

Bob Wilbur

From: "Gwyn Staton" <gwynstaton1@msn.com>
Date: Thursday, August 29, 2013 7:05 PM
To: "Bob Wilbur" <bbwilbur@broadstripe.net>; "Gwyn Staton" <gwynstaton1@msn.com>
Subject: RE: ACBC and the swimming pool issues

The board breached its contract with the members by failing to maintain, and this is the prior board so we do need to segregate this claim against the five. As I was sleeping I was thinking about this and Ed was to write this all down, but Jean and Maria changed the locks and took away the keys from Ed and Suzy and told Ed that he was not permitted to ever come into the pool to fix anything or for any reason. They told Ed and Suzy they could not have the alarm code and could only come into the pool with Jean or Maria. Remember how we thought they were sabotaging the pool and made the gas line overheat?? Only Jean and Maria and Karen, and then Dan at some point, had access to the pool. One of them is responsible for the "sabotage". They refused to permit Ed to fix and to keep the pool running when he had done so as an engineer for years prior and is amply qualified and would work for free. Jean fired Alex, our repair person etc so they clearly in bad faith and contrary to the community's wishes, refused to maintain the pool. They insisted on not getting the heater fixed when the vote was positive to do that and they removed the propane tank so the pool could not be heated even after the repairs. They refuse to collect dues and assessments. They have refused to enforce collection policies. They refuse to act in good faith and approach the bank and others for options to keep the pool like lease to Lions for one dollar, etc. They have refused to follow the motion also, which is another breach of contract, and this has to be directed to the errant directors because Ed and Suzy did not refuse, so please send this to Chris to get the five not covered especially all the old Board because they voted not to maintain, excluded the remaining Board, etc. When the members voted to fix the pool the board refused and did not follow the members' directive. Oh and for the past year they have refused to produce the records despite proper records requests, and still will not. This is another flagrant intentional disregard of our Bylaws and state law, also outside the insurance policy.

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From: bbwilbur@broadstripe.net
 To: Chris@skinnerlaw.net
 CC: dustin@local519.org; kblankenship@bluewilliams.com; gwynstaton1@msn.com
 Subject: Re: ACBC and the swimming pool issues
 Date: Thu, 29 Aug 2013 18:11:34 -0700

Hello Chris,
 Dustin and I have some questions we need guidance on.

1) When to file and what to file? Whatever we file, we not only need demolition work delayed but we also need those who have refused to pay the assessment for the demolition until the quagmire is resolved to not be designated as members not in good standing. That is, the due date is September 14 for payment, and we need to be in good standing with a vote thereafter. I suppose we could just pay on the 14th assuming the judge has blocked demolition. So what think you?

2) Kurt Blankenship, a Louisiana attorney who owns a home in Admirals Cove asks this: *I'm sorry that I have not had a chance to look at it until now. BIG CAVEAT: I am not familiar with Washington law so take that into account when considering my comments. I have two suggestions: 1) it might strengthen our argument that there may be irreparable harm if we point out that the pool might not ever be re-opened due to more stringent regulations governing such structures so near the beach and Sound. I would attach a picture of the pool showing it's location so close to the beach to enhance that point; 2) given that our main focus is that the Board failed or refused to follow the October 2012 motion, perhaps we should add some allegations that the Board is bound to follow all such lawful motions and that it is a breach of their fiduciary duty if they fail to do so.*

3) We would all really like to put this on the Fraudulent Four board members if we can find an Achilles that would not cover them by the ACBC legal insurance policy. That would be well received news by the members paying the premiums. The Four really deserve to not be covered. But that said, if there is no Achilles we would rather do the "whole Board" thing if that's what it takes to save the pool, that being our #1 priority. Below is what Gwyn has for you to consider. I'm less sure that we can substantiate those claims, but we do have some email verification and other Board member testimony documenting the fraud four's takeover of the ballot process. Here's Gwyn:

the policy excludes

- 1) breach of contract claims and
- 2) fraudulent or dishonest acts, so we should allege the fab four and Peetz, with respect to some actions, acted in flagrant disregard and in bad faith, violated our Bylaws, our Articles, and Washington state law. The 5 directors flagrantly and in bad faith refused to follow, despite numerous demands, the motion and our governing documents.

The Board Four engaged in fraudulent and dishonest conduct and flagrantly violated permit requirements. Specifically, Karen Shaak went to the county and asked the county to bypass the permit requirement, tortuously and without reasonable cause to believe a permit was not required, when the Board always acknowledged a permit was required, and Ed and Carol Delahanty so confirmed. Karen went to a new person at the county and requested to avoid the

permit requirement in order to rush this through for the purpose of benefiting themselves and their own agenda and not to act in the best interests of the community.

