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March 7, 2024

Jack Jenkins, President
Waterside Condominium Owners Association, Inc.
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Re: Legal Opinion for Waterside Deck issue

Dear Jack:

The purpose of this communication is to provide a legal opinion of whether expenses that will be associated with the repair of the decks that are deteriorating should be classified as a limited common expense or a common expense. In order to provide this opinion, I have reviewed letters from Derek E. Pumphrey, New Rome Enterprises LLC dated January 10, 2024 and January 25, 2024 (“Engineer’s Letters”), Memorandum from Obermeier-Sheykhet Architecture dated January 25, 2024 (“Project Manager’s Memorandum”) Waterside Declaration and amendments, and Montana law (specifically the Unit Ownership Act, Section 70-23-101 et seq.)

A General Common Element is described in the Declaration of Condominium for Waterside Condominium under the Montana Unit Ownership Act recorded August 5, 2005 as Document No. 200521713500 (“Waterside Declaration”) as follows:

General Common Elements: The General Common Elements include, but are not limited to, the land specifically described in Section 2 of this Declaration, all buildings on the Property except the individual Units, all exterior doors, windows, screens, fences, roadways, curbs, gutters, sidewalks and landscaping amenities, and all other elements necessary for the safety, maintenance, and existence of the Property and all the buildings except for the individual Units and all those items listed in Section 70-23-103(7), MCA.

A Limited Common Element is described in the Waterside Declaration as follows:

Limited Common Elements: The Limited Common Elements are those Common Elements reserved for the use of fewer than all of the Unit Owners. Without limiting the foregoing, the Limited Common Elements shall include stairways, balconies, entrances, stoops, flues, chimneys, ducts, cables, conduits, public utility lines, water, sewer, electrical, gas, cable television lines, hot and cold water pipes (all such utility pipes and lines are Limited Common Elements where they service fewer than all of the Units; where they service all of the Units, they shall be General Common Elements), boilers, hot water tanks, and fixtures, or other portions of the building servicing only a particular Unit or less than all the Units, skylights, and the utilities and heating contained within such individual Unit to the exclusion of the use thereof by the Owners, except by invitation.

Any expense associated with a Limited Common Element will be a Limited Common Expense and be borne by only the Unit Owners whose Units are affected. Any other repair expense will be a Common Expense and will be shared by all Unit Owners.

General Common Elements are generally the buildings that comprise Waterside except the individual Units and “all other elements necessary for the safety, maintenance and existence of the Property and all the buildings” *Waterside Declaration, Section 5*. The Montana Unit Ownership Act includes the following partial list of General Common Elements: “the foundations, columns, girders, **beams**, supports, mainwalls, roofs, halls, corridors, lobbies, stairs, fire escapes, entrances, and exits of the building”. *Section 70-23-102(10)(b) (emphasis added)*. The definition contained in the Montana Unit Ownership Act is relevant to the extent not otherwise provided in the Declaration. *Section 70-23-102(10)*. The Montana Unit Ownership Act defines “limited common elements” 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.” *Section 70-23-102(12)*.

The Waterside Declaration defines Limited Common Elements as those common elements reserved for the use of fewer than all of the Unit Owners and includes “stairways, balconies, entrances ...” *Waterside Declaration, Section 6 (this section of the Declaration was amended in the 7th Amendment to the Waterside Declaration, but the cited language was not changed in such amendment.)*

As a point of clarification, there appears to be a statutory code reference error in the Waterside Declaration. The General Common Element paragraph shown above references 70-23-103(7). The Waterside Declaration references this statute as being excepted from the General Common Elements description (a listing of Limited Common Elements). I have reviewed and researched this issue and the cited section appears to have never existed – now or at the time of the Waterside Declaration. I believe it was merely a typographical error and meant to be 70-23-102(8), which has now been amended and renumbered as 70-23-102(12).

The determination of whether the deck issue relates to a Limited Common Element or a General Common Element hinges largely on the cause of the failure of the decks and whether it is part of the structure of the building or merely the deck itself. The Engineer's Letters, page 1, references parallel beams having deterioration. The deterioration being in the beams would seem to indicate that it is more of a structural issue than simply multiple decks that are deteriorating. In support of this conclusion, the Project Manager's Memorandum indicates that the structural engineer considered the beams to be part of the primary structural framing system, integral with the structure of the rest of the building. While the Waterside Declaration did not reference "beams" in either list of examples for the General Common Elements or Limited Common Elements, beams are referenced in the Montana Unit Ownership Act as a General Common Element. That term, as referred to in the Engineer's Letters, is consistent with it being an integral part of the building having to do with the structure itself and not the individual Units.

The principle that is clearly set out in the Waterside Declaration and the Montana Unit Ownership Act about General Common Elements is its necessity for the safety, maintenance and existence of the buildings. The conclusion of the Engineer's Letters and the Project Manager's Memorandum is that there would be consequent damage to the exterior of the building if the noted beams that are deteriorating fail.

Based upon the foregoing, it is my opinion that the Association can reasonably classify the deteriorating portions of the deck and beams at issue as General Common Elements and treat the expenses to repair as Common Expenses.

Very truly yours,

By: /s/ Colleen P. Donohoe
Colleen P. Donohoe