brittons

From: Gary A. Braun [GBraun@winerbennett.com]

Sent: Thursday, April 02, 2009 10:38 AM

To: brittons@worldpath.net; sonnetrmr@earthlink.net

Cc: Susan M. Tinnin

Subject: LHE

Attachments: RELEASE OF LIABILITY AND ACKNOWLEDGEMENT OF SERVICE AS VOLUNTEER.doc; Certificate of Amendment to Declaration.doc

Good Morning Ladies – Thanks for your f/u emails. I have the following at this time in response to your emails and generally:

1. The amendments listed in the preamble portion of the certificate to amend are the amendments to the declaration only. Conversely, we did not list any of the bylaw amendments in the certificate. I suspect this issue results or may result from the fact that you may not have a complete copy of all of the recorded, governing instruments of the condo – including all of the amendments to those instruments. Sue will scan in all amendments to both the declaration and bylaws which are of record at present, and will send them to both of you under separate email.
2. With respect to the most recent amendment to the bylaws from November, 2008, please note that NH law provides that an amendment to a condo's governing instruments is not effective until it is recorded at the registry of deeds. Accordingly, we should get that amendment recorded as soon as we can, as until it is on record it is really not valid or enforceable. Could you send me a copy of that amendment if you are going to record it on your own? We are happy to assist via my office with the recording process if you like.
3. Marilyn and I have very briefly discussed in the recent past the potential that some of the past amendments to the condo's instruments may not have been executed or recorded in accordance with NH law. In turn, this could affect the validity and enforceability of those amendments. I am not trying to stir up an entirely new issue at this point, but I think it worth mentioning presently if only for the reason of not repeating the same mistake as to the form or recording processes used for the amendments. In other words, if we are going to record the new amendment to the bylaws from 11/08, it makes sense to me to do it in accordance with the law. For this reason alone, I would suggest you let me review the form of the 11/08 amendment before it is recorded. Thereafter, we should likely more generally address the issue of the past amendments, their form and manner of recordation.
4. Attached is a new copy of the draft amendment which I have modified ever so slightly, but not materially. I believe I neglected to mention when I first sent the draft amendment that the changes to the existing provisions of the declaration were shown in bold in that document. The language which is in non-bold text in the draft amendment is as it was originally in the declaration, including as amended by the amendment document appearing at Book 6516, Page 1228 from 11/01. I am sorry if this caused any confusion, including per the queries raised by Marilyn in her email to me from 3/31/09. It is best practice in my view to amend theses instruments by deleting the old provision entirely, and then substituting an entirely new and whole provision in its place. In this fashion, one does not have to go back and forth between the new and old language to try and make sense of the amendment.
5. In response to Marilyn's questions as raised in her email of 3/31 I have the following: (i) question re: listing of prior amendments in current certificate of amendment – answered per PP#1 above; (ii) again, the language which constitutes the amendment is shown in bold on the draft certificate of amendment; and (iii) per our prior phone discussions, I do not think it advisable to start listing certain or specific utility of other elements in the text of the amendment. There as several reasons for this. First, the existing language of your instruments - like all condo documents – contain terms of art used generally with respect to condos and particularly used in your documents. I want to preserve the integrity and consistency of these terms of art within your documents. Second, ambiguity is a good thing sometimes as Marilyn points out. I do not want to get pigeon-holed into a certain outcome by using language that is so specific that it leaves us no wiggle-room. Third and in relation to the foregoing, the use of generic terms in the amendment like "utility

systems" and "utility components" will, to my belief and understanding, cover the issue that you have much better than trying to identify each and every component or element of the condo property that we desire to regulate in this fashion. The superiority of the "generic" approach almost always holds true when you are trying to work up a system which practically allocates responsibility for maintenance, repairs and replacement (M, R&R) of the units versus the common area. Remember that your Bylaws and NH law both provide that owners are solely responsible for M, R&R of everything that makes up the units. Hence, if we define "units" to include all utility and like systems which serve only a single unit, and the portions, elements and components thereof, then the unit owners will be responsible for all aspects of M, R &R of those systems and components and the association will not. Finally, the amendment alone

6. Further, it is necessary to amend the declaration in the manner I have proposed despite the amendment to the declaration from 11/01 and appearing at Book 6516, Page 1228 of the registry. That amendment only provided that the units do not include pipes, systems, etc. which serve more than one unit. It did not address the situation we currently have which is trying to assure that owners are responsible for M, R &R of utility systems and components therefore which serve only the owner's unit, whether or not such system or component is located entirely within the unit or outside of the unit.