Thanks much,
Bob

From: [Chris Skinner](#)
Sent: Monday, August 26, 2013 1:16 PM
To: [Bob Wilbur](#)
Subject: RE: ACBC and the swimming pool issues

Bob – See below.

Christon Skinner

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From: Bob Wilbur [<mailto:bbwilbur@broadstripe.net>]
Sent: Sunday, August 25, 2013 5:48 PM
To: Chris Skinner
Cc: Dustin Frederick
Subject: Re: ACBC and the swimming pool issues

Hello Chris,
First thanks much (weekend work) and looks good. I will forward on to Dustin. On quick read I have these questions/comments below. Meanwhile Dustin and I with others will address the retainer and costs beyond.

¶ 1. and 3.10. Can we make this specific to just Salls, Jones, Shaak, and Chamberlain and leave the others out and in so doing make them personally responsible rather than the full Board and ACBC?

I understand your interest in keeping the "reasonable directors" out of the line of fire. But, in order for the court to have the ability to enjoin action that is improper at the board level, all of the directors have to be named so that they are all subject to any order. And from a strategic perspective, we don't want it to appear to the court that we are just

suing the directors whose votes we disagree with. They took action as a board so the court has to have jurisdiction over the entire board to make an effective ruling.

Today 3 of 7 are friendly and appear to be doing what is the proper thing; but that could change tomorrow. We aren't just asking for remedial action in this suit, we are also asking that the board cease and desist anything of this nature in the future.

¶ 3.7. This section speaks only of *recreation*, not of *athletics*, whereas the AOIs speak of both (Article V.1). Dustin and I need to see if that was a change implemented by the Board at the October 2012 annual meeting. If so, this would show intent to remove the athletic component (highlighted in the AOI) to facilitate pool removal.

Possibly, but I don't believe that is particularly germane at this time.

¶ 3.20 FYI: The Board will argue that the pool has no value because the tax folks are currently treating it as a liability because it is inoperable.

Value for tax purposes is not the same as value associated with the ownership of a lot that allows access to a recreational facility. While the current value of the pool has diminished in recent years, that is not the same as saying that your property has a unique and enhanced value by virtue of the right to have access to a swimming pool as part of the benefit of living in the plat. If the court accepts our theory on this, the board has an ongoing duty to maintain the pool in good condition. Just because they have chosen, over the years, to let it slide into a condition where it has to be totally renovated doesn't mean you don't have the right to insist that it be restored.

¶ 3.23 FYI: The Board will argue that the tax appraisers do not count it as an asset.

Same issue. There was value to you when you purchased your parcel that was not present in other plats. I mentioned the property that I own on Decatur Island. One of the assets of that lot is the community association's ownership of an airstrip and dock. I would not have purchased my interest in the lot if not for the existence of those assets. If the association's board just decided to let the dock deteriorate over time, they can't reasonably argue that I haven't been impacted financially just because the asset is now valueless. I think we have the same position in your case with regard to this pool.

¶ 4.4.4 Under the AOI (Article V.5), the club has the authority "to sell, convey, pledge,

lease, exchange, transfer, and otherwise dispose of all or any part of the property and assets.” And under VII, it seems to indicate that it would require a 2/3 majority at a meeting to be able to effect change under V.5, given that such change would modify the athletic purpose under V.1. I guess I am still struggling to see how that is not a major argument?

Article V is a problem for us in my opinion. The Article gives the board the right to “dispose of all or any part of the property and assets” of the ACBC. So, the board will offer that article as granting them the right to “dispose” of the pool. Our response is that disposing of the pool without providing a replacement in some form is contrary to the overall purpose of the corporation. So, it may be arguable that doing what they propose, in addition to failing to meet the direction of the members, is something that required a 2/3 vote because of its impact on the Purposes clause. On the other hand, the board is not proposing to change the Purpose of the corporation – they are just making its purpose less meaningful by eliminating the one asset that served the purpose. That is a different issue to some degree.

“Purposes and Powers” clauses in articles of incorporation are designed to avoid a shareholder’s argument that a board of directors’ decision on a matter such as a contract to purchase is “ultra vires” and therefore not valid. Basically, ultra vires arguments are asserted in disputes where shareholders attempt to invalidate action of the board of directors. They argue that the corporation lacked authority under its articles to take certain types of action. For example, if the corporation was only set up to be a recreational/athletic club, any action by the board to purchase something that is not part of that purpose, such as an apartment building, would probably be void because it exceeded the board’s authority. So, the broader the purposes clause in the articles, the less likely a challenge to board action for ultra vires acts. Here, I am not convinced that the specific decision to decommission the pool changes the purposes of the corporation – the purposes stay the same whether they do so or not. Its just that the purpose can’t effectively be carried out by destroying the primary asset that served the purpose.

