

September 23, 2010

**ATTORNEY-CLIENT PRIVILEGED**

Joanna Weeks  
1182 Dewey Dr.  
Coupeville WA 98239-9728

Re: *Close v. Admiral's Cove Beach Club, Inc.*  
Our File No.: 04811-010283

Dear: Ms. Weeks

I have received an offer to settle the matter with Roger Close, and while it is not complete, I believe that it is a reasonable basis upon which we may proceed. When we started this case, we met and discussed the possibility of turning this into a class action and litigating all of the potential claims that the Club had with other members who might want out. I now think that this avenue will not work as well as we originally thought now that I have had a chance to look deeper into the legal issues.

When I undertook the defense of this matter, I saw two major issues. First, is the Beach Club a "homeowners association" as described by RCW 64.38.010. "Homeowners' association" or "association" means a corporation, unincorporated association, or other legal entity, each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member. "Homeowners' association" does not mean an association created under chapter 64.32 or 64.34 RCW." While the original covenants perhaps leave something to be desired, the covenants recorded in 1985 would seem to clearly make the Club a "homeowners' association."

Second, is the chain of title, put pretty clearly everyone who owns property in Admiral's Cove is aware of the Club and the assessment of dues. Covenants such as those in issue here are usually conveyed by the original owner as a condition of the sale or in some cases later by the property owner. If this is not done, the covenants are not in the "chain of title" and may be unenforceable. The Club's regular attorney has analyzed this issue and believes that sound arguments can be made for the enforcement of the bylaws.

I have reviewed the conflicting legal opinions on whether the Club is homeowners' association. I believe the latter opinion, which opines the Club a homeowners' association and in a position to impose the cost of maintaining Club

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property and facilities on the members, is correct. In the absence of court determination, however, I cannot be certain. I now do not believe that this litigation will produce an answer to that question.

This new issue is the question of the offer that was made earlier this year to withdraw from membership. Close and about twenty others took the Club up on the offer and withdrew. There may still be others that given the choice would withdraw but for the fact the offer has been withdrawn. This change in position is troubling, because the offer appears to be a binding contract. Without getting into the issues of corporate authority, "For a valid contract to exist, there must be mutual assent, offer, acceptance, and consideration." *In re Marriage of Obaidi*, 154 Wn. App. 609, 616 (2010). While there is not a lot of consideration in the transaction between Close and the Club, there is enough to make a valid contract. "[W]here one makes a promise conditioned upon the doing of an act by another, and then latter does the act, the contract is not void for want of mutuality, and the promisor is liable though the promisee did not at the time of the promise engage to do the act; for upon the performance of the condition by the promisee, the contract becomes clothed with a valid consideration, which relates back and renders the promise obligatory." *Scott v. J. F. Duthie & Co.*, 125 Wash. 470, 471-472 (1923). In the *Scott* case the employee was a foreman. J. F. Duthie had a contract to build ships and promised Scott and other foremen that they would divide a bonus of one-half million dollars if they continued in employment until the completion of the ship building contract. Scott continued in employment and filed an action against Duthie to collect his bonus. Duthie maintained that the promise of a bonus lacked mutuality of obligation because the employee already received a salary. The only "consideration" was Scott continuing his employment until the completion of the building of the ship. That is not much consideration when measured against the value of the performance by Scott, because without the promise he would have had only his salary and nothing more. Applied to our situation, however, the Club made an offer to terminate membership; Close accepted that offer; the consideration was the loss of Scott's dues and the concomitant loss of a duty to allow him to use Club facilities. I do not think that anything in RCW 64.38 prohibits such a contract. I express no opinion as to whether it might violate a covenant or other condition of the plat. I assume that if the Club is a valid homeowners' association, it would be proper to remove property from the association under appropriate circumstances.

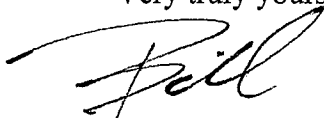
This "contract" poses two problems for our case. First, Close is not really a proper class plaintiff for other than those who opted out. Second, if the contract is valid, we lose no matter the merits of our argument concerning the covenants and homeowners' association as to those who opted out. In other words, what you want to accomplish – a determination of the Club's status as a homeowners' association – will not be decided under any circumstances.

It is my recommendation that we buy our peace with Close on as advantageous terms as possible. I suggest we make it clear that he cannot use Club facilities or trespass on Club property and that this agreement only lasts as long as he and Boyd own the property. I am attaching a redraft of their proposal.

