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Board of Directors
Association of Unit Owners
of North Shore Terrace Condominium
c/o Yaquina Bay Property Management Inc.
146 SE 1st Street
Newport, OR 97365

RE: Review of Governing Documents

Dear Board:

This letter is in response to your request for our opinion addressing a list of questions presented by Deborah and Andrew Cordone in a letter dated February 20, 2007. I will generally follow the numeration set forth in the Cordones letter, and will summarize their specific questions. I will also address some other questions from Lee Hardy of Yaquina Bay Property Management, Inc.

1. Are the Declarations and Bylaws for each phase of the condominium legally established and binding?

The answer is "yes". The Declaration for the first building (Stage 1 – Building 86) and the Bylaws of the Association were recorded on April 1, 1992. Supplemental Declarations annexing each of the five additional buildings into the condominium were recorded between October 15, 1992 and November 4, 1997. Each of these documents is legally binding.

2. Are any provisions of the governing documents in conflict with Oregon State Law such that they are superseded and/or enforceable?

The state statutes governing condominiums in Oregon are the Oregon Condominium Act (OCA) set forth in Oregon Revised Statutes (ORS) Chapter 100. Many of these statutes have been amended several times since the condominium was created in 1992. Provisions of the governing documents that were consistent with the OCA when the documents were written may therefore be inconsistent with subsequent amendments to the OCA. When such an inconsistency occurs, it is often difficult, if not impossible, to determine which provision prevails or controls. Amendments to the statutes generally do

not specify whether they prevail over inconsistent provisions of a pre-existing declaration or bylaws. It basically boils down to the opinion of counsel. Because of this uncertainty, I generally recommend amending the declaration and/or bylaws to be consistent with the changes in the OCA.

Fortunately, I did not find many inconsistencies. However, I must caution that I have not attempted to identify every inconsistency between your governing documents and current Oregon law. Following are those that I did discover:

a. Article III, Section 3 of the Bylaws provides that the annual meeting of the unit owners shall be held each year on the anniversary date, which is defined to be the anniversary of the turnover meeting in which control of the association was transferred from the developer to the unit owners. Section 5 provides that no notice of the annual meeting is required if the meeting is to be held on the anniversary date at the principal office of the association. This is inconsistent with ORS 100.407(3), which requires written notice of all meetings of the unit owners, including the annual meeting. This inconsistency is probably not significant because you undoubtedly give notice of the annual meeting, whether or not it happens to be on the anniversary date.

b. Article II, Section 1 of the Bylaws provide that a written designation of authority (usually referred to as a "proxy") at any meeting of the association "shall be deemed valid until revoked in writing", which would appear to make a proxy valid permanently, unless it is revoked in writing. This is inconsistent with ORS 100.427, which provides that a proxy that has not been revoked terminates one year after its date, unless the proxy specifies a shorter term. We have always advised that the statute prevails in this instance.

c. Article III, Section 4 of the Bylaws provides that special meetings of the unit owners may be called at the request of any three unit owners. This is inconsistent with ORS 100.407(2)(a), which provides that "the bylaws may not require a percentage greater than 50% or less than 10% of the owners for the purpose of calling a meeting." Three units is less than 3.2, which would be 10% of the 32 units in North Shore Terrace. This is another example of an inconsistency that would rarely become an issue. Amending this provision to require the request of four unit owners would eliminate the issue entirely.

d. A more significant and complex inconsistency can be found in the provisions regarding insurance. Bylaws Article X, Section 1 provides that a unit that has suffered damage must be repaired or reconstructed, and as a result, the Board of Directors is to procure the insurance required by ORS 100.435(2). Section 2 of Article X in turn requires each unit owner to maintain fire insurance and liability insurance covering the owner's unit. ORS 100.435(2) provides that if the bylaws require individual unit owners to obtain insurance for their units, the bylaws shall contain a provision requiring the

Board of Directors to obtain fire insurance and liability insurance covering the common elements. If only those provisions are considered, it would appear clear that unit owners are required to purchase and pay for insurance on their individual units, while the board is only required to provide insurance on the common elements.

