

JEFFREY J. BODE, Lawyer

Bellingham National Bank Building, 103 East Holly Suite 422, P0 Box 6092, Bellingham, W A 98227
(360) 734-4219 - jjbode@ecosystem.org

ATTORNEY-CLIENT COMMUNICATION PRIVILEGED AND CONFIDENTIAL

June 11, 2004

Edgemoor Association Board of Trustees
C/o Cassandra Koplowitz
229 Middlefield Road
Bellingham W A 98225- 7721

Dear Trustees:

You have asked for my opinions on a range of subjects that affect the Edgemoor Association's structure and affairs. This letter contains my opinions on those subjects. I appreciate your patience in waiting for these answers.

To prepare my opinions, I considered the following documents you provided:

Edgemoor Association vicinity map, purporting to depict the existing and 2 proposed boundary changes

2/16/1954 Articles of Incorporation of Edgemoor Association

4/9/1954 Quit-Claim Deed from Consuelo and Mary Larrabee and Mary Bourque to Edgemoor Association

8/23/1954 letter Moen to Sherwood 7/15/1951 letter Moen to Sherwood

7/14/1954 letter Horowitz to Moen

7/13/1954 letter Sherwood to Horowitz

By-Laws of Edgemoor Association, annotated "from 1984"

May 2003 and Feb 2004 proposed revisions of By-Laws of Edgemoor Association

12/10/1953 to 7/9/2002 Edgemoor Association Timeline of Events,

5/12/1954 Minutes of First Meeting of Trustees of Edgemoor Association

"June, 1971" unsigned Judgment and Decree in cause *no.43561* (Whatcom Cy. Super. Ct.)

7/2/1992 letter Doran to Burlington Northern Railroad 7/29/1992 letter Kroschel to Doran

1/25/2004 notes re. lagoon discussion between Sandie Koplowitz and Tim Wahl

10/29/2003 minutes of Edgemoor Association Executive Board

3/1/2004 letter Asmundson to Sutherland

Undated aerial photos (two) of Edgemoor vicinity

Annotations on most of the documents you provided indicate they were scanned from sometimes quite old originals. I do appreciate the convenience with which the uniformly clean scanned text can be read. However, I mention this because it limited the scope of my work, in that I did not consider the original documents. I do not know whether text scanning is any more or less prone to error than reading an old original, but I mention it as a caveat.

I also considered the following documents in the county auditor's records

9/7/1938 plat of Edgemoor

1/5/1946 plat of Edgemoor Division 2

7/*/1947 plat of Edgemoor Division 3 (*illegible date) 9/14/1949 plat of Edgemoor Division 1A

10/15/1953 plat of Edgemoor Manor

11/24/1947 deed from Larrabee Real Estate Company to Jackson

I turn now to your questions, which appear below in *italics* beneath the bold headings under which you arranged them.

Membership in Edgemoor Association:

Is membership in EA determined by property ownership or payment of dues or both?

Both, and by other factors. Article I of the by-laws determines membership. Eligibility for membership is restricted to owners of any lot in the four plats described in Art. I Section I. Sections II and III created two classes of members, charter and regular, both of which require payment of "dues or assessments" to be in good standing under Section IV. Section VI allows membership to be transferred to the buyer or other successor of a member's lot, if the Secretary is notified within 30 days. Section VII allows members to withdraw upon written notice to the Secretary, if given within certain time limits. Under the eighth section, the members in good standing may vote to forfeit a member's membership for non-payment of assessments.

Membership Fees and Assessments:

Can we institute mandatory membership fees assessed on all property owners in Edgemoor?

Yes, although you should choose the best way to go about doing this. There are at least three possible options: (1) rely on your existing by-laws and articles of incorporation for the necessary power; (2) amend your by-laws to expressly provide this power; (3) amend both your articles and by-laws to provide this power. I discuss these options in the following paragraphs.

One could argue that your by-laws have already instituted mandatory membership fees, at least for regular members. Section III of your by-laws allows you to "establish" the regular membership fee "from time to time." This implies that you may vary the fee over time. RCW 64.38.020 supports this interpretation, for among other powers it allows homeowners' associations to "impose and collect assessments for common expenses from owners," if that power is provided by the by-laws or other governing documents. Unfortunately, however, this reasoning touches only regular members, not charter members, and at best is an interpretive exercise.

