

October 16, 2007

Attorney-Client Confidential and Privileged Communication

By e-mail and U.S. Mail

Board of Directors
Meadow Stone Lodge Owners Association
c/o Bruce Gianola
P.O. Box 158
Kirkwood, Ca 95646

Re: How the Association may allocate Assessments for propane gas expenses.

Dear Board Members:

You have asked us to provide our opinion on the issue of how the Association may allocate Assessments for the Association's propane gas expenses.

Our opinion is as follows. As of January 10, 2005, the Association is required to allocate Assessments in a variable (Unit square footage) manner¹ for "Common Domestic" propane gas for "hydronic space heating and hot water heating." However, the CC&Rs are ambiguous as to the meaning of both "Common Domestic" and "hydronic space heating and hot water heating." Accordingly, it is our opinion that most likely a court would rule that the Association may allocate the Assessments as follows.

1. Unit space and water heating is not a "Common Domestic" use, because it does not relate to the Common Area, and, therefore, it is not an Association expense. The Association will pass through to the individual Homeowners Unit space and water heating charges billed by using meters.

¹ Based upon the ratio of the square footage of the floor area of a Unit to the total square footage of the floor area of all Units combined within the Project.

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2. Common Area use, consisting of use for hallways and the members' club, is a "Common Domestic" and "hydronic space and hot water heating" use. The Association will allocate the Assessments for propane gas charges for Common Area use in a variable (Unit square footage) manner.

3. Baseline amount for minimum operation of the Association's boilers is a "Common Domestic" and "hydronic space and hot water heating" use. The Association will allocate the Assessments for the propane gas charges for the baseline amount for the minimum operation of the Association's boilers in a variable (Unit square footage) manner.

4. Snow melt for roofs is a "Common Domestic" and "hydronic space and hot water heating" use since a space beneath the roofs is being heated. The Association will allocate the Assessments for propane gas charges for snow melt for the roofs in a variable (Unit square footage) manner.

5. Snow melt for the driveway is not a "hydronic space heating and hot water heating" use, since no space or hot water is being heated. The Association will allocate the Assessments for propane gas charges for snow melt for the driveway in an equal manner prorated among the Units.

Also, in order to change how the Association must allocate Assessments, it must amend the CC&R provision concerning allocation of Assessments. The CC&Rs provide that the Association must obtain approval of 100% of the Homeowners for the amendment, except that if any first mortgagee for a Unit is sold or transferred to FNMA or FHLMC or is FHA insured or is a VA mortgage, then the Association must obtain the approval of 67% of the Homeowners (and approval of 51% of first mortgagees for Units who have made written requests to the Association for "notice."). Due to the fact that it is somewhat nonsensical for the requirement for Homeowner approval to be reduced from 100% to 67% as indicated above, there is the possibility that a court would rule that the Association must always obtain approval of 100% of the Homeowners in order to amend the above-referenced CC&R provisions concerning allocation of Assessments.

I. How the Association may allocate Assessments for propane gas expenses.

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Our opinion is based on the fact that the following documents provide as follows.

1. The Association's CC&Rs, at Article 8, Section 8.06, provide that the Association must allocate Assessments for Common Domestic Propane based on a Unit square footage variable manner, and must allocate Assessments in accordance with any Declaration of Annexation:

Regular and Special Assessments shall be levied against each Unit (and its Owner) unequally, for Insurance, Common Domestic Propane, Paint and Roof Reserves, based upon the ratio of the square footage of the floor area of the Unit to the total square footage of the floor area of all Units combined within the Project subject to Assessment, as more specifically detailed in Exhibit C, "Proration Schedule Worksheet". The balance of all operating, maintenance and reserve responsibilities of the Association shall be equally prorated among the Units as provided in Exhibit "C". ***Exhibit "C" may be revised and superseded by the recordation of a Declaration of Annexation for any future phases of the Project setting forth new Assessment Allocation Schedule for the Project.*** The Declaration of Annexations for any subsequent Phases may provide such appropriate reallocation of Assessment obligations as the Declarant deems necessary to properly allocate subsequent Association maintenance obligations for any future Phase. Such future Assessment Allocation Schedules will be controlling and binding on the Association and Owners to the extent they modify this Section 8.06 provided any such Proration Schedule Worksheet is approved by the Department of Real Estate so long as the Department of Real Estate retains jurisdiction over the sale of the Project Units. Furthermore, if the Unit square footage area require adjusting due to as-built discrepancies, the Board is authorized to adjust said Unit square footages to properly reflect the actual square footage for areas of the Units.

