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February 20, 2019

Honoco, Inc.
c/o Robert King
P.O. Box 168
Aurora, NY 13026

Re: Honoco Road

Dear Bob,

This letter is in response to your request on behalf of Honoco, Inc. to review the historical and title information regarding Honoco Road and to give my legal opinion on the following questions:

Question Presented:

What authority does Honoco, Inc. have to repair, maintain, improve and collect contributions for the maintenance and repair of Honoco Road?

Facts:

Honoco Incorporated was incorporated on June 16, 1955 as a membership corporation. In 1969 the membership corporation law was repealed and became the Not-For-Profit Corporation Law. The New York State Department of State currently classifies Honoco Incorporated as a Not-for-Profit Corporation and therefore Honoco, Inc. is subject to the provisions of the New York Not-For-Profit Corporation Law. Honoco Incorporated predates, and therefore does not have to comply with, New York General Business Law §352-e which requires developers to file their offering plans and obtain approval from the State Attorney General's office in New York City for developments which will have shared amenities, such as a road, beach, park, lobby etc.

The State Department of Law defines "homeowners association" ("HOA") as including "developments consisting of individual homes or lots deeded in fee simple where a declaration of covenants, restrictions, easements and liens or an equivalent document, or restrictions contained in individual deeds or any other mechanism or covenant or local law or ordinance requires that homeowners or lot owners contribute cooperatively to the ownership and/or maintenance of property used in common. Units which are attached or are part of a condominium or cooperative corporation or which are vertically, rather than horizontally, situated are specifically excluded. An HOA also includes a development of individual homes or *lots deeded to individual*

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purchasers in fee simple associated with an organization which owns or maintains property for the common benefit of all the homeowners or lot owners where the homeowners or lot owners are required to contribute to the upkeep of the common property. Such organization may be incorporated but incorporation is not required for purposes of this application." (emphasis added) see CPS7-Simplified procedure for Homeowners Associations with a de minimis cooperative interest. https://ag.ny.gov/cooperative-policy-statements

The Certificate of Incorporation for Honoco Incorporated states in paragraph 2 the purpose of the corporation is for the "mutual assistance and to promote enjoyment of the members in their use of properties or possessory interest in properties on Cayuga Lake shore and to promote the construction, maintenance and improvement of common facilities and services for the mutual benefit of members, to hold and deal in land and interests in lands and to do and perform all and everything that may be necessary advisable or suitable and proper for the accomplishment of the purposes herein expressed and to exercise all implied powers and rights which the corporation may possess."

Although the Certificate of Incorporation does not expressly authorize Honoco, Inc. to impose assessments, it did provide for a Board of Directors. It has been held that in addition to the powers set forth in the Certificate of Incorporation, a corporation has all the powers which are necessary and incidental to those powers or essential to the purposes and objects of its corporate existence, including to charge assessments. *Bay Crest Association v. Paar, 2008 NY Misc. LEXIS 8218; Sea Gate Assoc. v. Fleischer*, 1960 NY Misc LEXIS 3988 (Sup. Ct. .Kings Co, 1960)

Furthermore, the users of the road in 1955 (the leasees of Lehigh Valley Railroad Company) purposefully created Honoco, Inc. and each user of the road was obligated to join the corporation so that 1) the road could be maintained as passible and 2) only one policy of insurance had to be purchased in favor of the Railroad Company. See letter dated July 2, 1956 from Harry S. Hamilton to Geroge H. Camlen.

The leases gave the tenants a license to use the 12 foot wide roadway, and required the tenants to join Honoco, Inc. which maintained the road. When the leaseholds were converted to freeholds, the license to use the roadway and the requirement to join Honoco, Inc. under the lease were not converted into an easement to use the roadway nor was there a deed covenant in the deeds mandating the landowners join Honoco, Inc.

Although there is no covenant in the deeds requiring the property owners join Honoco, Inc., all lots should trace title back to one of the leaseholders or landowners who were originally obligated to join Honoco, Inc. and each should trace title to the August 13, 1980 deed from Lehigh Valley Railroad Company to Adjacent Railroad Property Owners II, Inc. recorded in the Cayuga County Clerk's Office on August 22, 1980 in Liber 602 at page 27 which includes the

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right of repair, maintenance and removal of bridges, culverts, drainage pipes, water courses and other appurtenances, and conveys the land subject to visible easements and together with all appurtenances, estates and rights of the party of the first part, which would include the road which was in existence at that time.