However, Subsection 1 of ORS 100.435 creates a significant inconsistency. That subsection states that if the bylaws provide that a unit that has suffered damage must be repaired or reconstructed (as your bylaws provide in Article X, Section 1), then "the Board of Directors shall obtain and maintain at all times and shall pay for out of the common expense funds, [specified] insurance covering both the common elements and individual units. . .". Therefore, there is an inconsistency because this statute appears to require the association to pay for fire insurance covering both the units and the common elements, while your bylaws clearly state that the association is only responsible for insuring the common elements, and unit owners are responsible for insuring their units.

Despite this inconsistency, it is my opinion that the provisions of your bylaws prevail on this issue. The inconsistency would be eliminated if Article X, Section 1 was amended to remove the requirement that a damaged unit must be repaired or reconstructed.

e. Bylaws Article XIV, Section 2(i) provides that:

> "No antenna of any nature whatsoever shall be installed or maintained by a unit owner upon or within the common elements or units so as to be visible without the prior written consent of the Board of Directors."

While that provision may be consistent with Oregon law, it is somewhat inconsistent with Federal law. A rule adopted by the Federal Communications Commission prohibits private restrictions, including condominium association provisions, that prevent owners from installing certain antenna, including satellite dishes of less than one meter (39.37 inches) in diameter, in areas to which the owner has an exclusive right to use, such as on a deck that is a limited common element. 47 Code of Federal Regulations (C.F.R.) Section 1.4000. The provision of the bylaws requiring board approval may be valid, but the board does not have the legal right to prohibit outright an antenna that is covered by the FCC rule.

f. Article XX of the Bylaws provides that amendment of the Bylaws requires approval by a majority of unit owners, except that amendments relating to age restrictions, pet restrictions, limitations on the number of persons who may occupy units, and limitations on the rental or leasing of units shall require the approval of two-thirds of the unit owners. This provision is inconsistent with ORS 100.410(4)(b), which provides that an amendment relating to those specific matters "is not effective unless approved by at least 75% of the owners or a greater percentage specified in the bylaws." This inconsistency is the result of an amendment to the statute adopted in 2001. It is not clear

whether that amendment to the statute supersedes the inconsistent provision in your previously adopted Bylaws. I note, however, that Section 11 of the Declaration for Stage 1 does contain a restriction providing that no unit can be rented or leased for any duration of less than 30 days. Because that provision is in the Declaration, it prevails over the inconsistent provision of the Bylaws, and requires the vote of 75% of the owners to amend it (the percentage generally required to amend a declaration). The most pragmatic solution to the inconsistency would be to amend Article XX of the Bylaws to be consistent with the statute by requiring 75% of the owners to approve an amendment relating to those specified matters. That amendment would only require the approval of a majority of the unit owners.

I found several provisions of the Bylaws that I recommend be amended, although they are not inconsistent with Oregon law.

g. Article I, Section 2 states that the principal office of the association is 433 North Coast Highway, which is Mishey Real Estate.

h. Article III, Section 3 states that the annual meeting of unit owners is to be on the anniversary date of the turnover meeting. It should be amended to provide that the board will set the date of the annual meeting, but specify the month or months in which it should be held.

i. Article III, Section 5 provides that "no matters other than those shown on the agenda [of a meeting of the owners] shall be considered at the meeting unless all the condominium owners unanimously consent to the addition of other matters to the agenda." That is a typical provision for special meetings, but in your Bylaws it also applies to the annual meeting if it does not occur on the anniversary date. In most associations, owners are permitted to consider and act on any matters that come up at the annual meeting, except for specific matters that by law or another provision in the bylaws cannot occur unless stated in the notice. Examples are amendment of the declaration or bylaws and the removal of a director. I strongly recommend an amendment to allow this practice.

j. Oregon law allows matters to be submitted to the owners for a vote by mail without a meeting, unless this practice is prohibited by the bylaws. This can be a very efficient way to decide certain issues. However, Article III, Section 8 provides for action of the owners, without a meeting, if <u>all</u> owners sign a consent to such action (rather than the number of votes that would be required at a meeting). Arguably, this provision precludes the use of mailed ballots. I recommend Section 8 be replaced with one allowing mail-in ballots without a meeting.

