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August 1<sup>st</sup>, 2017

**VIA EMAIL**

Mr. Christopher J. Soelling  
Christopher J. Soelling, PLLC  
3000 Wells Fargo Center  
999 Third Avenue  
Seattle, Washington 98104-4088

Re: Forster Woods HOA/City of North Bend

**Public Letter to Mediator**

Dear Mr. Soelling:

This Public Letter is provided by the Forster Woods Homeowners Association (“HOA”) pursuant to your mediation letter submission requirements.

**Statement of Facts:**

Forster Woods is a residential community located with the city limits of the City of North Bend (the “City”). It consists of single family homes. The Declaration of Covenants (“CCRs”) was recorded August 20<sup>th</sup>, 1992, creating the HOA which manages the community. The development was created within platted Divisions 1 through 4 and 4a, between 1992 and 1995.

There are strips of land lining many of the streets, in which a sidewalk and trees were installed by developer (“planter strips”). Physically, the infrastructure involved is the street, then the trees and sidewalks in the planter strips, and then the owner’s yards/lots. The trees were of a type approved by the City before installation.

On September 21<sup>st</sup>, 1998, a Bill of Sale instrument (the “Contract”) was signed by the developer and the City. The Contract was recorded On May 1<sup>st</sup>, 1999. It states that “sidewalks” and “street trees” are conveyed and sold to the City. The Contract also states that “the City agrees to maintain the ... sidewalks, street trees, ... and other miscellaneous improvements that lie in the Public Right of Way, in the same manner as though they had been constructed by the City.” The Contract was signed by the Mayor of the City and approved by Mike Kenyon, then and current City Attorney. The sidewalks are open for use by the public, not just owners in the community. Streets in the community are public/owned by the City.

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As time passed, the street trees grew and their roots encroached under the sidewalks, buckling the panels in a large number of areas. The tree roots also grew under sections of the streets, causing rippling of the asphalt. The HOA is very concerned that the tree roots under the street are impacting or will in the future impact and damage underground utilities which are under the streets. The risk is real. There is an association in California where a gas line blew up due to tree roots damaging the line, causing great damage to surrounding homes and risk of harm to residents.

The sidewalks have become dangerous for people to navigate, with some of the concrete panels being pushed up 6 to 10 inches or more, so there are edges or gaps between panels. People have tripped and been injured due their condition. Some people avoid the risk from sidewalk use by walking in the street, which is dangerous due to vehicles.

For decades and until about two (2) years ago, the City patched sidewalks, trimmed and even cut down and removed trees in the planter strips, without prior notice to or asking consent from abutting owners or the HOA. No one complained, of course, because the City was doing what everyone knew and thought they were supposed to do, i.e., maintain the trees and sidewalks in the planter strips. Owners and the HOA believe the City was responsible for maintaining the planter strips, and the City's conduct confirmed that belief.

About two (2) years ago, to the great surprise of the HOA and owners, the City notified them that it was not responsible for the planter strips and would no longer maintain them. The City said owners or the HOA would have to care for them. The HOA then hired counsel to investigate the issues and determine who was legally responsible for the planter strips. Investigation into the history of the community and the City regarding the planter strips, and the contents of recorded documents, support the HOA's position that the City is entirely responsible for maintaining the trees and sidewalks in the planter strips.

Many months have been spent discussing the issues with the City, and offers and counteroffers have been made by the parties. Unfortunately, the issues have not settled. The HOA prepared and sent a final settlement offer letter and a lawsuit Complaint to the City Attorney. Our letter indicated that if the HOA's offer was not acceptable, the parties should engage in mediation. Fortunately, the City agreed, otherwise a lawsuit would have been filed by now for enforcement of the Contract, among other things.

[The HOA has investigated possible experts to use regarding information on "right" and "wrong" trees to plant in situations like the planter strips involved in this case. The investigation led to Mr. Alan Haywood ([www.haywoodarborist.com/about.html](http://www.haywoodarborist.com/about.html)). He is an arborist and formerly held a position to the effect of Director of Issaquah Parks. An example of his handling tree issues: The Klahanie neighborhood in Issaquah also had planted the wrong type of trees for abutting sidewalks and streets and had to remove all of them about 25 years later. He is knowledgeable regarding methods for directing roots at planting to prevent root damage. The HOA freely offers this information in the hopes it will assist the City moving forward in addressing the tree and sidewalk issues in Forster Woods, in the event the parties are able to settle. If the parties are unable to settle, the HOA reserves Mr. Haywood as its expert if litigation occurs.]

There is a collateral issue the parties will need to address, if not at this mediation then in the very near future. There are two large storm water detention ponds (ponds) in the community. Since the beginning of the community, the City has consistently maintained the ponds. The HOA and owners assumed the ponds belonged to and were the responsibility of the City. However, the City informed the HOA and owners that the ponds belonged to the HOA and it would not maintain them. Not only that, it was discovered that because no "deep" maintenance in the ponds had been done, they need to be restored or reconditioned so they work to optimum capacity (it was also discovered that the capacity and nature of the ponds are not what they should be, although they were approved by the City when platting occurred). Mr Mark Rigos, Director of Public Works for the City, informed the HOA that these ponds are the only ones within the City limits that are not owned and maintained by the City. He also told members and the Board of the HOA that it would be best if the City did take over and maintain the ponds, since their failure will significantly impact retail and other properties outside of the community due to location and topography. The HOA has asked the City to provide information on what it needs to do to recondition or restore the ponds to a level where the City would be willing to take over the ponds and maintain them. The City has not responded with such information. Please see HOA Mediation Exhibit 7 (page 45 of the Exhibits). That Exhibit is a letter from me to the City. Page 2 of that letter discusses the ponds issues and again requests the City to provide information on what it wants the HOA to do in order for the City to accept future maintenance responsibilities.