Some of the deeds out of Adjacent Railroad Property Owners II, Inc. (ARPO-II) reference maps, some which are attached to the deeds and show the road as a 12 foot wide driveway crossing the lot and continuing onto other lots. Some deeds reference filed maps, and the general rule of law is what the maps depict will be incorporated by reference into the conveyance or in other words the maps will be "taken as part of the deed." (e.g. Map No. 81-180 filed in the Cayuga County Clerk's Office on Sept. 1, 1981). See *McConnell v. Wright*, 151 A.D.3d. 1525 (3rd Dept. 2017) quoting *Brookhaven v. Dinos*, 76 A.D.2d 555 (2nd Dept 1980). These recorded maps mean some of the landowners have an implied easement based upon a filed map or upon pre-existing use as shown on the maps, where others are relying on a prescriptive easement based upon long use, and many will have the right to claim an easement by several of the foregoing doctrines.

It is my opinion that all of the 158 properties are both burdened by and benefit from an easement of ingress and egress over the roadway in the vicinity of the old railroad tracks. It is also my opinion the clear purpose of Honoco Incorporated is as a homeowners' association set up for the purpose of maintaining said easements and servitudes affecting the whole community.

Legal analysis:

When a purchaser of property within a private community has knowledge of the existence of the homeowners' association, they are impliedly obligated to share in the cost of maintenance of the facilities and services provided by that homeowners' association, regardless of whether or not they are a member in the association and regardless of whether or not they use the facilities. See *Seaview Ass'n of Fire Island N.Y. Inc v. Williams,* 69 NY 2d 987 (1987); *Goodnow Flow Assn Inc. v. Graves*, 135 A.D.3d 1228 (3rd Dept 2016); *Board of Directors of Millennium Homeowners Association v. Bosco*, 8 Misc. 3d 950 (Civ. Ct. City of New York, Richmond Co., 2005). This knowledge creates a quasicontractual relationship between the landowner and the association which allows the association to sue and recover the assessments from the landowner to pay their fair share of the common charges. See *Seaview and Goodnow, Supra.* Due to the contractual nature of the relationship, there is a 6 year statute of limitations to recover dues, meaning Honoco, Inc. can only recover for the dues owed in the 6 years prior to the commencement of any legal action. See *Perkins v. Kapsokefalos,* 57 A.D.3d 1189 (3rd Dept. 2008). Older dues may be collected as a condition of reinstating a member in Honoco, Inc.

In *Bay Crest Association v. Paar*, the Supreme Court of Suffolk County held that New York Real Property Law (RPL) §339-j and RPL §339-x apply equally to both condominiums and

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homeowners' associations. *2008 NY Misc. LEXIS 8218.* New York Real Property Law §339-j states:

> Each unit owner shall comply strictly with the by-laws and with rules, regulations, resolutions and decisions adopted pursuant thereto. Failure to comply with any of the same shall be ground for an action to recover sums due, for damages or injunctive relief or both maintainable by the board of managers on behalf of the unit owners or, in a proper case, by an aggrieved unit owner. In any case of flagrant or repeated violation by a unit owner, he may be required by the board of managers to give sufficient surety or sureties for his future compliance with the by-laws, rules, regulations, resolutions and decisions. Notwithstanding the foregoing provisions of this section, no action or proceeding for any relief may be maintained due to the display of a flag of the United States measuring not more than four feet by six feet.

Real Property Law §339-x states:

> No unit owner may exempt himself from liability for his common charges by waiver of the use or enjoyment of any of the common elements or by abandonment of his unit. Subject to such terms and conditions as may be specified in the by-laws, any unit owner may, by conveying his unit and his common interest to the board of managers on behalf of all other unit owners, exempt himself from common charges thereafter accruing.

These two laws effectively allow a homeowners' association to sue and seek the sums due to pay for the common charges as well as to require a security for future dues, and that no owner can exempt themselves from the obligation of paying dues by not using the common elements (the road) or by abandoning their property.

However, there have been some exceptions to this general rule allowing homeowners associations to sue for back dues where the homeowner's association did not exist at the time of purchase, the purchasers did not have notice of the homeowners' association's existence at the time of purchase, the landowners had no covenant in their deed requiring membership, membership was not always mandatory for every landowner in the community or dues were not mandatory at the time the landowner acquired title. See *Yankee Lake Preserv. Assn., Inc. v. Stein*, 68 A.D.3d 1603 (3rd Dept 2009) c.f. *Goodnow Flow Assn Inc. v. Graves*, 135 A.D.3d 1228 (3rd Dept 2016).