...

(Emphasis added.)

2. The Declaration of Annexation for Phase 2, at Section 10, which was filed with the County Recorder on January 10, 2005, provides:

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Exhibit "C" of the Declaration regarding assessment allocation is superseded in its entirety by Exhibit "B" attached hereto.

Section 1(A)(4) of the "Proration Schedule Worksheet," at Exhibit "B," attached to the Declaration of Annexation for Phase 2, provides that the Association's variable assessment includes Common Domestic propane costs described as:

Propane Gas
Hydronic Space Heating/Hot Water Heating

Please see the enclosed copy of the Declaration of Annexation for Phase 2.

Also, you have informed us that the monthly charges for the "Propane Gas, Hydronic Space Heating/Hot Water Heating" set forth on Exhibit "B" are so low in comparison to the actual total monthly charges for the Association's propane use that the "Propane Gas, Hydronic Space Heating/Hot Water Heating" do not reasonably appear to include Unit space and water heating.

II. How the Association may change how it must allocate Assessments for propane gas expenses.

In order to change how the Association must allocate Assessments, it must amend the above-referenced CC&R provisions concerning allocation of Assessments. The CC&Rs provide that the Association must obtain approval of 100% of the Homeowners for the amendment, except that if any first mortgagee for a Unit is sold or transferred to FNMA or FHLMC or is FHA insured or is a VA mortgage, then the Association must obtain the approval of 67% of the Homeowners (and the approval of 51% of first mortgagees for Units who have made written requests to the Association for "notice."). Due to the fact that it is somewhat nonsensical for the requirement for Homeowner approval to be reduced from 100% to 67% as indicated above, there is the possibility that a court would rule that the Association must always obtain approval of 100% of the Homeowners in order to amend the above-referenced CC&R provisions concerning allocation of Assessments.

The CC&Rs, at Article XV, Section 15.04, provide that a change in the CC&R provisions concerning allocation of Assessments requires the approval of 100% of the Homeowners:

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Unanimous Consent for Specific Amendments. The consent of all Owners shall be required for any amendment of Project Documents effecting a change in:

...

(b) ... the liability for Common Expenses appertaining thereto;

...

The CC&Rs, at Article XIII, Section 13.08, provide that a change in the CC&R provisions concerning allocation of Assessments requires the following approval if any first mortgagee for a Unit is sold or transferred to FNMA or FHLMC or is FHA insured or is a VA mortgage: (1) 67% of the Homeowners; and (2) 51% of any first mortgagees for Units who have made written requests to the Association for "notice."

FNMA, FHLMC, FHA, VA Mortgagees.

a) Conditions When This Section Applicable. The provisions of this Section 13.08 shall apply if any of the following conditions exist pertaining to First Mortgages on any of the Units:

i) Any First Mortgage is sold or transferred to FNMA;

ii) Any First Mortgage is sold or transferred to FHLMC; or,

iii) Any First Mortgage is FHA insured or a Veterans Affairs ("VA") mortgage.

b) Approval of Material Amendments. The approval of 67% of the total voting power of the Association and 51% or more of the Eligible First Mortgagees (based upon one vote for each first mortgage owned) must be obtained for amendments of a material nature to the Project Documents. A change to any of the following would be considered as material:

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ii) Assessments . . .

. . .

Also, the CC&Rs, at Article II, Section 2.14, provides:

“Eligible First Mortgagee” shall mean a First Mortgagee who has requested notice by sending a written request to the Association, stating both its name and address and the Unit number or address of the Unit it has the mortgage on.

As always, please feel free to contact me with any questions.

Very truly yours,
ANGIUS & TERRY LLP

Bradley J. Epstein

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