

# Little Whale Cove Homeowners' Association

P.O. BOX 49 Depoe Bay, OR 97341

Dear Owner,

The board of directors of Little Whale Cove Homeowners Association ("HOA") recently hired an experienced community association attorney to review the "merger" of the Little Whale Cove Condominium Owners Association ("COA") into the HOA that occurred in 1999. The board wanted to know three things: (1) was the "Declaration of Merger" legally valid; (2) if not, what is the current status of the COA, and (3) was the ownership of the common areas of the condominium (consisting of the Meadow House and the Pines) transferred from the condominium unit owners to the HOA?

After a thorough analysis and explanation of Oregon law, Cliff Collard, of the Law Offices of Dennis Bartoldus, in Newport, concluded: "both the purported merger of the COA into the HOA, and the conveyance of the common areas from the unit owners to the HOA, were invalid and ineffective", and that the COA remains in existence as an unincorporated association. Copies of Mr. Collard's letter will be provided to all of the unit owners. It will also be provided to all of the other members of the HOA upon request.

To summarize the major reasons for Mr. Collard's conclusions, his letter explains:

1. The Oregon Condominium Act requires an association of unit owners and does not authorize the association to be eliminated by merger with another association that includes non-unit owners:
2. Requirements in the Oregon Nonprofit Corporation Act for the merger of nonprofit corporations were not complied with (even if the Condominium Act permitted the merger); and
3. The Condominium Act expressly states that unit owners' interests in a condominium's common areas cannot be transferred separately from the units.

The board has unanimously accepted Mr. Collard's conclusions and feels that the opinion brings clarity to issues that have needed resolution. We encourage the owners of the 31 units in the Little Whale Cove Condominium to organize a meeting of unit owners to re-activate the COA and elect a board of directors as provided in the condominium's declaration and bylaws. We will provide assistance as desired by the unit owners, and look forward to working with the COA's elected board to restore the proper relationship between the two associations and to ensure that Oregon laws are followed.

Sincerely,

Pete Tuana, President

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February 26, 2015

Pete Tuana, Chairman  
Little Whale Cove Homeowners Association, Inc.  
PO Box 49  
Depoe Bay, OR 97341

Dear Mr. Tuana:

As you requested, I have reviewed the purported "merger" of the Little Whale Cove Condominium Owners Association, Inc. ("COA") into Little Whale Cove Homeowners Association, Inc. ("HOA"). In doing so I obtained and reviewed relevant documents recorded in the Lincoln County property records, and former and current Oregon statutes.<sup>1</sup> I also reviewed online records of the Oregon Secretary of State, Corporation Division, and contacted the Oregon Real Estate Agency.

1. Background.

The COA was created on June 6, 1979 by the recording of a Declaration of Unit Ownership for Phase I of the condominium. Book 101, Page 636, Deed Records of Lincoln County. As required by the Oregon Unit Ownership Law, the declaration was approved by the Oregon Real Estate Division on June 5, 1979. A supplemental declaration for Phase II was also recorded on June 6, 1979, and supplemental declarations for Phases III, IV, and V were recorded in 1979, 1980, and 1987, respectively.

The units in Phases I and IV are referred to as "Meadow Houses", and the units in Phases II, III and V are referred to as "The Pines". These designations only appear in "Exhibit C" of the

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<sup>1</sup> In 1979 condominiums were governed by the Oregon Unit Ownership Law, which was in Oregon Revised Statutes (ORS) Chapter 91. The Unit Ownership Law was later renumbered and moved to ORS Chapter 94. In 1989 the Unit Ownership Law was again renumbered as ORS Chapter 100 and renamed the Oregon Condominium Act (OCA). Despite this renumbering and periodic amendments, the substantive provisions of the statutes referred to in this letter remained largely the same.

declarations for the latter three phases (defining each unit's undivided percentage interest in the common elements as additional phases were added). They do not appear in the text of the declarations or on the plats for any of the phases. Both types of units were part of the COA, rather than having separate associations of unit owners.