In *Yankee Lake Preserv. Assn. Inc.,* the association could not recover their dues or assessments from the landowners because membership had previously been voluntary for non-lakefront properties, with voluntary contributions sought for lake maintenance. Furthermore, the founding documents of the Association did not require mandatory dues for non-members (they had been recently revised to require membership). The Court found that the landowners were

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not on notice of an obligation to pay dues nor had they implicitly agreed to pay dues when they purchased their properties. (by paying dues at the time of purchase). *Id*. At 1605.

The *Yankee Lake Preserv. Assn., Inc.* case did not discuss whether the other landowners could have sought reimbursement of a pro-rata share of the maintenance performed from the non-paying neighbors under the common law which states that all users of an easement share equally in its maintenance. See *Greens at Half Hollow Home Owners Assn., Inc. v Greens Golf Club, LLC,* 131 A.D.3d 1108 (N.Y. App. Div. 2d Dep't 2015) [all persons benefitted by an easement must share ratably in the cost of its maintenance and repair.]

In *Goodnow Flow Assn. Inc.*, the landowner's parents paid dues from 1957 to 1984 and he and his surviving parent paid dues from 1984 to 2012 until the defendant became the sole owner of the property and ceased paying dues. The association sued and won a judgment by demonstrating that the association had been in existence since 1957, the by-laws in 2012 required mandatory dues and that signage existed stating that certain common areas were maintained by the association for members use only, thereby giving adequate notice of its existence. 135 A.D.3d 1228 (3rd Dept 2016). The Defendant subsequently sued his lawyer for malpractice because he later found proof that indicated the homeowner's association was initially a hunting and fishing club with voluntary dues and did not become a homeowner's association until later with mandatory dues only after he had acquired title. See *Graves v. Stanclift, Ludemann, McMorris & Silvestri, P.C.* ,Essex County Supreme Court Index No. CV17-0502 Decision & Order dated June 28, 2018.

Here the current by-laws of Honoco, Inc. membership is automatic upon buying a property in the community and notice is given to each new purchaser in the community of the requirement to pay dues. Honoco, Inc. has signage at the intersection with the public highway regarding the community's private character. There is a website which contains the by-laws and meeting minutes of Honoco Inc. New owners are approached by members regarding the homeowners' association. A purchaser could hardly fail to know that there was a homeowners' association at the time of purchase of property within this community, and some have even paid dues to Honoco, Inc. upon the purchase of their lots, creating the quasicontractual obligation to continue to pay dues in the future. See *Yankee Lake Preserv. Assn. Inc. Supra.*

Accordingly, it is my opinion that Honoco Inc. can charge assessments against each owner within the community, regardless of their membership status, and that a failure to pay gives Honoco Inc. the right to bring an action in the Courts for payment. It may also give Honoco, Inc. the right to restrict the landowners from using the road, but the caselaw on this issue is split and likely to result in a lawsuit for interference with easement. However, before Honoco, Inc. charges the assessment and pursues litigation they should first: 1) ascertain whether the lot to be assessed was owned by a leaseholder or landowner who was part of Honoco, Inc. before 1980 when membership was mandatory and 2) that the deed Liber 602 at page 27 is in

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that lot's chain of title, **OR** 3) whether any current or former owner of that lot had paid dues at any point in the history of Honoco, Inc., and 4) whether any delinquent owner took title after the dues became mandatory.

Question Presented:

What are the rights and responsibilities of the landowners and/or easement holders regarding Honoco Road?

Facts:

Here there are 158 lots which are both benefited and burdened by the so called Honoco Road. In each instance the property owners are both dominant (easement holders) and servient estate holders (landowners) with all the rights and obligations attendant to such ownership.

Honoco, Inc.'s bylaws attempt to shift the burden of maintenance to the landowners as their "share" of the maintenance of the entire roadway as a means to keep overall dues low. However, the landowners have varying ideas of what reasonable maintenance of their portion of the road should constitute and other landowners are burdened with historically difficult portions of the roadway which places a higher burden on them to maintain their portion.

