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VIA FACSIMILE (808) 528-2804
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Board of Directors
Village Park Community Association
c/o Cynthia Guillermo
Cadmus Properties Corporation
332 North School Street
Honolulu, HI 96817

RE: Village Park Community Association's Authority With Respect to Height of Trees

Letter of Legal Opinion

Dear Members of the Board of Directors:

You requested, through Cindy Guillermo, a legal opinion regarding the following issues:

(1) what enforcement authority does the Association have with respect to the height of trees; and

(2) whether the Association can enforce a specific limit upon the height of the trees within the Village Park Community.

We understand that those issues arise primarily in the context of trees interfering with view, light or air of neighboring lots, but there were also complaints regarding safety of the neighboring lots due to the risk of personal injury or property damage resulting from a fall of an overgrown tree or its limbs or branches, and regarding the litter caused by fallen fruit, leaves, and twigs from the trees.

In preparing this opinion letter we reviewed the following materials:

(1) the Declaration of Protective Covenants for Village Park Community;

(2) Village Park Community Association Rules;

(3) Village Park Community Association Design Committee Rules;

(4) the applicable statutes, rules, and ordinances; and

(5) applicable case law.

Based upon the materials reviewed, it appears that, in general, the Association has the power, insofar as permitted by law, and in accordance with the Declaration, to do any and all things "that will promote the common benefit, health, welfare, safety and enjoyment of its membership." Articles of Incorporation, Fourth – Specific Purposes and Powers of the Association, paragraph (d)(1). The Declaration provides that the Association has the power to do any and all lawful things authorized, required or permitted to be done under the Declaration, "which may be necessary or proper for the peace, health, comfort, safety, and/or general welfare of its members." Declaration, Section 5.05 – Powers and Authority of the Association. The Association Rules have the same force and effect as if they were set forth and were a part of the Declaration. Declaration, Section 5.06 – Village Park Community Association and Rules.

The Association Rules contain the following provision relevant to the height of the trees: "Owners are responsible to maintain and trim all hedges or other plantings in a neat manner and will not allow such hedge or other plantings, because of its height and or design, to unreasonably interfere with the light, air or view of neighboring lots." Association Rules, at 5. In our opinion, the term "plantings" includes trees, at least insofar as such trees were part of the landscaping installed in the process of development of the property. Thus, the Association's governing documents contain an express provision requiring the owners to trim the trees on their property if their height unreasonably interferes with the light, air or view of their neighbors.

To the extent that the Association determines that a tree, because of its height, unreasonably interferes with the light, air or view of a neighbor, it has the authority, in the exercise of its right and obligation to enforce the Declaration and the Rules, to require the owner to cut or trim the tree. Of course, the determination as to whether a particular tree "unreasonably interferes with the light, air or view" will be subjective and will have to be made on case-by-case basis by the Board.

Such determinations will be subject to challenge by the owner and could lead to litigation. Therefore, the decision to pursue an enforcement action upon a neighbor's complaint regarding the height of the trees interfering with their view should be made conservatively and with caution. The covenants manager or another person designated by the Board, should investigate the complaint, and make a recommendation based upon a report documenting the findings with photographs and other evidence. The Board may consider establishing specific guidelines for conducting such investigations, in order to ensure uniform and equitable treatment of all members.

However, there appears to be no authority for the Association to set a specific limit upon the height of the trees within the Village Park Community. The Association would have to amend the Declaration to impose such a restriction.

The concerns regarding safety of the neighboring lots and the litter from the trees do not directly implicate the height of the trees. A tree can be a safety hazard and the litter from the tree can be a nuisance regardless of the tree's height. The Association may address the safety concerns pursuant to its general powers to do all things necessary for the safety of its members, and the Declaration expressly provides that "no accumulated waste plant materials shall be kept on any lot," Declaration, Section 3.02(m), see also Rules, at 6.

However, those matters are governed by the Hawaii law in general, and should be resolved between the owners without the involvement of the Association. For the Board's information and guidance, we quote the following language from the Hawaii case law pertaining to landowners' responsibilities with respect to the trees on their land:

> "Because the owner of the tree's trunk is the owner of the tree, we think he bears some responsibility for the rest of the tree. It has long been the rule in Hawaii that if the owner knows or should know that his tree constitutes a danger, he is liable if it causes personal injury or property damage on or off of his property. . . . Such being the case, we think he is duty bound to take action to remove the danger before damage or further damage occurs. . . . We hold that non-noxious plants ordinarily are not nuisances; that overhanging branches which merely cast shade or drop leaves, flowers, or fruit are not nuisances; that roots which interfere only with other plant life are not nuisances; that overhanging branches or protruding roots constitute a nuisance only when they actually cause, or there is imminent danger of them causing, sensible harm to property other than plant life, in ways other than by casting shade or dropping leaves, flowers, or fruit; that when overhanging branches or protruding roots actually cause, or there is imminent danger of them causing, sensible harm to property other than plant life, in ways other than by casting shade or dropping leaves, flowers, or fruit, the damaged or imminently endangered neighbor may require the owner of the tree to pay for the damages and to cut back the endangering branches or roots and, if such is not done within a reasonable time, the damaged or imminently endangered neighbor may cause the cutback to be done at the tree owner's expense. . . . [W]e also hold that a landowner may always, at his own expense, cut away only to his property line above or below the surface of the ground any part of the adjoining owner's trees or other plant life."

Whitesell v. Houlton, 2 Haw. App. 365, 367-68, 632 P.2d 1077, 1079 (1981). We note that a determination as to whether a plant is "noxious" may require an expert testimony.

Thank you for giving us an opportunity to provide you the foregoing legal opinion. Please contact us if you need additional information or if you have any further questions.

Very truly yours,

William J. Deeley
John Winnicki

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