KERR RUSSELL
Attorneys and Counselors

To: James Vondale

From: Brandy Mathie
John Gatti
F. Broc Gullett

Subject: HLPOA's Liability For Capital Improvements

Date: December 15, 2015

You have requested our opinion as to whether the Higgins Lake Property Owners Association ("HLPOA") should be liable to reimburse Pat Springstead for the replacement of sewer lines. Pat Springstead ("Springstead"),[1] as Landlord, and HLPOA, as Tenant, entered into a lease, effective January 1, 2014 (the "Lease") for one half (1/2) of the building commonly known as 207 Terrace Drive, Roscommon, Michigan (the "Premises"). Pursuant to the Lease, HLPOA has the obligation "to keep the premises in accordance with all police, sanitary and other regulations imposed by any government authority" (Paragraph 3 of the Lease) and to "keep the premises . . in as good repair . . . in like condition" (Paragraph 7 of the Lease).

It is our understanding that in 2013, the sewer line became inoperable and eventually needed to be replaced. To date, HLPOA has reimbursed Springstead approximately $1,300 of the costs associated with the sewer line and now seeks reimbursement from Springstead for those costs because HLPOA believes that the replacement of the sewer line was a capital improvement and beyond HLPOA's obligations pursuant to the Lease.

EXHIBIT
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[1] It is our understanding that even though this Lease was only for 2014, there were nearly identical leases for previous years.

CONCLUSION

Pursuant to the Lease, HLPOA is not liable for capital improvements to the property, and because the replacement of the sewer line constituted a capital improvement, HLPOA should not be liable for those costs. Further, because the sewer line was part of the common areas, absent a provision in the Lease to the contrary, Springstead has an obligation to maintain all common areas.

ANALYSIS

Under Michigan common law, tenants have the obligation to make fair and reasonable repairs, but nothing more. *Van Wormer v Crane*, 51 Mich 363, 367; 16 NW 686 (1883) (Sherwood, J., concurring). "The bare relation of landlord and tenant is a sufficient consideration for an implied promise to treat the premises occupied by him in a good and proper manner, according to the custom of the country or place in which they are located, and to make the ordinary repairs thereto, **not new or permanent, of course**, but such as will keep them from going to decay and dilapidation." *Id.* (emphasis added). Tenants under Michigan law are not obligated to make capital improvements.

Because the replacement sewer line is new and permanent and increases the value of the property, the replacement of the sewer line should be considered a capital improvement and HLPOA has no obligation to pay for its replacement. In *Leahy v Wenonah Theater Co*, a commercial lease agreement contained a covenant that stated:

> That [tenant] of the second part will, at its own expense, during the continuance of this lease, keep the said premises and every part thereof in as good repair, and at the expiration of the term, yield and deliver up the same in like condition as

> when taken, reasonable use and wear thereof and damage by the elements excepted.

251 Mich 594, 595-96 (1930).

In *Leahy*, when the plaintiff–landlord sued the tenant for the costs to repaint, redecorate, and repaper the premises after they were damaged during the defendant–tenant's use of the property, the court held that the covenant did not make the tenant liable for the damages because they were caused by the elements. *Id.* (citing *Van Wormer*, 51 Mich at 366 ("The purpose [of the clause] was to excuse the lessees in cases where the damages from the causes mentioned had happened without their fault.")). "[D]amage by the elements includes all injury by wind, rain, snow, frost, and heat as well as all ordinary decay from natural causes." *Sweezy v Collins Northern Ice Co*, 171 Mich. 75, 79-80 (1912) (holding that a similar covenant did not create a duty for the tenant to repair damages caused by the elements and that the owner was not entitled to a new structure in place of the old one). Similar to the covenants found in these cases, the Lease Agreement contains a covenant by which the tenant agreed to the following:

> To keep the premises, including the equipment and fixture of every kind and nature, during the term in as good repair and at the expiration thereof yield and deliver up the same in like condition as when taken, reasonable wear thereof and damage by the elements expected.

Lease Agreement, Paragraph 7.

Thus, similar to the foregoing cases, the damages to the sewer lines that were caused naturally by the elements—in this case, tree roots and settling of the earth—are not the responsibility of HLPOA.

Further, a landlord who retains control over a portion of the premises because he leases to more than one tenant is under an obligation to repair and replace the components contained in the

area over which he or she reserved control. *Everson v. Albert*, 261 Mich 182, 246 NW 88 (1933); *Cooper v. Lawson*, 139 Mich 628, 103 NW 168 (1905); *see Williams v. Detroit*, 127 Mich App 464, 339 NW2d 215 (1983). *Lipsitz v Schechter*, 377 Mich 685, 142 NW2d 1 (1966); *Huey v. Barton*, 328 Mich 584, 44 NW2d 132 (1950). The Landlord has the obligation to repair and replace equipment that remains in the landlord's control when is necessary for the tenants' use of the leased premises, such as heating systems, plumbing equipment, and elevators. *Morningstar v Stritch*, 326 Mich 541, 40 NW2d 719 (1950) (heating system); *Rice v. Goodspeed Real Estate Co*, 254 Mich 49, 235 NW 814 (1931) (elevators); cf. *Waidelich v. Andros,* 182 Mich 374, 148 NW 824 (1914) (plymbing equipment).

Because Springstead leased to HLPOA and another tenant, he retained possession and control of the shared services including, but not limited to, the plumbing and sewer system. Therefore, absent an express obligation by HLPOA to assume that obligation (or reimburse him for it), the repair and maintenance of the sewer system should be Springestead's obligation.

I trust this addresses your concern. If you need additional assistance, please let us know.