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Esmann Island Homeowners Association, Board of Directors

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Re: Request for Legal Opinion regarding Building Restrictions

Dear Board of Directors:

You've asked for my opinion regarding the following questions:

1. Whether a carport is a "building," and thus, should setback rules apply?

The Bylaws forwarded to me didn't contain a specific definition of "building." The State Building Code, Iowa Code Chapter 103A(2) states, "Building" means a combination of any materials, whether portable or fixed, to form a structure affording facilities or shelter for persons, animals, or property. The word "building" includes any part of a building unless the context clearly requires a different meaning.

A carport is clearly a building, under the definition of the Iowa Building Code, as it is made of materials designed for sheltering property. Therefore, it is my legal opinion that a carport would be considered a building and is therefore subject to Article VI, Section 7 and Section 10, setback and building permit requirements.

Additionally, I see a problem with someone building a new structure that crosses the property line because this could potentially create a violation of Article VI, Section 6, which does not allow subdivision of lots. If someone builds a structure that crosses into his or her neighbor's lot and the neighbor acquiesces to that structure being built, maintained, and established on their property, the party building that structure which encroaches may have a future claim for ownership interest in that area of ground for which the encroachment is occurring. This

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would, in effect, create a subdivision of the encroached lot. This another good reason not to approve new encroachments even if both current owners agree.

2. Is a temporary structure "portable or otherwise" subject to the setback restrictions?

Utilizing the definition of a "building" as described above under Iowa Code Section 103A.3(2), a structure is a building if it is used for sheltering persons, animals, or property, whether it is portable or fixed. Therefore, if a small shed is being used to store property or animals, it would be considered a building and subject to the setback rules. A structure that is not a building, such as a sidewalk, light post, fence is not subject to the property line setback rules of Article VI, Section 7, but still would be subject to the 20ft high water mark rule regarding the Mississippi, in section 7.

3. Does the Board of Directors Building Permit Committee have authority to approve a variance?

Under Section 10, I don't believe there is any authority for the Board of Directors Building Permit Committee to grant a variance to the setback or other building restrictions, including Sections 3-9. My reading of Section 10 requires the Board of Directors Building Permit Committee to review any proposed construction and exterior improvement to ensure that they meet with the use restrictions of the Bylaws as well as being in harmony with the external design and location of surrounding structures and topography. The only exception that I can find the allows any variance from the Use Restrictions under Article VI is for nonconforming uses which have already been established as of September 1, 1992, and therefore, Section 11 would not apply to any new nonconforming uses.

Furthermore, it's my opinion that establishing a procedure for either the Board of Directors or the Building Permit Committee to allow a "variance" would require an amendment to your Bylaws.

4. Can the Association bill a member for legal fees associated with enforcing the covenants conditions and restrictions contained in the Bylaws?

Yes. You may send a bill for the reasonable legal fees seeking reimbursement from any member who has "violated, or threatens to violate, the covenants, conditions, and restrictions" of your Bylaws. However, the Board of Directors would have to be sure that the legal fees were solely for dealing with a member who had actually violated or actually threatened to violate the covenants, conditions, or restrictions of the Bylaws. If a member is just asking for permission to do something, such as seeking a variance, this would not be something you could seek reimbursement for legal expenses, as there has been no violation or a threat to violate. If you do send the member a bill, and the member doesn't pay,

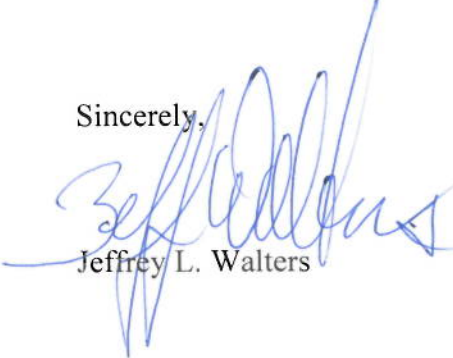
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you would then have to file a legal action to enforce collection of that expense. If successful, the cost of the legal action to enforce payment of the bill would also be taxable as an expense to the member. If the court ruled that the member had not violated or threatened to violate the rules and covenants, they would not have to pay any legal expense of the Homeowners Association.

If I can be of further assistance, please don't hesitate to contact me.

Sincerely,



Jeffrey L. Walters

JLW:ara