Obviously, it would be better to amend your by-laws to provide, in unmistakably clear terms, for mandatory membership fees assessed on all owners. However, in evaluating this second option you should bear in mind that the statute allowing the exercise of this power is relatively recent. The

Homeowners' Association Act, Chapter 64.38 RCW, is so new that few courts have yet had occasion to comment on its meaning. At least one court (Division One of the Washington Court of Appeals, whose opinions matter because they bind the Whatcom County Superior Court) has interpreted Ch. 64.38 in a manner that is very generous to homeowners' associations. Division One has ruled that by-laws may be amended to exercise any power set forth in RCW 64.38.020, so long as the articles of incorporation and the covenants are either silent as to that power or not inconsistent with its exercise. This ruling suggests that no amendment of your articles of association may be necessary for the purpose of instituting fees and assessments. However, although this ruling may seem tempting, it is the opinion of but one of three Divisions of the Court of Appeals; if a conflict among the Divisions were to develop, then the Supreme Court of Washington would resolve it, and meanwhile the outcome cannot be forecast with any reliability. In other words, the law suggesting you need only amend your by-laws, is unsettled.

Under these circumstances, it would be best for you to do what you can to support the powers you wish to exercise, without relying exclusively on RCW 64.38.020. This means you should amend the articles of incorporation, as well as the by-laws. The membership can amend the articles of incorporation to provide that the by-laws may contain any power authorized by the relevant law, including the Non-Profit Corporation Act as well as Ch. 64.38. The membership could then amend the bylaws to allow you to exercise those powers. You will find it necessary to amend the articles anyway, to accomplish other changes you want. I now turn to your next question.

What is the mechanism by which we enforce it?

Under your existing by-laws the membership clearly may forfeit a delinquent's membership. But in my opinion this gets you nowhere. Under by-laws containing all the powers set forth in RCW 64.38.020, you could among other possibilities enforce a mandatory assessment by late fees, and ultimately by a lien on the delinquent lot that you could foreclose like a mortgage. However, for the reasons explained in my answer to the preceding question, I recommend that before you amend the by-laws to contain powers to enforce assessments, you first amend the articles of incorporation to provide for those and other powers.

Edgemoor Association Boundaries

Can EA legally increase our boundaries?

Yes. Increasing the boundaries would require action by the existing membership. exercise power over the proposed members similar to that exercised over the existing membership would require the proposed members' consent.

What is the mechanism for doing so?

To the existing membership may increase the boundaries by amending the articles of incorporation to describe the enlarged area. However, before you will have the power to approve building plans and enforce restrictions in existing covenants on lots in the added area, you will need the consent of the affected lot owners. If there are no covenants on some lots whose owners wish to become members, you could prepare and record a uniform set of covenants. Likewise, for the power to impose dues, assessments, and general regulations, you could first amend your articles of incorporation, and then amend your by-laws, as described above; and then *record* your by-laws. In either case, the affected lot owners would consent to enforcement of the covenants and by-laws by signing an appropriate instrument.

If we increase our boundaries, will the annexed properties have the same rights to the lagoon property as the original property owners, or shall rights to the lagoon property run with the original property owners?

Yes and no. To clarify, increasing the Association boundaries would not affect the ownership of the lagoon property or rights to its use. However the Association, not the members as lot owners, owns the lagoon property and holds the power to decide who may use it.

If we increase our boundaries, will that affect the rights granted to us to enforce the covenants and building restrictions by the Larrabee foundation as stated in the Quit Claim Deed?

No. Increasing the Association boundaries will not affect the rights granted by the Quit- Claim deed.

Lagoon Property Liability Issues:

Can we be found liable for personal injury on the lagoon property?

If so, are all property owners in EA liable or are only current EA members who paid their dues liable?

Does our incorporation protect us from liability?

If the corporation becomes a stock corporation, does that protect us from liability ?

If we leased the property to adjacent property owners and asked them to provide proof of insurance, does that release us from liability?

I answer these related questions together. Yes, it is possible for the Association's members, officers or trustees to be found liable for an injury they did not cause in any physical, blameworthy sense, but simply because of their status as a member, officer, or trustee. But generally the members and management of any type of corporation (nonprofit, stock, or other) do not have personal liability for the obligations of the corporation. (Recall that the Association owns the lagoon property, not the member lot owners or the officers or trustees).

