

9/12/08

VIA REGULAR MAIL

Mr. Michael Winer

Re: Silver Springs Underdrain System

Dear Michael:

Pursuant to our telephone conversation of last week, I am sending an outline of my findings respecting the Association's obligations respecting the underdrain system in the Silver Springs^{SE} Homeowners Association.

As we discussed, and as I believe you are aware, there is a long history of documents and amendments respecting the Silver Springs Homeowners Association; there is also some confusion arising from the relationship between the Silver Springs Homeowners Association and the Master Association. All of these factors are further complicated by the fact that Utah does not have any comprehensive statutory law dealing with the governance of community associations. All of this makes it difficult to assess with any certainty how a court would interpret the Association's obligations respecting the underdrain system.

There are certain conclusions that can be drawn from a review of the documents, however. These include the fact that the Summit County Planning Department has been concerned regarding groundwater within the Silver Springs area since the inception of the project, and the developer was specifically required to deal with these issues. Summit County has occasionally assisted in the maintenance of the underdrain system but has denied an obligation or intention to do so in the future. Several years ago, several board members of the Silver Springs^{SE} Homeowners Association were under the assumption that the Master Association would be responsible for maintenance the underdrain system and the Association's other common areas.

Following my review of the documents, I cannot state with certainty that the Association has a legal obligation to maintain the under drain system. Nonetheless, I would recommend that the Association should accept that responsibility, unless the Homeowners Association can

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substantiate that the maintenance obligation has been assumed by the Master Association. (I would recommend another request to Summit County, but it seems quite clear from 2004 correspondence that Summit County will not accept that obligation.)

Document Background

The Silver Springs Homeowners Association's original declaration, recorded in 1979, did not impose any obligation for maintenance of the underdrain system; the obligation for maintenance initially arose on June 25, 1982. On that date, the Association's developer entered into an agreement with Summit County through which the developer acknowledged an obligation to maintain "the underdrain system"; on the same date the developer recorded a Declaration Amendment which specifically added maintenance of the underdrain system to the Association's obligations. The June 1982 amendment modified Article 8 of the Declaration to include that the Association had the duty to

"(a) Own, and/or maintain and otherwise manage all of the common areas and all of the facilities, improvements and landscaping thereon, including but not limited to the private streets and street fixtures, the underdrain system and all other property acquired by the Association."

The Association's specific obligation to maintain the underdrain system appears to have remained part of the Association's documents until an amendment in February 1993; notes respecting the Board's review of the Declaration at that time suggests that the Association removed several sections of Article 8 based upon an assertion that "the responsibilities described in the deleted sections have been transferred to the Master Association". The obligations which were removed from the Declaration at that time included the Association's obligation to maintain all of the common areas, the obligation to pay the taxes, the obligation to obtain various utility services and the right to grant easements.

Assuming there is documentation which in fact transferred these obligations to the Master Association, I have not seen it. In the absence of such documentation, I am concerned that the Declaration Amendment may have passed under a fundamental misunderstanding by the membership; and I am concerned that the Association may face liability if the maintenance of the common areas "including the under drainsystem" were to simply have been abandoned.

Easement Provisions of the Declaration

Article IX of the original declaration provided several sections dealing easements; Article IX, Section 2 specifically provided: "Easements over the lots and common area properties for the installation and maintenance of electric, telephone, Cable Television, water, gas and sanitary sewer lines, drainage facilities... are hereby reserved by the declarant, together with the right to grant and transfer the same for the use and benefit of the members of the Association. The Declaration referenced platted easements "over the rear and side five feet of each lot".
plot provides 8 feet

I was informed by Bill Noland that the exact areas where the underdrains are located are unknown, and they may or may not^{ed} be within platted easements. There is, however, no reason to believe that any of those locations have been modified or altered since the beginning of the Association.

The Issue Presented

This issue was initially presented to me with an outline and number of documents from Bill Noland, who was acting as the Chairman of the underdrain committee. Shortly after I met with him, I received an email from Clay and Lucy Archer, suggesting that there may be differing viewpoints among the Board respecting the obligations and asserting that the underground system had been "abandoned". From this, I have assumed that there is a division among the Board as to whether or not the Association should be undertaking the expense of repairing and/or maintaining this under drain system. Additionally, there seems to be some dispute as to whether certain water issues in certain areas are related to failure of the under drain system or the result of surface water or other factors.

Conclusion and Recommendation

It is probably impossible, in the absence of a court review and order, to determine whether the Association has the legal obligation to maintain the underdrain system. It does appear quite clear, however, that Summit County has long had concerns about the groundwater in this area; it also seems quite clear that water-related issues have occurred periodically over the years and are occurring, at least on a limited basis, at the current time.

Although I cannot predict with certainty what a court may do if faced with these issues, I believe that the Board should, at a minimum, have the underdrain system inspected and evaluated by an engineer. Only following a professional engineer's review will the Association Board be able to determine whether existing problems are arising from the improper functioning of the underdrain system; if it is determined that the underdrain system is operating sufficiently, the Association's obligation will be met. Alternatively, if it is determined that the underdrain system is in need of maintenance or repair, the Association most likely has an obligation to repair it.

Even in the absence of the provision in the Condominium Declaration, I believe a court would impose an obligation upon the Association to maintain and repair the common areas. This arises by virtue of the nature of a Common Association; the Association has an obligation pursuant to the Declaration, even as amended, to "promot[e] the recreation, health, safety and welfare of the members of the Association and, in particular, the improvement and maintenance of the properties, services devoted to this purpose and related to the use and enjoyment of the common area. (Declaration Section 5.2). A similar obligation has been imposed by many courts, in many states, even in the absence of a specific obligation. The Uniform Common Ownership Interest Act (UCIOA), which has been adopted in many states and will be considered in the 2009 session of the Utah Legislature, specifically affirms this obligation and provides, in relevant part: "If damage is inflicted on . . . any unit . . . [and] the association if it is responsible, [it] is liable for the prompt repair thereof." (Section 3-107, UCIOA)

My recommendation that the Association should undertake the maintenance of the underdrain system also arises from the practical impossibility of individual maintenance. As the functioning of an underdrain system requires that the entire system function, it is not practical for the Association to assume that individual unit owners should undertake the maintenance of that portion of the underdrain on their own property. Even if this maintenance were somehow practicable, it would be inadvisable, as individual owners may improperly or inadequately maintain or repair the system. An improper or inadequate repair to the underdrain may be worse than no repair at all.

Conclusion

It is my recommendation, from practical and legal basis, that the Association should retain a professional engineer to review and evaluate the condition of the Association's underdrain

system. That engineer should prepare and provide a report for the Association Board as to the condition of the underdrain system, the nature of problems (if any) which are arising, and the needed and recommended repairs, if any. Following the receipt of that report the Board can and should reassess the situation and determine what the Association's proper course of conduct should be.

Should you have any questions regarding this matter, please feel free to give me a call. In the event that it may be of assistance in the Board meeting tonight, I can make myself available by telephone to discuss the issues which are to be discussed.

Very truly yours,

HOBBS & OLSON, LC

Lincoln W. Hobbs

Formerly affiliated with the firm
of Winder & Haslam

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SSSFHOA 1985 CCRs .

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