



ATTORNEYS AT LAW

# GATES WISE SCHLOSSER & GOEBEL

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## MEMO

**To:** Trevi Gardens Homeowners Association

**From:** Bradley B. Wilson  
Gates Wise Schlosser & Goebel

**Re:** Repair of Streets in Trevi Gardens Fifth Addition P.U.D. Condominium

**Date:** February 3, 2023

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## BACKGROUND

Trevi Gardens is governed by the Declaration of Covenants, Conditions, Restrictions and By-Laws for Trevi Gardens Homeowners Association (hereinafter referred to as the "HOA Covenants").

Contained within the HOA Covenants are the By-Laws of the Trevi Gardens Homeowners Association (hereinafter referred to as the "HOA By-Laws"). Article III of the HOA By-Laws provides for the creation of a Board of Directors to govern the affairs of the Trevi Gardens Homeowners Association (hereinafter referred to as the "HOA"). Pursuant to Article III of the HOA By-Laws, such a Board of Directors (hereinafter referred to as "the HOA Board") has been established.

Within Trevi Gardens there is the Trevi Gardens Fifth Addition P.U.D. Condominium Development (hereinafter referred to as "the Condo Development"). The Unit Owners in the Condo Development are members of the Lots 20 & 21 Trevi Gardens Fifth Addition P.U.D. Condominium Association (hereinafter referred to as the "Condo Association"). The Condo Development is governed by its own Declaration of Condominium Ownership Lots 20&21, Trevi Garden Fifth Addition P.U.D. Condominium (hereinafter referred to as "the Condo Declaration"). Under Section 5 of the Condo Declaration the members of the Condo Association were to elect a Board of Directors (hereinafter referred to as the "Condo Board") to govern the affairs of the Condo Development. However, such a board has not been established.

Portions of Messina Drive, Resina Drive and Argenta Drive are located within the boundaries of the Condo Development. (Such portions of Messina Drive, Resina Drive and Argenta Drive are hereinafter collectively referred to as the "Condo Streets"). Section 1(f) of the Condo Declaration specifically identifies the Condo Streets as part of the Condo Development's common elements (hereinafter referred to as "the Common Elements").

The Condo Streets are “private streets” and, as a result, are not maintained by the City of Springfield. Under Section 1(f) of the Condo Declaration, the Condo Association is responsible for the maintenance and repair of the Condo Streets. Similarly, Article VI, Section 1(a) of the Condo Association By-Laws (hereinafter referred to as the “Condo By-Laws”) identifies “Operation, care, upkeep, maintenance, replacement and improvement of the Common Elements” as one of the duties of the Condo Board.

Under Section 8 of the Condo Declaration, each Unit Owner in the Condo Development owns a percentage of the Common Elements in accordance with each Unit Owners percentage of ownership as a tenant in common. Each Unit Owner has roughly a three percent (3%) ownership interest in the Common Areas, including the Condo Streets. Section 8 of the Condo Declaration further provides that the Condo Board has the exclusive authority to adopt rules regarding the Common Elements. Section 15 of the Condo Declaration states, “No alterations of any Common Elements, or any additions or improvements thereof, shall be made by any Unit Owner without the prior written approval of the [Condo] Board.”

Pursuant to Section 20-A of the Condo Declaration the owners of each unit in the Condominium Development are members of the Trevi Gardens Homeowners Association, subject to assessment fees levied by the HOA Board over and above such fees as may be levied by the Condo Board, and obligated to comply with the provisions of the HOA Declaration. Section 20-A of the Condo Declaration if there is a conflict between the terms and conditions of the Condo Declaration and the HOA Declaration, the Condo Declaration shall control.

Under Article I, Section 6 of the HOA Covenants, the HOA is responsible for maintenance, repair, or replacement of any “Area of Common Responsibility.” In 2015, Article IV, Section 2(a) the HOA Covenants was amended to state:

“(a) Any roadway within the Trevi Garden’s subdivision which is now existing (or will ever hereafter come into existence) that is privately owned and/or otherwise not dedicated to the City of Springfield (collectively, Private Roadways”), are considered as an Area of Common Responsibility, which shall be the responsibility of the Association. Notwithstanding the foregoing, however, the cost of maintenance, repair and/or replacement of those Private Roadways shall be borne by those lot owners whose property consists of such Private Roadways, on a pro rata basis. Assessments solely for the cost of maintenance, repair and/or replacement of Private Roadways are not subject to the same procedural requirements for annual and special assessments as provided for in Article VII of this Declaration and may be imposed at the discretion of the Board by a simple affirmative majority vote thereof. The Board shall have the same powers to enforce the assessment for cost, repair and maintenance of Private Roadways as provided by this Declaration.”

Pursuant to the above amendment, for the last eight years, the HOA Board began charging a special assessment to the Condo Development Unit Owners. The purpose of the special assessment was to raise funds for the maintenance of the Condo Streets.

The HOA has requested that I address the following questions which have arisen as a result of the above facts. Those questions, and my respective answers thereto, are set forth below.

### **DISCUSSION**

**Question:** Does the Trevi Gardens HOA, who is now collecting a Special Assessment from 5<sup>th</sup> Addition residents (in the absence of a 5<sup>th</sup> Addition Board to do the same) obligated to seek the approval of 5<sup>th</sup> Addition residents before initiating a repair/replacement to any of the three 5<sup>th</sup> Addition streets.

**Response:** Initially, it should be noted that the HOA is under no obligation to replace or repair the Condo Streets. Granted, the 2015 Amendment to the HOA Covenants ostensibly designates the Condo Streets as an Area of Responsibility such that the HOA is responsible for their maintenance. However, under the Condo Declaration it is the Condo Association who is responsible for the maintenance of the Condo Streets. According to Section 20-A of the Condo Declaration if there is a conflict between the terms and conditions of Condo Declaration and the HOA Declaration, the Condo Declaration shall control. Thus, the language of the Condo Declaration trumps the 2015 Amendment to the HOA Covenants and, as a result, it is the Condo Association who is responsible for the maintenance of the Condo Streets.

The foregoing notwithstanding, should the HOA wish to make repairs to the Condo Streets, it should first obtain approval of the Unit Owners as they are the owners of the Condo Streets pursuant to Section 8 of the Condo Declaration. It should be noted that if there was an established, functioning Condo Board, the HOA could enter into an agreement with the Condo Board for the repair of Condo Streets. However, because there is no established, functioning Condo Board, the HOA has no alternative but to deal directly with the Unit Owners.

**Question:** If approval is required then in what form should it take and in what manner should approval be sought? Should it be majority of those voting? Should it be a majority of the 5<sup>th</sup> Addition property owners (whether voting or not)? Does it need to be unanimous?

**Response:** Under Section 8 of the Condo Declaration, each Unit Owners owns a percentage of the Common Elements, including the Condo Streets as a tenant in common. A Unit Owner does not own a specific portion of the Common Elements. In other words, the Unit Owners who live on Messina Drive do not own Messina Drive but, rather, ownership of Messina Drive is shared with all of the Unit Owners in the Condo Development. For this reason, it is suggested that the HOA attempt to get the written approval of all of the Unit Owners before the HOA initiates any repairs to the Condo Streets.