k. Article VI, Section 1 provides that whenever a director sells his [or her] unit, the board must appoint one of the purchasers of that unit to fill the selling director's

seat. There is no rational basis for that requirement, in my opinion. This should be amended to permit the board to appoint any unit owner the board feels is qualified, just as it does when a director resigns for any other reason or dies.

l. I found no provision authorizing special assessments when needed. In my opinion the OCA provides that authority, or special needs can be included in the budget and be funded by regular assessments, but this should be covered. In many associations, special assessments require a vote of the owners, or approval by a specific percentage of the unit owners.

m. Article XIX, Section 1 designates National Security Bank, which no longer exists, as the association's bank.

3. Are any provisions of the governing documents for each phase of the condominium in conflict or inconsistent with each other (such as defining general and limited common elements or unit space)?

I understand from Lee Hardy's letter to me dated May 3, 2007 that owners have asked questions regarding the definitions of basic terms such as "general common elements", "limited common elements", and the difference between undivided interest and percentage interest in general common elements and limited common elements. Therefore, I will first review those basic definitions.

A condominium project is divided into three categories of property: the units themselves, general common elements, and limited common elements. "Units" are defined in each declaration, generally by both describing the vertical and horizontal boundaries of each unit, and also by listing certain components that are included as a part of each unit. There is also a statute, ORS 100.510, which supplements the definitions of each unit as set forth in the declaration. A unit is the only part of a condominium that is owned entirely by a single owner.

Common elements, on the other hand, are owned in common (as tenants in common) by all of the unit owners. Another way of saying the same thing is that the owners of each unit also own an "undivided interest" in the common elements of the condominium. ORS 100.515(1) ("Each unit shall be entitled to an undivided interest in the common elements in the allocation expressed in the declaration.") This undivided interest can be expressed either as a fraction (e.g. 1/5) or a percentage (e.g. 20%). In North Shore Terrace, the owners of each unit own an undivided $1/32^{nd}$ of the common elements. See Supplemental Declaration for Stage VI, Section 6.

All common elements are further classified as either "limited common elements" or "general common elements." "Limited common elements" are defined as "those common elements designated in the declaration as reserved for the use of a certain unit or

number of units, to the exclusion of the other units." ORS 100.005(18). For example, the decks in North Shore Terrace are classified as limited common elements. As such, the owners of a unit only have the right to use the decks associated with that unit. As an example of limited common elements used by more than one unit, the Supplemental Declarations for Stages IV and V provide that the sewage pump station serving those buildings is a limited common element used by the eight units in those buildings. Please note the distinction between ownership and use. All common elements, including limited common elements, are owned in common by all of the unit owners, even though only owners of one or more units have the right to use a particular limited common element.

"General common elements" are defined as all parts of the condominium that are not part of a unit or a limited common element. For example, the land, roofs, and exterior siding are general common elements.

In my review of the declarations for each building and the Bylaws, I did not find any provisions that were inconsistent with each other in terms of their definitions of general and limited common elements or parts of a unit. However, I did find an apparent inconsistency in the Bylaws regarding maintenance of limited common elements, which I will discuss below. That is not to say, however, that similar parts of different buildings are not classified differently by their respective declarations. For example, the declaration for Stage I provides in Section 6 that the covered patio area on the east side of each unit is a part of that unit. However, Section 5 of the Supplemental Declarations for Stages IV and V classify the patios on the south side of each unit as limited common elements. That difference in classification is legally valid.

4. Specifically address if maintenance and/or replacement of exterior doors, windows, balconies and decks are the responsibility of each unit owner or the Association.

I addressed these issues previously in letters dated June 3, 2004 and November 17, 2004. With regard to windows and exterior doors, my first letter concluded that, under Section 7 of the initial Declaration and ORS 100.510, these components are part of each unit and, as such, are the financial responsibility of the individual unit owners. I adhere to that conclusion. Section 7 provides:

> "Unit Boundaries. Each unit is bounded by the interior surfaces of its perimeter, including bearing walls, floors, ceilings, window and window frames, doors and door frames and the air space so encompassed. The finished material attached to said structural elements shall be a part of the individual unit. In addition, each unit shall include the outlet of any utility services, including water, sewage, gas and electricity and any ventilation ducts within the unit [but] shall not include any part of such lines or ducts themselves."