Legal Analysis:

"Generally, absent an express agreement, all persons benefitted by an easement must share ratably in the cost of its maintenance and repair." *Greens at Half Hollow Home Owners Assn., Inc. v Greens Golf Club, LLC,* 131 A.D.3d 1108 (N.Y. App. Div. 2d Dep't 2015); See also *Green Harbour Homeowners' Ass'n v. G.H. Dev. & Constr., Inc*., 307 A.D.2d 465, 466-467 citing to *Cohen v. Banks,* 169 Misc 2d. 374 (1996) (Justice Ct. Nyack Village, Rockland Co.). The landowner has a right to have the natural condition of their land preserved as nearly as possible and to insist that the easement enjoyed will reaming substantially as it was at the time it accrued. *Lopez v. Adams*, 69 A.D.3d 1162 (3rd Dept 2010) citing to *Meyers v. Baker*, 45 AD 26 (1899). This means that there can be no substantial changes to the easement, if it was always a gravel road, it has to remain a gravel road. The easement holder has the right to carry out work necessary and reasonable to fulfill the purpose of the easement, but cannot materially increase the burden on the land or impose new or additional burdens on the land. *Lopez*, Supra, citing to *Solow v. Liebman*, 175 AD2d 120 (1991). This means the easement holder cannot build up ramparts or install drainage pipes which cause flooding and erosion, as happened in the *Lopez,* case. A balance has to be struck that is fair to both the easement holder in the exercise of their rights and the landowner in the preservation of the character of their property.

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A landowner may make any use of their property that does not interfere with the rights of the easement holder to use and maintain their easement to the level or standard they have become accustomed. See *Grafton v. Moir,* 130 NY 465 (1892) and *Lopez, Supra.*

Application:

Honoco, Inc. has tried to shift the burden of maintenance onto the landowners in contravention of the common law rule. It could be argued that the landowners burdened by a particularly difficult stretch of the road have agreed to pay more road maintenance. This shifting maintenance obligation would be effective if all 158 lot owners were members of Honoco, Inc. and abided by that agreement. Since there is a lack of full participation by all landowners, Honoco, Inc. uses dues to repair and maintain the areas along the road where maintenance is lacking or needs assistance.

Honoco, Inc. has the right and standing to enter onto the properties of the landowners to maintain the road for the easement holders to the same level of maintenance that portion of the roadway had previously been maintained. Honoco, Inc. can also carry out work necessary and reasonable to fulfill the purpose of the easement (passible road) to fix bridges, culverts, drainage pipes, water courses and other appurtenances, so long as they do not unreasonably interfere with the landowner's rights to have their property preserved as they have always enjoyed it or as close to as possible. However, the landowners do not have the right to cause an interference with the maintenance and use of the road.

In my opinion to make the maintenance obligations more fair across the board there needs to be a more even application of the maintenance responsibilities. Either Honoco, Inc. increases their dues, assesses everyone the same and undertakes the entire duty of maintenance of the road themselves in the Board's discretion, or there is a schedule of fees, some of which are base charges which can be credited back to the landowners' for the road maintenance they satisfactorily perform on their property out of their own pockets. This would leave Honoco, Inc. the funds to address the problem areas that are above and beyond regular upkeep to engage in permanent solutions to problems which yearly affect the passible nature of the road and endanger the health safety and welfare of everyone on the road.

Question Presented:

How to best maintain the road when opinions differ with respect to the amount of maintenance and repair required?

If Honoco, Inc. did not exist, each landowner who maintained the roadway could seek compensation from each property owner for their share of the maintenance that was performed.

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This would result in a patchwork of lawsuits between community members about overburdening their land and interference with easement rights. With Honoco, Inc. the decisions can be made centrally by a board that is elected and that are agreed to by the majority of the landowners for the benefit of all. Good faith decisions of a board are given deference by the Courts and requires a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith. *Bay Crest Association v. Paar, 2008 NY Misc. LEXIS 8218.*

As stated above, Honoco, Inc, Board should have the final decision on what is best for the community keeping in mind the rules and advice stated above.

DISCLAIMER

My opinions are based upon the documents I reviewed, the law, my education and experience as a real property attorney. Notwithstanding the foregoing, I cannot guarantee or warrant that a judge or jury will interpret the facts in a manner consistent with my opinion.

If you have any questions or concerns, please don't hesitate to contact my office at the number listed above.

Very Truly Yours,

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