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October 2, 2024

VIA EMAIL

Board of Directors
College Square Condominiums
c/o Atlantic Community Management
5520 Greenwich Road, Suite 201
Virginia Beach, VA 23462

Re: Tree Branch Hanging Over Common Element.

Dear Board of Directors:

You had stated that there is a tree in an owner's back yard and the branches from said tree are hanging over the Common Element. You have also stated that the Association's insurance carrier has expressed concern over those branches hanging over the Common Element and you wanted to know who would be responsible for removal of the branches. After a review of your legal documents and the applicable case law, we offer the following comments and opinion:

First, we must determine how backyards are classified. Since the back yards are not part of the boundaries of the Unit, they are part of the Common Element. Further, because they are limited to the use of one or more, but less than all of the units, they are Limited Common Element.

Next, we must examine the Association's governing documents to discuss responsibility for maintaining trees. According to Article XII, Section B of the Declaration, "each Unit Owner shall cut, or cause to be cut and otherwise maintain at his own expense, the yard within the fenced limited common area assigned to his unit." Furthermore, pursuant to the the Chart of Maintenance responsibilities, rear yards of Units are to be maintained by the Owners, which includes lawn maintenance and cleaning. So, we would take this to mean that the Owners must maintain the trees in the rear yard and would be responsible for any damage caused by lack of maintenance.

We also note that in the next section of Article XII, Section C of the Declaration, it does state that Owners shall reimburse Association for expenditures incurred in repairing or replacing any Common Element damaged through his negligence or his failure to promptly perform all maintenance and repair work within his unit. So, if the tree branch that hung over the Common Element actually caused damage to the Common Element, the owner would be responsible for said damage.

This rationale is bolstered by the ruling in *Fancher v. Fagella*. In this case, the Virginia Supreme Court stated:

We hold that encroaching trees and plants are not nuisances merely because they cast shade, drop leaves, flowers, or fruit, or just because they happen to encroach upon adjoining property either above or below the ground. However, encroaching trees and plants may be regarded as a nuisance when they cause actual harm or pose an imminent danger of actual harm to adjoining property. If so, the owner of the tree or plant may be held responsible for harm caused to [adjoining property] and may also be required to cut back the encroaching branches or roots, assuming the encroaching branches or roots constitutes a nuisance.

In the present case, the tree branches themselves are not in the back yard, but they hang over the Common Element. Since the Association has control over the Common Area, they could trim the tree branches back to the line of the back yard. This is known as “self-help.” In *Fancher v. Fagella*, the Court also stated, “we do not, however, alter existing ... law that the adjoining landowner may, at his own expense, cut away the encroaching vegetation to the property line whether or not the encroaching vegetation constitutes a nuisance or is otherwise causing harm or possible harm to the adjoining property. Thus, the law of self-help remains intact.”

Based on the foregoing, it is our legal opinion that the Owner(s) of the property where the tree is planted is responsible for maintaining the tree and would ultimately be responsible for any damage that the tree causes. As such, we recommend that the Association sends the Owner(s) a letter informing them that they are in violation of the Association’s legal documents and that they cure the violation within the appropriate time frame. If the violation is not cured, we recommend holding a Due Process hearing for the at-fault Owner(s). In the meantime, we recommend that the Association uses self-help and trims any branches that are hanging over the Common Area. If the Owner(s) continue(s) to fail to maintain his property, the Association can file an injunction in the General District Court.

We trust that this letter has answered your questions. Should you have any other questions or concerns, please do not hesitate to contact our office at (757) 491-4141.

Very Truly Yours,

Paul E. Thomas

Paul E. Thomas, Esquire