



LAW OFFICE OF
RICHARD B. SHATTUCK
4102 NW ANDERSON HILL RD.
SILVERDALE, WA 98383

TELEPHONE: (360) 698-5560
FAX: (360) 698-5569

April 13, 2007

Port Ludlow Village Council
c/o Larry Nobles, President
81 Harms Lane
Port Ludlow, Washington 98365

Re: **Legal Analysis**

Dear Mr. Nobles:

You asked me to provide short legal opinions regarding certain issues that have come before the Board of Directors for the Port Ludlow Village Council. My analysis follows:

ISSUES PRESENTED

1. What standard of care will be imposed in any lawsuit associated with alleged improper acts/omissions of a member of the Board of Directors of the Port Ludlow Village Council?
2. Does the Port Ludlow Village Council have the authority to provide comments and recommendations on land use applications regarding the Port Ludlow Master Planned Resort area?
3. Does the Port Ludlow Village Council have the power to amend "draft" minutes of its meetings?
4. Do the guidelines set forth in the Port Ludlow Master Plan Resort Amended and Restated Master Declaration of Covenants, Conditions and Restrictions ("the Declaration") apply to Ludlow Bay Village?

SHORT ANSWERS

1. The standard of care to be followed by a member of the Board of Directors is set forth in RCW 24.03.127. The standard of care includes (1) acting in good faith, (2) acting in a manner that the director believes to be in the best interest of the Village Council, and (3) using such care as an ordinarily prudent person would use under similar circumstances.
2. Yes. The Council' s governing documents provide comment authority and RCW 4.24.510 provides civil immunity to complain or provide information to local government.
3. Yes. Under the Rules and Procedures adopted by the Port Ludlow Village Council (Policy & Procedure IX) and under Roberts Rules of Order, a motion to adopt and/or amend minutes is in order. Prior to formal adoption, the formal vote to amend would be based upon a simple majority. After a formal adoption of the minutes, however, a two-thirds vote is generally required to adopt an amendment to the minutes.
4. No. Paragraph 9 of the Declaration exempts Ludlow Bay Village from the design guidelines if properties in the Village are developed pursuant to the subdivision and land use approvals in existence as of September 1, 2000.

FACTUAL BACKGROUND

The Port Ludlow Village Council is a nonprofit corporation organized under Washington' s Nonprofit Corporation Act, RCW 24.03. Under its governing documents, the purpose of the Port Ludlow Village Council is to provide a forum for building consensus along the residents, merchants, property owners and others having an interest in the Port Ludlow Community. Amended Articles of Incorporation, Article III, Section 1. The Council is managed by a Board of twelve Directors. Amended Articles of Incorporation, Article IX, Section 2.

LEGAL ANALYSIS

1. What is the standard of care for acts and omissions of members of the Board of Directors?

Two statutes address the relevant standard of care for members of the Board of Directors for the Port Ludlow Village Council. The first is the Homeowners Association Statute, RCW Chapter 64.38. Under the statute, Directors are required to act as follows:

Except as provided in the association's governing documents or this chapter, the board of directors shall act in all instances on behalf of the association. In the performance of their duties, the officers and members of the board of directors shall exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 24.03 RCW.

The duties of Directors are further defined for all nonprofit corporations under RCW Chapter 24.03. Specifically, RCW 24.03.127, provides as follows:

A director shall perform the duties of a director, including the duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

In performing the duties of a director, a director shall be entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, in each case prepared or presented by:

- (1) One or more officers or employees of the corporation whom the director believes to be reliable and competent in the matter presented;
- (2) Counsel, public accountants, or other persons as to matters which the director believes to be within such person's professional or expert competence; or

- (3) A committee of the board upon which the director does not serve, duly designated in accordance with a provision in the articles of incorporation or bylaws, as to matters within its designated authority, which committee the director believes to merit confidence; so long as, in any such case, the director acts in good faith, after reasonable inquiry when the need therefore is indicated by the circumstances and without knowledge that would cause such reliance to be unwarranted.

The duties are further clarified in cases in which the activities of Boards of Directors have been subject of review. For example, in Schwarzmann v. Ass' n of Apartment Owners, 33 Wn.App. 397, 402, 655 P.2d 1177 (1982), the Washington Court of Appeals adopted a "business judgment" standard for Directors. Id at 402. The Schwarzmann court held that Directors will not be liable for honest mistakes, even if the errors are so gross as to demonstrate the unfitness of the Director to manage corporate affairs. More recent cases, however, have emphasized that the standard requires more than simple good faith, but also requires reasonable actions. See e.g., Riss v. Angel, 131 Wn. 2d 612, 632, 934 P.2d 669 (1997) ("decisions of [property owners] associations must be reasonable").

