VIA EMAIL AS PDF ONLY,
TO giacinto@mcn.org and hannahclayborn@sbcglobal.net

19 January 2015

Re: Timber Cove Trails Issue

Dear Hannah, John and Tom:

This document answers questions which the three of you presented regarding the Timber Cove development ("TC") in Jenner.

I.

INTRODUCTION

TC features a number of meandering trails or paths, suitable for travel by members and invitees both on foot and horseback ("Trails"). The questions presented center on whether TC members’ use of the Trails can be protected from efforts by the HOA Board ("TCB") to modify, diminish or eliminate such use. As is discussed more fully below, my opinion is that those rights of use have been established as easements, and can be protected. As I understand it, the question arises from the following events:

- A residential real estate development on the coast, TC is burdened by CC&Rs and a recorded map, both documents having been created and recorded with the Official Records of the County of Sonoma in March of 1965. They appear not to have been modified since that time.
- Both the map and the CC&Rs make reference to the Trails.
- To varying degrees of frequency since 1965, TC members have taken advantage of and benefitted from use of the Trails for exercise, exploration, recreation and enjoyment, for the beauty, serenity and quiescence of the wooded environment and views of the coast and nature.
- Recently some TC members have undertaken to change the dimensions of their parcels by merger, lot line adjustment or otherwise. These parcel changes have been approved by the County of Sonoma. The county has refused to opine on whether such changes impact any easements exist, has referred any interested party to private counsel for such a determination and, in bold, print, all caps, made it clear that it was dealing only with the issue of public access to any trails or pathways in TC (see undated memo from County of Sonoma PRMD “Re: Right-of-way
Vacation of Trail Easements).

These lot changes have created a perceived conflict or disturbance with the interrelation between them and the existing paths and trails.

Some or all members who have so adjusted their parcels may take exception to the use of the trails or paths adjacent or through their parcels because of concerns related to an invasion of privacy, seclusion and perhaps interference with plans to improve certain parcels or portions of parcels. Some of these TC members who claim to be adversely affected by the location of the Trails also serve on the TCB.

Minutes maintained in the normal course of business for TCB meetings reflect that the modification or elimination of Trails was argued, discussed, then voted on, receiving a unanimous vote, by all TCB members including those whose parcels are affected. At the next TCB meeting, per the usual custom and practice, the minutes were reviewed and approved. Thereafter, other TC members complained about an apparent conflict of interest for the TCB members who voted and are interested in the matter brought to vote. TCB then sought to revise the minutes and asserted that the conflicted members had in fact recused themselves from the vote. The efforts to modify or eliminate the Trails have not been brought to a vote by the general TC membership.

TCB is sufficiently concerned about its actions that it retained Barbara Zimmerman, an attorney in Santa Rosa, for an opinion as to the propriety of its actions. The more recent work by her was not something voted on by TCB, since Tom Giacinto, a board member didn’t hear about it and didn’t otherwise approve it. Tom suspects that VC funds have been used to pay for Ms. Zimmerman’s services. TCB declined to distribute the Zimmerman opinion, though asked to.

II.

ANALYSIS

A. Conflict of Interest

A board member’s voting on a pending matter that advances his or her interests is a fairly obvious conflict of interest, and is totally improper (Corp. Code, § 7233, subd. (b)(1), (2); Raven’s Cove Townhomes v. Knuppe Dev. Co. [1981] 114 Cal.App.3d 783, 799). The after-the-fact attempt to revise the minutes—thus altering a document which correctly reports the event to avoid the documentation of an embarrassment or a potential liability—simply compounds the problem. In my opinion, the interested members cannot even participate in the deliberation of the issue. Thus, not only did the board tolerate an indiscreet conflict of interest, falsifying the record memorializing it exacerbates the malfeasance.

