

June 19, 2018

Timbrshor Association, Inc.
c/o Board of Directors

RE: Water COSA and well plan

Dear Board of Directors:

Dan McCarthy has requested that our firm author a letter related to the activities of Timbrshor Association, Inc. as it pertains to the contemplated well plan and water COSA rewrite. Specially, Dan asked that we opine regarding the authority of the Board of Directors to act with respect to the well plan and the costs of related improvements.

As we have indicated in the context of prior matters, Timbrshor Association, Inc. generally acts through its Board of Directors. The effective governing document for the units and common areas at Timbrshor is the Amended Declaration Under the Unit Ownership Act and Restrictive Covenants last recorded March 27, 1980, as Instrument No. 254044, records of Lake County, Montana. Although the Amended Declaration is sometimes unclear and does not account for all matters, as we have frequently discussed, it does provide that:

The Association shall adopt bylaws and annually elect a Board of Directors, pursuant to Section 70-23-308, M.C.A., as amended, whose function it shall be to enforce the declaration of covenants, conditions and restrictions and perform any other service, including the functions of the architectural control committee that may be for the best interests of the members.

In turn, the Association's bylaws, as amended, provide that "[t]he business and affairs of the Association shall be managed by its Board of Directors."

The Members elect the Board of Directors. The Members also provide valuable input to the Board upon which the Board presumably makes its decisions. And any action that

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involves a grant of a Member's private property rights requires the written approval the affected Member and all Members in the case of a grant of an interest in the Timbrshor common areas. Still, it is the Board that manages the day-to-day decisions of the Association, not the Members.

With respect to the contemplated well plan and water COSA rewrite, it certainly makes sense to continue to keep the Members informed and to solicit their input and address their concerns. It also makes sense to solicit votes of the Members to gauge support. Ultimately, however, it will be the Board that makes decisions with respect to the details of the water COSA and the well plan.

In terms of payment for the improvements that might occur thereafter, the Amended Declaration Amended Declaration is less clear. It provides at paragraph 12:

The Association shall have the right to set special levies and assessments for purposes contemplated by this membership agreement to supply the various services that the membership may require or want from time to time or as the membership may vote. It is understood that all of the costs of utilities, water, roads, streets, paths and lighting and other utility or service requested or required by the membership shall be paid by the Association or those affected thereby, and the Association shall have a right to levy against each dwelling site its pro rata share of such costs and expenses.

The Bylaws reiterate this provision. The Amended Declaration, however, also provides at paragraph 11(f) that:

Developer will furnish water facilities, telephone, electric and sewage facilities in a trunk line as shown on the plat in the office of said company. The members are fully conversant with such utilities as are now furnished and agree that at the time of entering into this agreement such facilities are adequate and suitable for the purpose intended. It is understood that where common water and sewage pumps are utilized, all rights of ingress and egress for the purposes of maintenance, new installations and repairs are given and preserved as the case may be. The members further agree that if

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[the] State Board of Health¹ or any other regulatory body requires a change in the sewage or water facilities made available to the membership, that the costs of any such change shall be paid pro rata by the members affected by such requirements.

In an effort to reconcile these provisions with one another, it is likely that they would be interpreted to allow the Association to set levies for water improvements only when improvements are “requested or required” by the Members, presumably evidenced by a vote of the Members, or alternatively when the water improvements are “require[d]” by the Department of Environmental Quality.

My understanding is that Lake County, in conjunction with the DEQ, at this time only have required the development of a well plan and water COSA rewrite and that they currently are not requiring the construction of the improvements. Specifically, I understand that the DEQ has indicated that some of the units are already grandfathered under existing systems and therefore no change will ever be required by the DEQ for those units, that undeveloped units are not required to comply with the anticipated new well plan and COSA rewrite until such time as they are developed, and that even the 13 nonconforming developed units will have some period of time (three to five years) in which to comply with the anticipated plan and water COSA rewrite.

Contrast this with the recent wastewater treatment improvements where I understand the DEQ did indeed require those improvements and the Members unanimously approved those improvements and related assessments.

Thus, while the Amended Declaration certainly is less than clear, it appears that the Association has authority to set levies to develop the new water plan and pursue the COSA re-write, as the public authorities are requiring those actions currently. The Association also likely would have the authority to assess levies to require the 13 noncompliant units to move to a ground water system when ordered to do so by the DEQ, which may occur in the next three to five years. With respect to the other units, i.e., the undeveloped and grandfathered units, however, unless and until there is a regulatory order requiring those units to move to a groundwater system, the Association appears to lack the authority to require those changes or assess levies therefor. Of course, the Members could always voluntarily vote for these changes, in which case – assuming

¹ The functions of the former State Board of Health are now carried out by the Department of Environmental Quality.

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all affected unit owners approved – the Association would have authority to enact these changes and assess costs according to the Members' vote.

I hope this is helpful. Feel free to contact our office with any questions or concerns. Thank you.

Sincerely yours,
RHOADES SIEFERT & ERICKSON PLLC



Robert Erickson