In summary, Washington statutes and cases require a Director to act (1) in good faith, (2) in a fashion that the Director believes is in the best interest of the corporation, and (3) in a reasonable manner.

2. Does the Port Ludlow Village Council Have the Authority to Provide Information to Jefferson County on Land Use Applications Relating to the Port Ludlow Master Planned Resort area?

The Port Ludlow Village Council' s mission statement outlines the Council' s purpose, in relevant part, to be as follows:

The purpose of the Council is to be a unifying force in the community: to identify issues of importance, to formulate a consensus of opinion among residents, merchants and developers, and to represent those community interests to the public as well as to government entities.

See also Amended Articles of Incorporation, Article III, Section 1. One of the stated purposes of the Council is to provide information to government entities.

The 2002 legislature found that the threat of civil lawsuits acted as a deterrent to full participation in government decision-making. Defending against such suits were found to be severely burdensome and the legislature accordingly adopted legislation to prevent "strategic lawsuits against public participation," commonly known as SLAPP suits. Emmerson v. Weilet, 26 Wn.App. 930, 936 (2005). Under RCW 4.24.510, the courts are also given the authority to award reasonable attorneys' fees and punitive damages against those who seek to block full participation in government decision-making:

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

The Port Ludlow Village Council has the organizational authority and statutory right to provide "good faith" information to Jefferson County officials regarding land use issues of concern to the Port Ludlow Village Council.

3. Does the Port Ludlow Village Council Have the Authority to Amend "Draft" Minutes of Its Meetings?

The Port Ludlow Village Council has adopted policies and procedures dealing with keeping meeting minutes. Under Policy and Procedure IX, the Council is required to keep "complete and accurate minutes of all PLVC Meetings..." This policy and Procedure also provides that the minutes are to be "approved", but there is nothing in the Policy and Procedure with regard to how the minutes are to be approved.

Roberts Rules of Order outlines the procedures for adopting and amending minutes. This procedure is succinctly outlined in The New Robert's Rules of Order by John Sherman, as follows:

Minutes are usually amended (corrected informally, the chair directing the correction to be made when suggested). If objection is made, a formal vote is necessary for the amendment. The minutes may be corrected whenever the error is noticed, regardless of the time that has elapsed. However, after their adoption, when it is too late to reconsider the vote, they require a two-thirds vote for their amendment unless previous notice of the proposed amendment has been given. Only a majority vote is then required for its adoption just as with the motion to rescind. This is necessary for the protection of the records that otherwise would be subject to risk of being tampered with by temporary majorities.

Id. at 107 – 08.

The minutes are subject to approval and amendment by the Port Ludlow Village Council.

4. Does the Amended and Restated Master Declaration of Covenants, Conditions and Restrictions Apply to Ludlow Bay Village?

The Port Ludlow Master Plan Resort Amended and Restated Master Declaration of Covenants, Conditions and Restrictions ("the Declaration") was signed and recorded on September 1, 2000, under Jefferson County Auditor's File No. 436865. The stated purpose of the Amended Declaration was to provide certain covenants for certain properties within the Port Ludlow Master Planned Resort.

Paragraph 9 of the Amended Declaration specifically releases the plat of Ludlow Bay Village from the reach of the Declaration if it is developed in accordance with subdivision and land use approvals in effect on the effective date of the Declaration:

Release of Ludlow Bay Village. The description of the Property subject to this Declaration shall not include any lands within the Plat of Ludlow Bay Village as recorded in Volume 6 of Plats of Pages 228 through 233, records of Jefferson County, Washington, if those lands are developed pursuant to subdivision and land use approvals in existence as of the date hereof.

Port Ludlow Village Council
04/13/07
Page - 7

Accordingly, provided Ludlow Bay Village is developed in accordance with subdivision and land use approvals effective as of September 1, 2000, the Village is released from, and not subject, to the Declaration.

SUMMARY

I thank the Port Ludlow Village Council for this assignment. Of course, if I can provide any further clarification regarding the points set forth in this letter, I am happy to do so.

Very truly yours,

A handwritten signature in black ink, appearing to read 'R. Shattuck', written in a cursive style.

RICHARD B. SHATTUCK

RBS/klr