B. TCB’S Procedural Errors

1. Previous Vote Void. Since members of a board of directors may not vote on a matter in which they have a vested interest and in this case the interests of voting members were in conflict, the vote by TCB on the Trails issue is void. It cannot be redeemed by erasing some of the votes or the revision of minutes. Any action based on the void vote would again compound liability and fault already attached to the board (CAJUR CORPORATIONS § 830 Common directorship conflicts of interest, California
2. Procurement and handling of Zimmerman Opinion. The Barbara Zimmerman letter, assuming it was the product of a hire by the TCB and paid for by TC money, is property of the TC. As such, any member of TC is entitled to see and get a copy if he or she wishes. The reported reluctance by some TCB members to share the letter, or even the hesitation to do so, is not only improper, but also is consistent with conduct of guilt or liability. One could argue that, along with other conduct by board members here, it is an implied admission of liability for a breach of fiduciary duty and self-dealing.

3. The Proper Vote. Under Clause VIII of the CC&Rs, pedestrian and equestrian access and routes are to be protected. The clause does say that the "easements . . . shall not be within the building area of any lot after it has been designated," but I don't know if any of the lot line adjustments or alterations that has created a building envelope that competes for space with an existing trail; if the county were approached on such an issue, I doubt the county would approve such an envelope after hearing concerns of objecting TC members who don't want Trails in use for nearly fifty years to be eliminated. Be that as it may, under Clause XIII, the CC&Rs may be modified, in other words the location of mapped Trails changed, but that requires "written consent of the Association and of the owner or owners of record of the property to which such annulment, waiver, change or modification shall apply." [emphasis added]. I don't know if any parcel in TC that would not be affected by such a change. Thus, were the board to propose that the existing trails be relocated, not only would a fully-noticed hearing or meeting be required, but written consent from virtually all, if not all, TC property owners would be needed.

C. The Trail Easement Rights

I understand that some, perhaps many, TC members don't avail themselves of the Trails and have asserted that the Trails have been abandoned or at least receive use only in extremely rare situations. You've disputed this notion. The frequency of use of the Trails however does not control the termination of the right for others to use the Trails. I further understand that it may be that Ms. Zimmerman maintains that there is no easement rights in the Trails vested with TC members.

I do not share Ms. Zimmerman's view, if I indeed have stated it accurately. To do so would be to ignore nearly fifty years' of use and acquiescence to the easements' existence, it's being of record and the existence of which every buyer of a TC parcel has been allowed to rely in acquiring his or her parcel. Yet, "[the meaning of the language in the deed . . . may be interpreted in light of the circumstances surrounding its execution, including the conduct of the parties subsequent to the transaction" [emphasis added] (Miller and Starr California Real Estate 3D, Database updated September 2014, Harry D. Miller and Marvin B. Starr, Chapter 8. Deeds; see also City of Manhattan Beach v. Superior Court 13 Cal.4th 232, 914 P.2d 160 Cal.,1996.). I have reviewed a sample legal description on a deed for a parcel in TC. The deed makes it clear that the subject property is part of Timber Cove and is described by reference to the map, which must then be viewed not only for its content but also that of the CC&Rs. The word "easements" is used with approval in the CC&R section referenced above. The conduct of the members of TC over nearly fifty years has confirmed the location of the easements, if a given length of a trail were to be found to deviate slightly from the map.
Furthermore, the notion that there are no easements cannot be true based on grounds of estoppel (Miller and Starr, 6 Cal. Real Est. § 15:45 (3d ed.) Methods of Creating an Easement, 6. Other Methods of Creation).

Estoppel on sale by reference to a map. A subdivide or other seller may sell property by reference to an unrecorded map that shows streets providing access to the property.[FN8] Although there may be nothing of record or in the deed that indicates that there is an easement in the street, the seller may be stopped from denying that such an easement exists in favor of the buyer's lot, because of the buyer's reliance on the display of the map showing the street, and the seller's representations that it can be used by the buyer.[FN9] (ibid.; see also Christian v. Flora, 164 Cal. App. 4th 539, 78 Cal. Rptr. 3d 892 (3d Dist. 2008))

III.

CONCLUSION

Members of the TCB have exposure for breach of fiduciary duty and self-dealing. The previous vote is void. Members of TC have an easement on and over the Trails. In order for this to change, the CC&Rs would have to be modified, a prospect I suspect has little chance of ever happening.

Please call if I can be of any further service. Thank you for this opportunity to offer my help.

Yours Truly,

[Signature]

Martin G. McOmber

MGM: mh