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VIA EMAIL
November 18, 2024

Josh Arneson
Town Manager
Town of Richmond
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Richmond Selectboard
c/o David Sander, Chair
203 Bridge Street
Richmond, VT

Re: Southview General Permit 3-9050

Dear Mr. Arneson and Richmond Selectboard:

I represent a group of homeowners in the Southview Estates Development ("Development")[1] and write to address the Town's stated position concerning the residents' obligations relating to the Southview General Permit 3-9050 as expressed in the Selectboard's November 4, 2024 draft letter ("Letter") that was discussed at the November 4, 2024 Selectboard meeting.

In the seventh bulleted paragraph of the Letter, you state that a "Declaration of Covenants … legally binds the property owners as members of a homeowners association, which can assess costs and fees to members for permit compliance" and that the Town intends to work with the homeowners association as the party responsible for the costs. The Town appears to have concluded that there is a homeowners association responsible for the stormwater permit solely based on the existence of the Southview Development Protective Covenants recorded at Book 48 Page 104 of the Richmond Land Records ("Protective Covenants") and the reference therein to a to-be-created association for managing the privately owned roads within the development. That position is incorrect for several reasons.

First, there is no existing homeowners association for the Development, and to the best of my clients' knowledge, none has ever been organized. While the Protective Covenants applicable here impose certain restrictions on the use of the properties in the development, they fail to organize or create any entity that could take action as an association absent the consent of all lot owners. The Protective Covenants are conditions that run with the land until 2033 and impose certain restrictions or requirements on the use of the land subject to the covenants. An unincorporated association, on the other hand, is a voluntary partnership of the members,

[1] This firm does not represent all of the homeowners in the Southview Development. This letter is only on behalf of the homeowners that have retained our services.

whereby they join together to achieve or further some common purpose, evidenced in nearly all cases by some written or oral agreement, such as a set of bylaws, an association name, an executive board, and officers. *See e.g., F.R. Patch Mfg. Co. v. Capeless,* 79 Vt. 1, 63 A. 938, 939 (1906) (holding, an unincorporated association is fundamentally a partnership); 27A V.S.A. § 3-101; *Alpine Haven Prop. Owners Ass'n, Inc. v. Deptula*, 2003 VT 51, ¶ 4, 175 Vt. 559 (describing association for development subject to deed covenants formed by voluntary action).

To create a partnership, there must be some affirmative act or agreement of the members to join together in furtherance of a shared or common goal. *See e.g., The Detroit,* 63 U.S. 330, 333, 16 L. Ed. 249 (1859) ("A contract of partnership is where parties join together their money, goods, labor, or skill, for the purposes of trade or gain, and where there is a community of profits."); *Berthold v. Goldsmith*, 65 U.S. 536, 541, 16 L. Ed. 762 (1860) (a "partnership is usually defined to be a voluntary contract between two or more competent persons, to place their money, effects, labor, and skill, or some one or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them."). While official incorporation with the Vermont Secretary of State is not required to create an unincorporated association, Vermont law does not support the conclusion that an unincorporated association has any authority without some affirmative act of its members. *See e.g., Daniels v. Elks Club of Hartford*, 2012 VT 55, ¶ 6, 192 Vt. 114 (discussing liability of unincorporated association, the Elks Club, that had been formally incorporated but then terminated due to failure to file annual report but continued to hold itself out as a club and take actions as voluntary association for 19 years, including electing officers of the club, and managing property of the club); *F.R. Patch Mfg. Co. v. Capeless*, 79 Vt. 1, 63 A. 938, 938 (1906) (suit brought against unincorporated association with five or more members, that had an associate name, a president, another officer and a clerk or treasurer); *Johnson v. Paine*, 84 Vt. 84, 78 A. 732, 732 (1911) (discussing membership in unincorporated agricultural society that had executive committee and constitution and whether defendant actions met the provision of the constitution for becoming a member).

Here, however, based on the records currently available, there is no evidence that any declaration or bylaws were ever adopted, no board members elected or appointed, no property ever owned or managed in the association name, and no action taken in the name of the association. Thus, the Protective Covenants alone do not organize an association that could work with the Town on the stormwater permit.

Second, the reference to an association in paragraph 14 of the Protective Covenants is specific to management and cost sharing of privately owned roads. Even if that reference alone could have created an unincorporated association at the time, the association's powers were limited to maintaining those private roads—it provided no authority over private lands not part of the roads, and the obligation imposed on the lot owners was only to pay their pro-rata share of the association's road maintenance costs. *See Watson v. Vill. at Northshore I Ass'n, Inc*., 2018 VT 8, ¶ 23 (discussing association is limited to those powers set forth in original declaration); *Alpine Haven Prop. Owners Ass'n, Inc. v. Deptula*, 2003 VT 51, ¶ 17 (holding powers of association governed by plain language of deed covenants). Paragraph 14 did not create an overarching association, incorporated or otherwise, that could manage private land or stormwater

infrastructure within the development, and it did not obligate the owners to create or join such an association.

Third, the sole purpose of that theoretical road maintenance association terminated decades ago when the Town took ownership of the roads. Thus, even assuming the existence of an unincorporated association when the development was created in or around 1985, it dissolved or terminated upon the Town's acceptance of the roads. Furthermore, any vestige of it would conclusively terminate, by the terms of the Protective Covenants, in 2033.

In regard to any stormwater permit, the Protective Covenants do not create an association that has any authority or ability to manage private property in the Development or work with the Town on behalf of the property owners regarding the stormwater permit, nor do they obligate the property owners to create such an association. Instead, for an association to be formed, the owners would all have to voluntarily agree to join the association and adopt a declaration outlining the powers of the association, adopt bylaws for the association, appoint an executive board, and comply with the reporting requirements of the federal Corporate Transparency Act, amongst other actions. It is highly unlikely that all the property owners would be willing to do so, and individual property owners in the Development do not have a legal mechanism or the resources to compel them.

For these reasons, the Town's position that there is a homeowners association governing the Development and that it may work with the Town regarding the stormwater permit should be reassessed.

Sincerely,

SHEEHEY FURLONG & BEHM P.C.

/s/ Peter G. Raymond

Peter G. Raymond

PGR/cjm