Sounds a bit circular I know. Unfortunately, the facts and law related to a case like this are not clear. We will have an uphill battle in this case because courts tend to want to confirm board action if possible. The specific breach of the members’ intent stated in the October 2012 motion is as strong a complaint as the more general complaint that the board’s action is contrary to the bylaws.

I will wait to hear from you about whether you want me to proceed with the suit and motion.

Again, it looks good, and we will be back to you further tomorrow,

Bob

From: [Chris Skinner](#)

Sent: Sunday, August 25, 2013 4:24 PM

To: [Bob Wilbur](#)

Subject: RE: ACBC and the swimming pool issues

Bob –

Attached is a draft complaint that I put together this weekend to outline what I think is a viable cause of action both for injunctive relief and damages. You will note that I am not asking for declaratory judgment as part of the lawsuit since the court will necessarily have to determine the meaning and significance of the articles and bylaws in order to make a decision on our claim that the board exceeded its authority to try and decommission the pool.

You will see that I am taking a very specific approach to the lack of authority argument which is related to the fact that the board did not follow the members wishes and directions expressed in the motion that was approved in October. And I am pursuing a more general claim that the board lacks authority to remove the pool no matter what kind of vote it gets because the bylaws only permit it to operate the facilities – not close them or remove them. When you take into account the purpose of the association and the fact that the swimming pool was an express part of the consideration received when deeds were conveyed, I think we have a reasonable argument that the pool should be retained to fulfill the purpose of the association and the owners' expectations. Under that theory, the only thing the board should be considering is how much to request in the way of a special assessment for operating the pool – not tearing it down.

The argument that a 2/3 vote was necessary to approve the proposed change doesn't seem as strong to me because the pool is not

referenced specifically in the bylaws even though I understand the thought. Since the pool was the primary facility in existence, taking it out seems to fly in the face of the stated purpose of the organization. We may still get to make that argument but at this point I think a general complaint that suggests that the board did not follow the membership's direction, created a confusing and misleading ballot, and lacked authority to decommission in the first place, will get us to the point where we can submit a motion for temporary injunction.

Also, we are adding the specific claim that your property interest is adversely affected if the pool is removed. I think Gwyn feels that way as well. You bought your lots with the idea that ownership in this association created a unique and valuable element to its location. Seems like the board shouldn't be able to take that away through its actions without paying monetary damages to each lot owner. At least that is the theory. None of these theories are specifically identifiable in other cases but I think they do fit within the general principles of the law. I can't promise that these claims will make it past a summary judgment motion because they are rather unique and fact specific, but I believe they are defensible and will help further your cause without being deemed frivolous or unsupported.

I have not prepared that document yet since I wanted to make sure I could think my way through a defensible claim. I believe we have that. Also, I want to be sure you are ready to proceed before I invest the additional time.

A budget for this case is hard to estimate because we don't know if a trial will be necessary. I am assuming that we will have to prepare for and conduct a hearing on a motion for a temporary injunction at a minimum and that could take approximately \$5000-\$6,000 in time based on my experience in other cases that start with restraining orders and temporary hearings. Once the judge rules on the temporary injunction though, we will know whether the case is going forward or not – and the odds are the board may change course if the judge grants that motion after a hearing.

In order to take your case, I am requesting payment of a \$1500 retainer and a \$3500 fee deposit for a total of \$5000 to start. The retainer is applied to the time and services already provided and other factors that I consider when deciding to take a case. The fee deposit is

held in trust and used to apply against time charges that I will incur going forward. I have spent about 4 hours on your case thus far. That is incorporated in the retainer. Time charges at our hourly rates would apply from this point on. I charge \$325 an hour. My paralegal is billed at \$125 an hour when doing work other than clerical matters. We have associates in the firm who may work on the case and they are billed at \$250 an hour. If you elect to retain my firm we will send you a formal engagement letter that outlines the details.

The next step will be the preparation of a motion and declaration for temporary restraining order and order to show cause. That should be something we can get assembled by Wednesday of this week if I hear from you tomorrow.

If you have questions about any of this please give me a call. I assume you will forward this to Mr. Frederick since I don't seem to have his email address handy. Thank you. I hope this helps.

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