7. Attached is a draft of a document entitled "Acknowledgment of Volunteer Service and Release of Liability". It serves and establishes the following in my view: that this is a volunteer relationship and that the volunteer receives no remuneration or no substantial remuneration for their volunteer services; that the volunteer is not an employee of the association; that the volunteer has signed the document freely and without duress, after consulting with an attorney or having the opportunity to do so; that the volunteer will follow the general instructions of the Board but is free to perform the services at the time and in the manner determined by the volunteer (this helps use some with the test employed by NH's Department of Labor as to whether a person is an employee or independent contractor); insurance issues are covered as is the issue of reimbursement of the volunteer's expenses; the retention by volunteers of materials is covered in that the document provides that such retention shall not constitute in kind payment or compensation; the volunteer waives any claims for liability against the association and its members, director, officers, etc. for injury etc. to the volunteer while performing his or her volunteer activities, whether such injuries result from the claimed negligence of the association or from other causes; and, the volunteer indemnifies the association if the association gets sued etc. due to the volunteer's activities – this means that if the association suffers a loss or must hire an attorney to defend a claim based on the acts or omissions of the volunteer, then the volunteer must reimburse the association for such loss and the cost of such legal services to the association. Please let me know what you and the Board think generally about the draft and we can go from there in terms of finalizing the document.

8. I do need your help specifically with the portions of the draft release which are highlighted, including any questions so highlighted.

9. Per Ann's recent email, I must admit I have never heard of the concept of scavenger's rights, and do not know off-hand if the principle is recognized in some or any fashion in NH. However, and as noted I have tried to structure the release so as to exclude from consideration as compensation any property or other items that might be retained by the volunteer with permission of the association as payment in kind – such as firewood. I am not adverse per se to the volunteers retaining the wood they cut, including because removal of wood by the owners will benefit the association and the condition of the property. I think we simply deal with this issue expressly in the release as I have.

10. As to Ann's question regarding insurance coverage for contractors hired by owners to work on units, I have the following. Article VI of the Bylaws contains provisions regarding insurance which is required and insurance which is discretionary at the condo. However, my reading of these provisions is that they do not necessarily or completely control the issue you are referring to. Article VI requires the Board to purchase CGL, casualty and WC insurance on the condominium property and for the condominium association. Unit owners, on the other hand, are not required by Article VI or other provisions of the Bylaws to purchase any type or amount of insurance. Rather, Article VI provides only that the owners *may* purchase insurance for themselves and their units including betterments and improvements coverage, personal property/contents coverage, and liability coverage. See Subsections 3 (a) through (d) of Article VI of the Bylaws. Note that Article VI does not even suggest that the owners carry casualty insurance in order to cover the deductible on the Association's master casualty policy. While such "discretionary" language in the Bylaws regarding owner-purchased insurance (which is common to many condos in my experience) may be problematic for other reasons, I would again indicate that I do not think the

language in Article VI controls this issue.

My feeling is that correct approach to this issue lies with the Board's rule-making authority. The Board is free to promulgate rules regarding operation of the condominium property, so long as such rules are rational and not arbitrary, are not discriminatory, and do not conflict with the terms of the Bylaws or the Declaration. I therefore think it appropriate and lawful for the LHE Board to promulgate a set of rules and policies regarding the use by owners of third party contractors to perform work on or at units within the condo. The Board, in my view, certainly has an interest and duty in assuring that the condominium property and person on it are adequately protected, including by requiring any contractor who comes on the condo property to be fully insured (and licensed if required), and that proof of such insurance satisfactory in the eyes of the Board is provided to the Board prior to the time the contractor comes onto the property and commences work at a unit. Almost all of the condo associations of which I am aware in my own practice regulate all third party contractors who come onto the condo property in this or a similar fashion.