The principal exception to this general rule is the doctrine of "piercing the corporate veil." Under this doctrine, courts in certain cases have disregarded the corporate form to impose personal liability on corporate owners. Washington courts have followed a restrictive rule requiring proof that (1) the corporate form has been intentionally used to violate or evade a duty owed to another, and (2) disregard of the corporate form is necessary to prevent unjustified loss to the injured party .Therefore, the risk of personal liability is limited.

This limited risk can be managed. It can be reduced by posting warnings, by adopting and enforcing safety rules, by improving the safety of the physical environment of the site through conscientious landscape design. The risk can also be insured. A major benefit of liability insurance is the insurer's duty to defend against claims. The cost of defense must be borne by a defendant, or by the defendant's insurer, regardless of the outcome of litigation. Without insurance, the Association or its members, officers, or trustees, as the case may be, would need to employ their own defense counsel to defend against even frivolous claims.

To fund insurance, the Association could amend its governing documents to allow it to assess its members for the cost of liability insurance for members, officers, and trustees. Commercial packages including this coverage are available. Insurers can often suggest additional ways to manage risk exposure and reduce risk. Moreover, an appropriate liability policy would insure against risks other than injuries on the lagoon site.

A lease to the neighboring properties, with an insurance requirement, would not provide as many benefits to the Association, its members, officers, and trustees, as a policy held by the Association. Under a typical lease, the Association would lose some control of the property and with it some opportunities to reduce

risk. The lessees might miss a payment resulting in a lapse in coverage, or overlook a notice requirement resulting in a loss of coverage. If a decision to lease the lagoon property is made, however, prepaid insurance naming the Association, its members, officers and trustees as principal beneficiaries should be required of the lessees.

Would it help us to add a section in the articles of incorporation about indemnification of officers?

Yes, a section requiring indemnification of officers would help the officers directly, and would help the Association with an insurance claim. The relevant statute, RCW 23B.08.520, says that "unless limited by the articles," a corporation *shall* indemnify any "director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the director was a party because of being a director of the corporation against reasonable expenses incurred by the director in connection with the proceeding."

The statute does not mention officers. It seems fairly clear that the "director" in the statute is synonymous with "trustee" in your corporation, and it is arguable that since all your officers are trustees except perhaps a Secretary- Treasurer, "director" as a practical matter is nearly synonymous with "officer," too. But rather than rely on these interpretations, the better course would be to add an indemnification clause expressly benefiting trustees and officers.

Were you to obtain appropriate liability insurance for your Association, its members, officers, and trustees, your insurer would be responsible for defense of claims and for indemnification under this statute. If you do not obtain insurance, however, then the Association would need to be able afford to indemnify. If the Association's articles and by-laws were amended to permit an enforceable assessment process, it would improve the Association's ability to indemnify. However, because the cost of indemnification under the statute cannot be forecast accurately, insurance is a much more reliable solution.

Enforcement of Covenants and Restrictions

As we were given the duty of enforcing the C,C & Rs, how do we do so?

Enforcing the covenants has legal and practical dimensions. The Association holds a legal right to enforce the covenants directly by filing a legal proceeding against a non-complying lot owner within its jurisdiction, as it has apparently done before (e.g., *Greene v. Miller*, 1983). (Neighboring lot owners may hold the same legal right, but the subject of enforcement by individuals is beyond the scope of this opinion.) The Association may also enforce the covenants indirectly. After amending its articles and by-laws as described earlier, the

Association could adopt a variety of reasonable rules and regulations to implement the covenants, perhaps administered by a committee; it could impose fines for non-compliance with covenants, rules, regulations, or by-laws, after notice and an opportunity to be heard by the board or its representative; and in my opinion it could collect those fines in the same manner as unpaid assessments.

Regulation #1) states that the owner must submit building plans to the EA for review. How do we enforce that requirement?

This first covenant, requiring the Association's consent to construction, illustrates the difference between the legal and practical dimensions of enforcement. The covenant clearly is legally enforceable, by the Association, against any lot owner whose deed contains this covenant and who erects or places an unapproved structure on his or her lot.