This provision is ambiguous and poorly written. If it means that the boundary of a unit is the interior surfaces of windows, window frames, [exterior] doors, and door frames, then the windows, etc., themselves would be outside of the unit and, therefore, would be common elements. However, the phrase that follows is "and the air space so encompassed." Obviously that was not intended to designate a part of the boundary of units, but was intended to be a part of the unit. What the drafters meant was "[and includes] the air space so encompassed." The critical question is whether the drafters meant windows, etc., to also be included as a part of the unit (like the air space) or only a part of the boundary of a unit (like bearing walls, floors, and ceilings).

ORS 100.510 provides a solution to this uncertainty. It provides:

> "**100.510 Units and common elements distinguished.** Unless otherwise provided in the declaration, if the declaration designates walls, floors or ceilings as boundaries of a unit:
>
> (1) All lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring and any other materials constituting any part of the finished surfaces thereof shall be a part of the unit except those portions of the walls, floors or ceilings that materially contribute to the structural or shear capacity of the condominium. All other portions of the walls, floors or ceilings shall be a part of the common elements.
>
> (2) The following shall be a part of the unit:
>
> (a) All spaces, nonbearing interior partitions, **windows, window frames, exterior doors, door frames** and all other fixtures and improvements within the boundaries of the unit; and
>
> (b) All outlets of utility service lines, including but not limited to power, light, gas, hot and cold water, heating, refrigeration, air conditioning and waste disposal within the boundaries of the unit."

The relevant parts of this statute were in existence when the declaration was drafted and recorded. In my opinion, it applies to make windows and exterior doors part of the units, and thus the responsibility of the owners.

I note, however, that the requirement that individual unit owners bear the expense of maintaining and replacing these components does not mean that they have the right to paint their exterior doors any color they wish or install any style of window they wish. ORS 100.535(3) provides that, unless it is otherwise provided in the declaration or bylaws, "a unit owner may not change the appearance of the common elements or the exterior appearance of a unit without permission of the Board of Directors of the association."

With regard to decks, my letter of November 17, 2004 stated that the decks are classified by the declarations as limited common elements. That statement remains correct. The only reference to balconies that I found is in the declaration for Stage VI (Building 85). Section 5 of that supplemental declaration states that the balconies on the west side of the second floor of each of the four units is a limited common element.

My letter of November 17, 2004 also concluded that maintenance and repair of all decks and balconies is a common expense of the association. Upon further review, I believe that issue is more complicated than first appeared and that my earlier conclusion should be re-examined. The declarations do not specifically address the responsibility for maintenance, repair, and/or replacement of the limited common elements. That subject is addressed in Article X of the Bylaws, but it contains provisions which appear to be inconsistent. Section 6 provides:

> "Maintenance and Employment. Nothing herein shall be so construed so as to prevent the Association from retaining the services of personnel necessary for the maintenance, upkeep and repair of the common elements, and the expense of same shall be the expense of the Association."

Because this provision refers to "common elements," without differentiating between general common elements and limited common elements, it would generally be interpreted as applying to both kinds of common elements. ORS 100.005(7) (" 'Common elements' means the general common elements and the limited common elements.") That supports my earlier conclusion. However, the last sentence of Section 2 states:

> "Additionally, each unit owner shall be responsible for maintaining the limited common elements in good repair and condition."

That provision, on its face, is directly inconsistent with the contrary provision in Section 6. In attempting to reconcile such apparently inconsistent provisions, Oregon courts sometimes apply the principle that a more specific provision controls over a more general provision. Because the provision in Section 2 specifically refers to "limited common elements", while Section 6 refers more generally to "common elements", this principle would seem to make Section 2 prevail. Thus, the provision in Section 6 could be interpreted as applying only to "general common elements", despite the general rule that it would apply to both kinds of common elements.