It sounds as if you have been following this policy with contractors hired by the association. I would note that you should ask your own contractors, as well as unit owner contractors to provide proof of CGL, auto and worker's compensation coverage. The lack of WC coverage can be a killer if the contractor lacks such insurance and an injured employee makes a claim against the association as his or her employer. I would suggest you discuss this issue with Chris Snow if you have not already done so.

In the final analysis, and as the Board desires, I can assist you in preparing a Board policy or set of rules regarding unit owner contractors which policy covers the following, basic points: (i) the provision of prior notice to the Board of a unit owner contractor coming onto the property to perform work on a unit (ii) the provision by the contractor or the unit owner to the Board of proof of the contractor's CGL, auto and WC coverage, in form and amounts satisfactory to the Board (iii) the provision by the contractor or unit owner to the Board of contact information for the contractor's insurance agent or carrier so that the Board may confirm proof of insurance provided by the contractor or address other questions as necessary (iv) the provision that if the contractor's insurance lapses, is cancelled or is terminated, the contractor must immediately inform the owner and the Board, and that any permission previously provided the contractor to come onto the condominium property is immediately revoked upon the lapsing, termination or cancellation of the contractor's insurance. Any other procedures you follow with respect to assuring coverage for the associations' contractors could also be worked into the policy.

At the same time, I am unsure whether the Board can lawfully *require* unit owners to have their own liability coverage with a rider for workers in their home, when the Bylaws expressly provide that the decision to purchase liability coverage by owners is within the discretion of the owners. I will think a bit more about this issue, but at least at present I think it presents an issue with respect to the current policy employed by the Board as to requiring such insurance be maintained by owners.

11. Finally, I still have some concerns about the extent of WC insurance that might be available to an injured volunteer, as compared to what the law requires be paid an injured employee. I will take these issues up directly and further with Chris Snow if you do not mind and will report back to you. It may be that I am confused as to what Chris indicated. Of course, the key to avoiding WC liability is by assuring as best we can that the relationship between the volunteers and the association is not deemed by the NH Department of Labor to constitute an employee-employer relationship, and I have tried to accomplish this per the draft release.

I hope all of this is helpful. Please contact me if you need further assistance or have any other current questions, which I suspect may be the case following your meeting. If the Board determines that a face-to-face meeting between use would be helpful, I am more than happy to try and accommodate such request. Thanks much. Gary

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From: Gary A. Braun [GBraun@winerbennett.com]
Sent: Tuesday, March 24, 2009 4:59 PM
To: brittons@worldpath.net
Subject: Amendment to Declaration
Attachments: Certificate of Amendment to Declaration.doc

Hi Marilyn – Here are the draft amendments to the Declaration, set forth in a single document entitled "Certificate of Amendment." The Certificate is in the precise form to be recorded at the registry of deeds following, and assuming, adoption of the amendments. As we discussed, it is my thought to have the owners cast a single vote for or against both amendments as they are entirely dependent on one another. In other words, we must amend both Sections of the Declaration, as set forth in the Certificate, in order for this to work as intended.

As you can see, both Section 3 (d) (iii) and Section 3 (e) (i) of the Declaration are subject to the amendment. The amended language for each Section is shown in bold on the attached Certificate. You and the rest of the Board can compare the new, proposed language with the old, existing language set forth in the Declaration. Please remember that the Declaration was previously amended (at least arguably) with respect to Section 3 (d) (iii) in 2000 and/or 2001.

The Board should understand that by amending the Declaration in this fashion, all utility fixtures, systems, elements and components that serve a single unit only shall be deemed part of the unit regardless of where the fixture, system, element or component is located. Further, because unit owners are responsible for all aspects of maintaining, repairing and replacing their unit per the Bylaws, they will be responsible going forward from the date the amendment is recorded at the registry for all aspects of maintaining, repairing and replacing those utility systems, fixtures, etc. that serve their unit only.

The Certificate is primarily submitted for the Board's review and edification. I would suggest that the unit owners be provided with a simpler document containing only the proposed amendment language when notice of the proposed amendment, and any meeting relating to the same, is provided to the owners. Finally, please note my prior comments about the timing of seeking lender approval of the amendments, which I believe should wait until and be conditioned on obtaining owner approval in the first instance.

I hope to also have answers to the other questions posed by Ms. Lammers within the next couple of days. Thanks much. Gary

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