Although the covenant is clear as a legal matter, the logistics of its enforcement are another matter. First, without checking the deed, one cannot say whether a lot owner is subject to this covenant. After considering the plats, my impression was that a few lots were not platted and so might not be bound by these covenants. Putting aside that detail, to enforce the covenant one must first be aware that construction is occurring. If a lot owner did not submit his or her plans, the only ways to learn of them involve regular and systematic vigilance. If plans are submitted, then the Association must have the resources to perform a timely review. In either case, if the lot owner commences construction before approval is granted, the Association has only one adequate remedy: a lawsuit seeking a restraining order. Once the articles and by-laws have been amended as I have recommended, RCW 64.38.050 would allow the court in appropriate cases to award reasonable attorney's fees to the prevailing party.

If they refuse and we go down to the Building Department and review their plans

&

If we then send a letter to that homeowner stating that we have reviewed their plans at the Building Department, does that invalidate Regulation # 1)

No, it would not invalidate the covenant to do this occasionally, but a habitual practice of waiving the submission requirement would be evidence of abandonment of the covenant. It is important to note that the covenant itself does not require submission to the Association before seeking permits from the City. Yet this omitted detail creates a practical problem for the Association and for the lot owner who obtains City permits for plans to which the Association is unable or unwilling to consent. At this time, the proper course for the Association is to amend its articles and by-laws as recommended and then prescribe a rule that coordinates the Association's consent process with the City's permit process. The City Planning and Building Departments should be consulted with respect to this rule.

May we bill for the time it takes to go to the Building Department and review the plans? How do we enforce its collection?

As things stand, no, I do not believe the Association could support a demand for payment for its officers' time spent reviewing plans at the Building Department. One reason is that the covenant does not require submission of plans to the Association before the City. Another reason is that the articles and by-laws may not support a regulation requiring such payment, were such a regulation to be adopted without the amendments I have recommended.

However, yes, after the amendments I have recommended are made, the Association may promulgate a regulation requiring pre-submission of plans to the Association, and imposing fines for violations, collectable in the same manner as unpaid assessments.

Some of the properties have height restrictions and set backs and a 9 month time limit between the start and completion of outside construction. Most of these violations may not be discovered until after the house is completed. How do we retroactively enforce these?

In the absence of fraud, concealment, or the like, it may be difficult to enforce such provisions after the fact. However, once the amendments I have recommended are made, height limits may be compared to the lot owner's written plans and consent withheld where appropriate, and if exceeded by the completed structure the limits may be enforced by fines or a lawsuit. The nine-month limit could be embodied in a reasonable regulation, perhaps with exceptions for appropriate circumstances, and a schedule of escalating fines for unexcused non-compliance. A lawsuit to enforce the time limit would be counter-productive.

What is the definition of "start and finish of construction"?

If the terms were not defined by the covenants, or by an applicable regulation, a court would give them their ordinary meaning, perhaps by recourse to dictionaries. However, as applied to an actual construction project the 'ordinary meaning' could produce widely differing results. In construction contracting, the terms "commencement" and "completion" of construction are typically defined by agreement, in terms of specific dates. One solution, after making the amendments I have recommended, would be to include in the regulation requiring plan submission a condition to consent predicated upon agreement to these dates.

Can we set up a fine system?

Must we go to court each time?

I believe I have answered the first part of this question, two paragraphs above. However, I must add that recourse to fines or other alternatives to litigation is a choice that may eventually preclude litigation as an option. To illustrate, imagine this: assume that a particular covenant had been enforceable by litigation, but the Association instead of ever filing suit set up a system of fines as its only enforcement mechanism for this covenant. Then the Association satisfied itself with fines for ten years, after which a particularly egregious violation occurred, prompting

it to file suit. I don't know how the suit would turn out, but I am certain the violator would argue that the Association had by its actions abandoned litigation as an enforcement tool, and that he or she, the violator, had relied upon this to his or her detriment. Therefore, the Association would have at least that additional argument with which to contend, so that its lawsuit would be that much harder to win. The moral is to be conscious that your choice of enforcement tools, and the habits you adopt in their use, could be used as evidence that you abandoned other tools.

Do we also have the right to enforce the covenants and building restrictions on annexed properties?

No. The act of enlarging the Association boundaries by amending its articles will not confer enforcement power over the added area. The consent of the lot owners in the added area is necessary before the Association may enforce covenants and restrictions found in deeds there. Please refer the discussion following the second question under the heading "Edgemoor Association Boundaries," above.

