follows that, if the Sub-Indentures are required to remain consistent with the Indenture, any change of the Indenture terms could obligate the Boards of Trustees of the Village subdivisions to change each Sub-Indenture to bring it into compliance with the Indenture (in the similar way that each subdivision was required to conform its original Sub-Indenture to the mandates set forth in the Indenture).

V. **THE SUBORDINATION AND CONFORMITY ANALYSIS ABOVE AVOIDS ARBITRARY AND NONSENSICAL RESULTS WHICH OUR COURTS STRIVE TO AVOID.**

In construing contracts in a manner which harmonizes all terms thereof, our Courts also strive to avoid constructions which have the effect of rendering other terms meaningless or lead to arbitrary results. *Storey*, 466 S.W.3d at 655. Construction of the Sub-Indentures as a restriction upon the Indenture would lead to several arbitrary and nonsensical results.

First, the clear, indisputable intent of the Indenture is to develop the subjected properties, including each of the subdivisions, in accordance with the Master Plan and “to provide a plan for ... maintaining the Common Lands for the benefit and behoof of the Owners, their successors, and the subsequent owners...” To construe the Sub-Indentures as only required to conform with the original set of Indentures, irrespective of amendments thereof, would artificially limit the stated purpose of the Indenture to maintain the Common Lands. There does not appear to be any language in any of the documents to suggest this was the intent. It would also severely diminish, if not render meaningless, the amendment authority of the Indenture because the amendment would not need to be followed by the subdivision lot owners (the same people who would vote for amendment under the Indenture). Additionally if enactment or amendment of the Sub-Indenture was capable of restricting the Indenture, it is unclear why the Indenture termination provision (upon vote of the Village) would be necessary as each of the subdivisions could choose on their own to simply disregard the Indenture provisions.

Second, the Indenture required that the deeds conveying the lots to the Village vest ownership of the Common Lands in each of the owners of the Village – each of which belong to a single subdivision. To construe a Sub-Indenture as limiting the authority of the Indenture would mean owners of a single subdivision, who could hold less than half of the total ownership of the Common Lands, could be able, without vote or notice or say of the owner tenants in common, to impair the rights and obligations of the entirety of the remaining Village owners as a whole – a result which does not seem to have been intended.

Third, to construe the Sub-Indentures as being able to limit the authority of the Park Trustees to set Common Land assessments under the Indenture would seem to cause conflict between the provisions of the Indenture empowering and requiring the Park Trustees (not the Board of Trustees for each subdivision) to hold, maintain and keep in good order and repair the Common Lands and provisions in the Sub-Indentures providing deference to the Park Trustees’ authority to maintain the Common Lands. *See e.g. Country Club Sub-Indenture*, §12.01 et seq.; *Ladue Trails Sub-Indenture*, §IV(2).

These possible conclusions and issues are meant to be exemplary, not exhaustive. There are certainly other arbitrary results which would be reached by construction of the Sub-Indenture as constituting a limitation on the Indenture.

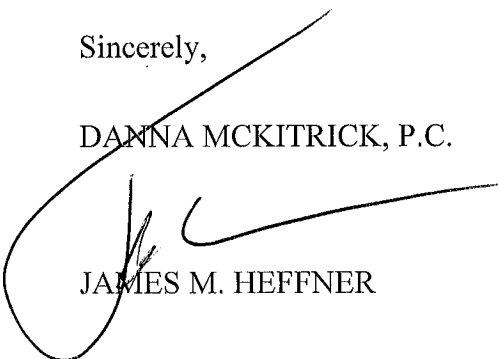
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**CONCLUSION**

Based on the foregoing, there is sufficient authority, based both on the language of the Indenture and Sub-Indentures, as well as comparable Missouri case law, to conclude that the Village Sub-Indentures are subordinate to the covenants of the Indenture, and the limitations imposed (presently or prospectively) by the subdivisions do not impair the Park Trustees' (via owner vote) ability to amend the Indenture in order to increase annual assessments to owners. The above approach based on the plain language of the relevant indenture documents and the necessary interpretation of these documents in light of each other is similar to the analysis that a Court would employ in order to evaluate any challenge raised by an owner or a subdivision to such an amendment or restatement of the Indenture. In sum, the most reasonable construction of the language favors the Park Trustees' ability to bind the owners and subdivisions.

Sincerely,

DANNA MCKITRICK, P.C.



JAMES M. HEFFNER

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