**Significant Legal Issues:**

The City has not raised factual issues with the HOA that we are aware of. The recorded documents and history of events are fairly clear.

The legal issues are:

1. is the Contract clear and enforceable regarding the language stating the City owns the trees and sidewalks in the planter strips and is required to maintain them?
2. the City adopted an ordinance in 2009 that states in pertinent part that homeowners are responsible for maintaining landscape strips and sidewalks on City-owners streets; does such an ordinance negate or supersede a prior contract signed by the City in 1998 in which the City accepted ownership of and responsibility for the trees and sidewalks in Forster Woods?
3. if the City acknowledges ownership and responsibility for the street trees and sidewalks in the planter strips, to what extent is the City required to repair the sidewalks and to remove and replace the street trees (all of them, since it is clear that even those not yet damaging abutting sidewalks will eventually do so)?
4. other issues may exist as indicated in the letter exchanged with the City, attached as exhibits to this letter.

**Itemization of Damages Claimed:**

This is a difficult topic to address. The costs for repair of sidewalks depend on the nature of the repairs. The City has stated it will use asphalt patching (creating an asphalt ramp from a lower panel to the one that shifted upwards). However, the HOA maintains that some sidewalks, due to the extreme separation and shifting of panels, will require removal and replacement after the abutting street trees and their encroaching roots are completely removed. Patching sidewalk panels/edges with asphalt, to create a sort of ramp effect, is useless for two (2) reasons. First, many of the problem sidewalk areas are so bad that creating an asphalt ramp to connect the disjointed panels in itself creates a hazard for sidewalk users. Second, if the tree roots remain in place and continue to grow, the patch will break apart, at the least, or the panels will continue to shift from each other. So, the HOA believes the only viable solution that removes causation of the sidewalk issues is to remove the trees and their roots, including roots growing under the sidewalks and causing them to buckle and push up.

Please see Exhibit 8 (page 59 of HOA Mediation Exhibits), consisting of several estimates/quotes regarding costs for tree removal and sidewalk repairs/restoration. These are interim reports from vendors who do work on trees and sidewalks. They show numbers regarding trees involved, sidewalk areas involved. Exhibit 4, in fact, is a report from Mr. Mark Rigos, City Engineer, regarding the number of problem trees and sidewalks areas which presently exist. His letter report does not include all of the trees and sidewalks needing removal or repairs. The costs to remove trees range from \$53,900 to \$110,000, depending on number and nature of removal. The cost to repair and replace sidewalks in the planter strips ranges from \$122,500 to \$166,000, depending on number and nature of repairs/restoration needed. The costs could be more at this point. As time has passed since these reports, more damage to sidewalks may have arisen due to tree roots.

5. **Documents:**

Accompanying this letter are the following Exhibits (they are page numbered at bottom center for easy reference):

- #1 Sept. 21<sup>st</sup>, 1998 Bill of Sale, recorded March 1<sup>st</sup>, 1999 (the Contract) (page number 1);
- #2 May 18<sup>th</sup>, 2016 letter of HOA attorney Greg Cromwell to City Council Members (page number 10) ;
- #3 June 15<sup>th</sup>, 2016 City Attorney Mike Kenyon's letter response taking the position that the City ordinance makes the planter strips the responsibility of the HOA and/or owners (page number 16) ;
- #4 August 15<sup>th</sup>, 2016 City of Public Works Director Mark Rigo's letter and information – his estimate on number/extent of sidewalk separations and trees requiring immediate attention – contains offer to HOA that City will pay \$28,000 to help the HOA cope with issues, but did not accept ownership or present or future responsibility for the planter strips, so was rejected (page number 18);
- #5 October 17<sup>th</sup>, 2016 HOA attorney response to City's August 15, 2016 offer of \$28,000 (page number 29) ;

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- #6 March 13<sup>th</sup>, 2017 letter from city to HOA property manager Dennis Howard, containing 2<sup>nd</sup> offer from City (page number 42) ;
- #7 April 20<sup>th</sup>, 2017 letter of HOA attorney to City Attorney rejecting their March 13<sup>th</sup> offer and making counteroffer – accompanied by unfiled Complaint (page number 45) ;
- #8 various quotes/proposals on costs to remove trees presently causing problems, and restore, repair, replace concrete sidewalk panels (page number 59) ;
- #9 News Article on City project removing downtown North Bend trees along Main Street due to, among other things, concern their roots are impacting underground utilities – provided as evidence the City recognizes the issue, which also exists for Forster Woods where street trees' roots are growing under the street areas where utilities exist (page number 70) .

All of the contents of these exhibits are important for understanding this case, but I have highlighted the most important sections, which will hopefully reduce your review time.

**Presentation at Meeting:**

We will not make a presentation at the meeting. The mediation letters and exhibits give ample information on what is involved in this matter. Giving a presentation would be a waste of valuable time better spent mediating.

**Name and Title of Decision Makers:**

Jason Gram, Director  
Jean Hoedl, Director  
William (Bill) Stovall, Director  
Dennis Howard, HOA Property Manager, will also attend.

**Conclusion:**

Thank you for your time and willing to act as our mediator.

Sincerely,  
Hans Irvine Prothero PLLC

  
Gregory F. Cromwell  
Attorney at Law

cc: Association Board Members  
Dennis Howard, Property Manager

Michael Kenyon, City Attorney, via Email