The Phase I Meadow Houses each appear to have one garage space and one carport space, which are both designated as limited common elements serving the respective units. The Phase VI Meadow Houses each have a single carport as a limited common element. The Meadow Houses also have covered walkways, also designated as limited common elements, between the garages or carports and the living units. The Pines units do not have detached parking spaces and do not have any associated limited common elements.

The 31 units in all five phases are distinguishable from most condominiums in that they are all detached structures, so that their exteriors are part of each unit, as is the particular land upon which each is located. Only the land between the units (and between the limited common elements in the Meadow Houses) is designated as general common areas (referred to as "general common elements" in the Oregon Condominium Act).

The purported "merger" at issue is the result of a document entitled "Declaration of Merger of [COA] into [HOA]" that was recorded on June 3, 1999 in Book 382, Page 1901, Deed Records of Lincoln County. A copy is attached to this letter. The Declaration of Merger was signed by the president and secretary of each association, and by the president of Halvorson-Mason Corp., Inc., the developer of Little Whale Cove.

Section 1 of the Declaration of Merger provides:

"The Little Whale Cove Condominium Owner's Association, consisting of thirty-one owners, have unanimously voted to **merge the Condominium Owner's Association into the Little Whale Cove Homeowner's Association** and assign and set over and convey all the common property held in common ownership by the Condominium Owner's Association. **Each unit owner waives, releases and conveys their undivided interests in and to the common property** in and to the condominium developments known as "the Pines" and "Meadows House" and all of the Condominium Owners' duties, rights and obligations concerning the common property known as "the Pines" and "Meadows House" **unto the Homeowner's association** (subject to paragraph 3 below, and upon the conditions of paragraph 3) pursuant to written approvals by each of the owners, said written approvals being attached to this Declaration and incorporated herein." (emphasis added)

Thus, the two major purposes of the Declaration of Merger were: (1) to merge the COA into the HOA, and (2) to convey each owner's undivided interest in the common areas (both general common areas and limited common elements) to the HOA.

As explained below, it is my opinion that the Declaration of Merger was invalid, and failed to accomplish these intended purposes.

2. The Association of Unit Owners is Mandatory and Cannot be Eliminated.

At the time the Declaration of Merger was executed and recorded in June 1999, ORS 100.100(5) provided, in relevant part:

“The provisions of and rights conferred by ORS 100.005 to 100.910 shall not be varied or waived except as expressly provided in those statutes.”

This provision remains the same today.

Also in June 1999 (as now), ORS 100.405(1) specified that “[a]n association of unit owners shall be organized to serve as a means through which the unit owners may take action with regard to the administration, management and operation of the condominium.” That provision was added in 1979, 20 years before the Declaration of Merger. 1979 Or.Laws ch. 650, Section 9.

There was nothing in the Oregon Condominium Act that expressly authorized a merger of the association of unit owners into another association that was not limited to unit owners (significantly, the Declaration of Merger does not cite any statute as authority). There is no question that the purported merger would vary or waive rights granted under the applicable statutes. For example, the unit owners could no longer elect a board of directors who manage only the condominium, and are answerable only to the unit owners. In *Towerhill Condominium Association v. American Condominium Homes, Inc.*, 66 Or. App. 342, 346 (1084), the Oregon Court of Appeals noted that ORS 94.146 “mandates” that there be an association of unit owners. Therefore, the purported merger to eliminate the separate COA clearly violated ORS 100.100(5) and 100.405(1). The fact that the unit owners unanimously voted to approve the merger does not cure this violation, as the Condominium Act did not allow them to eliminate their own COA.

3. Noncompliance with Oregon Nonprofit Corporation Act.

The HOA was incorporated as an Oregon nonprofit corporation in 1977, and the COA was likewise incorporated in 1978. As nonprofit corporations, they were both subject to the Oregon Nonprofit Corporation Act, which is ORS Chapter 65. That Act has provisions governing the merger of two nonprofit corporations, and they are essentially the same now as in 1999. Those provisions were not complied with.

