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April 2, 2004

Bywater Way Road Maintenance Association

P.O. Box 65093

Port Ludlow, WA 98365

Re: Association's Right to Collect Assessments and Costs

Dear Members of the Association's Board:

You have asked for our opinion regarding the ability of the Association to assess property owners in the Bywater Way area for the costs of maintaining the roads.

As you know, all of the properties in the Bywater Way area are subject to covenants contained in two recorded documents, as follows:

(1) "Covenants and Private Road Easement and Maintenance Agreement," dated November 16, 1988, recorded under Jefferson County Auditor's File No. 318666; and

(2) "Declaration of Road Maintenance Covenants, Conditions and Restrictions," dated January 18, 1989, recorded under Jefferson County Auditor's File Number 319389.

These documents spell out the standards for maintaining the roadways in the Bywater Way development, assessing the costs against property owners and the procedures for enforcing the obligation to pay such assessments. These documents provide that any individual or group of homeowners shall have authority to implement and enforce the covenants.

In June of 2000, a group of property owners formed the Bywater Way Road Maintenance Association, a Washington non-profit corporation, "to establish and administer a meaningful road maintenance program for property owners" in the area, and as a vehicle for enforcing the covenants.

The covenants provide that:

"Every Lot owner shall be liable for an equal prorata portion of the Contractor's annual charges for providing the Road Maintenance (the "Maintenance Fee").

We understand that, acting under the authority granted in the covenants, the Association has sent billings to all property owners during the last few years. Although the vast majority of all owners have paid their annual maintenance fees as requested, a few have not. You have asked what steps the Association may take to compel the delinquent property owners to pay their assessments.

The covenants provide, at paragraph 5:

"5. Enforcement of Covenants. These covenants, conditions and restrictions are for the mutual benefit of Pope and its heirs, successors and assigns, and any Lot Owner is given the right to enforce the covenants, conditions and restrictions by injunction or other lawful procedure and to recover any damages resulting from such violation."

The foregoing provision authorizes any homeowner (or the Association, representing all of the homeowners or some of them) to institute legal proceedings to collect delinquent assessments.

Paragraph 8 of the covenants also authorizes the recovery of the costs of filing suit to recover delinquent assessments:

"8. Attorneys Fees. In any suit, action or appeal therefrom to enforce or interpret this Declaration, the prevailing party or parties shall be entitled to recover its or their costs incurred therein, including court costs, costs of litigation and reasonable attorneys fees."

With respect to the question of whether a lien may be placed on property to secure the obligation to pay, the covenants contain the following clause within paragraph 3:

"3. ....If any Lot Owner does not pay his portion of the Maintenance Fee when due, then the Contractor shall have the full right and authority to place a lien against the Lot

Owner's Lot for nonpayment of such portion of the Maintenance Fee."

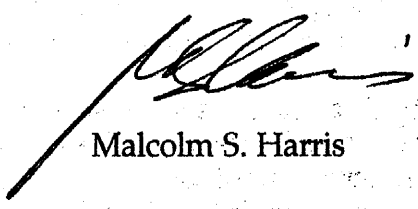
This language purports to give the contractor performing the maintenance services a lien right, rather than creating that right for the owners or for an Association. However, I believe that the Association could succeed to the contractor's right by having the contractor execute a simple assignment of the contractor's right to impose a lien, whenever a particular project is undertaken. Alternatively, you could simply rely upon the fact that, if you sue a delinquent party and obtain a judgment, the full amount of the judgment automatically becomes a lien against all real property in the county owned by the judgment debtor.

I have also reviewed the provisions of the Homeowners Association Act at RCW Chapter 64.38. Your association is a "homeowners' association" as defined in the Act and, as such, has the authority to "Impose and collect charges for late payments of assessments ....." [RCW 64.38.020(11)]. Accordingly, you may wish to institute a "late payment fee," interest or other penalty for failure to pay on time. The Act does not, however, authorize an Association to impose a lien upon property, unless such authority is expressly granted in other documents which are recorded as senior covenants against the property. You would have to rely upon an assignment from the contractor or a judgment lien in order to have lien rights, as discussed above.

I hope that this letter answers your questions. Please do not hesitate to contact me if any questions remain.

Yours very truly,

HARRIS MERICLE & WAKAYAMA



Malcolm S. Harris

Property Owner  
Address  
City, State, Zip Code

Re: Delinquent Road Maintenance Fees

Dear Property Owner

Our records show that the Bywater Way Road Maintenance Association (a Washington State Non-profit Corporation of Lot Owners) has not received the following payments for the property known as (Sub-division name/Lot Number) located at (Address).

<u>Year</u>	<u>Maintenance Fee Due</u>	<u>Accrued Interest</u>	<u>Total Amount Due</u>
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The Covenants that apply to this property for Road Maintenance are Jefferson County File Numbers 318666 and 319389.

The Covenants and Private Road Easement and Maintenance Agreement, Jefferson County File Number 318666, Section 2 reads:

"When a majority of the lot owners decide that maintenance is needed on the easement roads, the expense shall be borne in equal shares by the owners of all lots adjoining said easements or their heirs, assigns or successors, unless and until such roads are improved to county standards and are dedicated to and accepted by Jefferson County."

In addition the Declaration of Road Maintenance, Covenants, Conditions and Restrictions, Jefferson County File Number 319389, Section 3 reads, in part:

".....Every lot owner shall be liable for an equal prorata portion of the Contractor's annual charges for providing the Road Maintenance (the Maintenance Fee)."

Section 5 of this Covenant allows any Lot Owner to enforce the covenants and recover damages from violations. Section 8 provides that if action is taken to enforce the Covenants, the prevailing party is entitled to collect all costs incurred including court costs, cost of litigation and attorney's fees.

The Bywater Way Road Maintenance Association hereby <sup>expects.</sup> demands that you pay the full amount of the Maintenance Fees and Accrued Interest within 30 days. If payment is not received in full by that date action will be taken to collect the maintenance fees, accrued interest and costs including filing costs and attorney's fees.

Respectfully

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President, Bywater Way Road Maintenance Association