Name Change to Old Edgemoor Association:

Can we legally change our name to Old Edgemoor Association?

Yes.

What is the mechanism for doing so?

You may do this as part of the amendments of the articles of incorporation.

Does this name change allow us to retain the lagoon property ownership and rights granted in the Quit Claim Deed?

Yes. I will comment, however, that the name change risks confusion, especially if another group is formed as the Edgemoor Association or a similar name. For example, and in case you are not aware, the Edgemoor Community Association is an active Washington non-profit corporation, formed May 24, 2000. The address of its registered agent, Julie J. Saul (23016 SE 45th Pl., Sammamish, WA 98075), suggests it may be concerned with a different neighborhood, but I mention this out of an abundance of caution. This example shows that the Corporations Division of the Secretary of State may accept a confusingly similar corporate name.

By Laws Revisions:

What is the mechanism for revising the By Laws?

The Association board would first prepare proposed by-law amendments. The board then has two options on how to accomplish the amendments.

The first option is to hold a meeting. For that option, the Secretary must give the membership notice of a general or special meeting. The notice should be sent by mail or delivered in person and must contain the date, time, and place of the meeting and a brief statement of the proposed amendments. The notice must be delivered not less than ten or more than fifty days before the date of the meeting. A quorum of one-third of the membership must be present at the meeting. A vote in favor of the proposed amendments by two thirds of the members in good standing present at the meeting will accomplish the amendments.

The other option is to circulate a form of consent to the amendments. The form should request consent to the amendments and should set forth the proposed amendments in full. The consent form should be sent by mail, or delivered in person, to all members. A consent signed by all of the members in good standing will accomplish the amendments without a meeting.

After June 15, it will be possible to circulate a consent form by email. However, this will first require that members have consented to receive email from the Association, and that members designate an address for such email. For an Association of your size, I consider the use of email for this purpose would probably be more trouble than it is worth. If you disagree, please let me know and I will explain the required procedure.

Do proposed changes to the By Laws need to be reviewed by an attorney?

No, but I strongly recommend that a lawyer review your proposals.

If so, review the proposed By Laws changes.

I would be honored.

Articles of Incorporation Amendments:

If the name is changed to Old Edgemoor Association

If we must change the [reference to RCW 24.04 because that chapter has] been repealed If we add an indemnification clause

An amendment of the articles is necessary to accomplish any of the above.

What is the mechanism for amending the Articles of Incorporation?

The Association board should first prepare proposed amendments. The board then has two options on how to accomplish the amendments.

The first option is to hold a meeting. For that option, the Secretary must give the membership notice of a general or special meeting. The notice should be sent by mail and must contain the date, time, and place of the meeting, and a brief statement of the proposed amendments. The notice must be delivered not less than ten or more than fifty days before the date of the meeting. A quorum of one-third of the membership must be present at the meeting, if held. A vote in favor of the proposed amendments by two thirds of the members in good standing present at the meeting will accomplish the amendments.

The other option is to circulate a form of consent to the amendments. The consent should be sent by mail, or delivered in person, to all the members. A consent signed by all of the members in good standing will

accomplish the amendments without a meeting. (Please see the paragraph about consent by email, at the top of this page).

The Association must next prepare Articles of Amendments in duplicate. The Articles of Amendment must set forth:

- (1) The name of the corporation.
- (2) The amendments so adopted.
- (3) (a) A statement setting forth the date of the meeting of members at which the amendments were adopted, that a quorum was present at such meeting, and that such amendments received at least two-thirds of the votes which members present at such meeting were entitled to cast, or

(b) A statement that such amendments were adopted by a consent in writing signed by all members entitled to vote with respect thereto.

An officer of the Association must sign the Articles of Amendment in duplicate. Both signed originals of the Articles of Amendment must then be filed by mailing them under an appropriate cover letter to the Secretary of State, Corporations Division, p .0. Box 40234, Olympia, W A 98504-0234.

This ends my answers to the questions you asked. I am aware that some of my answers may raise other questions. I would be happy to meet with you to discuss any questions you may have. Toward that end, I could meet on June 14 or 15 at any time between 3: 15 p.m. and 11:00 p.m. Please let me know by phone or email if you wish me to be present. Thank you.

Sincerely,

(Signature on File)

Jeffery J. Bode