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Keep this close to your chest. This draft should not get out other than at a board meeting and then only to Board Members. Collect all copies if it gets passed around.

Very truly yours,

A handwritten signature in black ink, appearing to read "Bill", written in a cursive style.

William L. Cameron

WLC/wlc  
Enclosure

1. Agreement made between Roger Ll. Close ("Close") and Admirals Cove Beach Club, Inc., a Washington non-profit corporation, now known as Admirals Cove Homeowners Association, Inc. ("Club") which is also for the benefit of and enforceable by Valerie J. Boyd ("Boyd"). "Club" also includes any successor in interest of the current Club.

2. Agreement shall provide for:

a. Other Definitions.

i. The "Action" is the above entitled action. (add caption)

ii. The "Close Property" means Lots 22, 23 and 53, Plat of Admirals Cove, Division No. 7, as per plat recorded in Volume 9 of Plats, Page 73, records of Island County, Washington, situate in Island County, Washington.

b. Agreed Order. An agreed order shall be entered in the Action in the form attached. Include in Order that it is hereby ordered:

i. Neither party admits or concedes the other parties' factual or legal litigation positions.

ii. Order does not constitute an adjudication on the merits of such positions, the claims of Roger Close, or the defenses of the Club.

iii. For so long Roger Close or Valerie Boyd or both own the Close Property, or any part thereof:

1. Close and Boyd and the Close Property shall not be subject to payment of dues or assessments or other monetary amounts levied or charged by the Club, shall have no other obligations to the Club, and shall not be subject to its jurisdiction or authority, as an alleged homeowners association or otherwise; and the Club releases Close and Boyd and the Close Property from the same, and waives any right to assert or bring any action to enforce the same.

2. Close and Boyd shall not be members of the Club; <sup>\*</sup> and the Club releases Close and Boyd and the Close Property from the same, and waives any right to assert or bring any action to enforce the same.

*\*Close and Boyd shall not use or enter upon Club property*

## Action shall be

iv. The ~~claims of Close are~~ dismissed without prejudice and without award of attorney fees to either party.

~~1. Determination that the Court is aware that the Club has asserted affirmative defenses that this action should be certified as a class action with the class to include all lot owners in Admirals Cove, and an affirmative defense that such lot owners are indispensable parties, and that the dismissal without prejudice of the Close claims is appropriate and will not prejudice any such owners.~~

~~v. Other provisions: To be determined.~~

c. Agreement to terms and conditions of agreed order and incorporation by reference as terms and conditions of agreement.

d. Covenants not to sue.

i. By Close: No suits/claims against Club upon the claims made in the complaint, except as counterclaims in any suit by the Club or any third party naming Close as a defendant, and except as part of any class action.

iii / Parties  
1. The ~~Club~~ agrees that any statute of limitations applicable to claims ~~by Close in the complaint shall be and is permanently~~ tolled commencing upon the effective the date of this agreement. so long as Close or Boyd own the property

ii. By Club: No suits/claims against Close or Boyd, or in rem against, or that otherwise would affect, the Close Property, to enforce any alleged authority or jurisdiction over, to enforce any alleged covenant running with the land or equitable restriction against, to collect any alleged monetary obligation including dues and assessments or any lien for the same, from, Close, Boyd, or to enforce any alleged obligation arising from alleged membership in Club or ownership of all or part of Close Property, regarding any period in which Close or Boyd own any part of Close Property.

e. In the event that, at any time, any other members of the Club or lot owners are given the choice or opportunity or right by the Club, or make an agreement with the Club:

- i. To not be members of the Club;
- ii. To not be subject to authority or jurisdiction and/or to not have their AC property subject to Club authority or jurisdiction;
- iii. To not have their membership in the Club be appurtenant to their AC property or any covenants running with the land or equitable restrictions; and/or
- iv. To not be subject to, or have their AC property subject to, Club dues, assessments or any other alleged obligation(s) to the Club;

then Close and Boyd, and/or any future owner(s) of the Close Property, or any part thereof, shall have the right, by written notice to the Club, to elect to have the same opportunity or right, or to make the same agreement with respect to themselves and/or the Close Property, and, if so elected, the Club shall enter an enforceable agreement with the party so electing, and their successors, to such effect.

- f. Other Terms and Conditions.
  - i. Non-severability?
  - ii. Fees?
  - iii. General terms and conditions.
- g. Need warranties of Club authority with attached resolution and authorized signator.
- h. Signatures and acknowledgments