Additional support for that interpretation can be found in the way "common elements" is used elsewhere in Article X. Section 5 states:

> "Proration. All general assessments shall be prorated among the units with each unit being responsible for a portion of the general assessment equal to that unit owner's fractional ownership of the **common elements**."

Here, again, "common elements" is used without differentiation. However, in addressing the same subject, Section 9 of the initial Declaration provides:

> "Allocation of Common Expenses and Right to Common Profits. Allocation of common expenses and the right to common profits shall be on the same basis as the allocation of the General Common Elements. Common expenses and the right to common profits shall not be affected by or allocated in accordance with any interest in Limited Common Elements."

Here, the allocation of assessments is clearly tied to the allocation of general common elements, and expressly **not** to limited common elements. The declaration prevails over the bylaws. ORS 100.122. Therefore, "common elements" in Article X, Section 5 of the Bylaws must have been intended to mean only general common elements. This creates a strong inference that "common elements" means the same thing in the very next section, Section 6.

For these reasons, it is my opinion that unit owners are responsible for maintenance, repairs and replacement of the decks and balconies associated with their units, and that my earlier opinion to the contrary was incorrect.

5. Allocation of Dues (Assessments).

Section 9 of the initial Declaration provides that the allocation of common expenses shall be on the same basis as the allocation of the general common elements. The general common elements are allocated equally on a fractional basis according to the total number of units, so $1/32^{nd}$ of the general common elements are allocated to each unit. See Supplemental Declaration for Stage VI, Section 6.

Section 16 of the Declaration for Stage I reserved the developer's right to annex additional stages to the condominium. Subsection 16(d) states:

> "The common elements to be added to the condominium would not substantially increase the proportionate amount of common expenses payable by the existing unit owners. Such additional common elements would merely consist of additional real property upon which identical or similar units would be constructed."

In their letter, Mr. and Mrs. Cordone assert that this statement was violated when subsequent stages were created. Their letter states: "The actual quantities of common elements added were not proportionate from unit to unit (not even close) and that substantially increased the amount of common expenses payable by each unit owner." To

support that statement, the Cordones included a chart showing the annual cost of maintaining each of the six buildings, based on the 2005 reserve study, and the cost per unit in the building.

It appears that Stage I (Building 86) is close to the median in annual maintenance costs, with Stage IV (Building 96 A-D) being by far the highest. The cost per unit is by far the lowest for Stages II and III (Buildings 66 and 76) because those buildings have the lowest annual maintenance cost and the greatest number of units (seven units each). Stages IV, V and VI have by far the highest cost per unit, largely because they have only four units in each building. Therefore, the argument is made that, with assessments being equal for all units, some unit owners are unfairly required to subsidize the higher proportionate maintenance costs of other units.

Mr. and Mrs. Cordone have asked a number of questions, the thrust of which is whether the statement in Section 16(d) of the initial Declaration provides a basis to change the dues structure of equal payment for each unit to some sort of proportionate system. The second part of my letter of June 3, 2004, stated that "any change to the allocation of liability for common expenses must be approved by the owners of the 'affected units'." I cited ORS 100.135(6), but did not quote that statute. That statute provides:

> "Except as otherwise provided in ORS 100.005 to 100.625, an amendment may not change the allocation of undivided interest in the common elements, the method of determining liability for common expenses, the method of determining the right to common profits or the method of determining voting rights of any unit unless such amendment has been approved by the owners of the affected units."

Section 13 of the initial Declaration says the same thing. The statute makes it clear that any change in the allocation of undivided interests in the common elements, or in the method of determining liability for common expenses, must be approved by the owners of the affected units. Because all 32 units would be affected by the proposed change, the approval of all unit owners would be required.

I know of nothing that would change this analysis. The governing documents under which all owners purchased their units clearly set forth the equal allocation of general common elements, equal liability for assessments, and equal voting rights. The alleged unfairness of that system does not change the legal rules.[1]

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[1] It is possible that the Association, or owners in Stages I, II and III, may have had a legal basis for suing the developers when Stages IV, V and VI were annexed. I express no opinion on that issue. I am confident that any claim that may have existed is legally barred by the passage of time.