Without going into detail, a merger must be approved by a vote of the members of both corporations, by at least two-thirds of the votes cast or a majority of the voting power, whichever is less, as well as by the board of directors of both corporations. ORS 65.487(1). In addition, ORS 65.491(1) provides that, after a plan of merger is approved as required, the surviving corporation must file articles of merger with the Oregon Secretary of State, and subsection (2) provides that the merger takes effect when the articles of merger are filed. The Declaration of

Merger indicates in Section 2 that the board of directors of the HOA voted to adopt the merger, but there is no indication that the members of that association ever voted on the issue (which certainly would have been stated if such a vote had occurred). Moreover, the records of the Secretary of State, Corporation Division (available on its website), do not indicate that articles of merger were ever filed.

Therefore, it is clear that legal requirements for the merger of two nonprofit corporations were not complied with.

A possible counter-argument is based on the fact that the COA was administratively dissolved by the Corporation Division on June 15, 1995 for failure to file the necessary annual report. At that time it ceased to be a nonprofit corporation, and became what is referred to as an unincorporated association. Arguably, the statutes referred to the preceding paragraph did not apply because the purported merger in 1999 did not involve two existing nonprofit corporations. However, that would be an extremely weak argument. The recorded Declarations and Bylaws for the Little Whale Cove Condominiums provided that the association of unit owners is to be a nonprofit corporation. It is my opinion that the failure of the board of directors of the COA to maintain its status as a nonprofit corporation as provided in the Declarations and Bylaws cannot avoid or reduce the requirements for a merger under the Nonprofit Corporation Act.

Furthermore, the involuntary dissolution of the COA is no answer to the failure of the HOA to satisfy legal requirements on its end. The Declaration for the HOA provides, in Section 5.5:

**“The Condominium Owners’ Association may contract with the Homeowners Association for the purpose of performing any or all function or functions otherwise to be performed by the Condominium Owners’ Association. Upon the completion of the development of Little Whale Cove, it is anticipated that the Condominium Owners’ Association and the Homeowners Association may merge. (emphasis added)**

The use of the words “anticipated” and “may” indicates that merger was merely a possibility. Nothing is said about how the decision whether to merge is to be made by each association, or the procedure to accomplish a merger. However, Section 4.4.2 of the HOA Declaration provides that the HOA has “[t]he powers and obligations of a nonprofit corporation pursuant to the general nonprofit corporation laws of the State of Oregon.” This language leaves no doubt that the anticipated merger with the HOA could not be accomplished without complying with the procedural requirements set forth in the Nonprofit Corporation Act. As explained above, those requirements include a vote of its members and the filing of articles of merger, neither of which occurred.

Therefore, the purported merger of the COA into the HOA was invalid and ineffective. The COA continued as an unincorporated association of its unit owners, but remained subject to its Declarations and Bylaws. ORS 100.405(1)(f) (providing that when an incorporated association is dissolved at any time and for any reason, it continues as an unincorporated

association of the same name, its powers and obligations continue as before, it remains governed by its bylaws, and its directors and officers continue as directors and officers of the unincorporated association).

4. Conveyance of Common Areas to the HOA.

Article X of the Declaration for Phase I of LWC Condominiums contains the following language:

“In addition, the Condominium Owners Association may enter into one or more service or management agreements for the condominium property. The agreements may be entered into with or in conjunction with the Little Whale Cove Homeowner’s Association for the purpose of coordinating the Associations’ activities, duties, rights and obligations, it being the intent that the two Associations cooperate as a single entity excepting such provisions under their separate Bylaws or the laws of the State of Oregon which may be applicable only to one Association or the other. **Upon the affirmative vote of all condominium unit owners, title to all common areas may be deeded to the Little Whale Cove Homeowners Association pursuant to the terms of ORS 91.584, subject to a unit owner’s right to partition under ORS 91.593.**” (emphasis added)

The Declarations for the other phases contain the same language. The language in the Declaration of Merger, purporting to convey condominium common areas to the HOA, appears intended to carry out the emphasized sentence above. At the time Phase I was created in 1979, ORS 91.584 provided in subsection (1):

“All of the unit owners may remove a property from the provisions of ORS 91.500 to 91.671 and 91.990 by executing and recording an instrument to that effect if the holders of all liens affecting any of the units consent thereto or agree, in either case by instruments duly recorded, that their liens be transferred to the undivided interest of the unit owner in the property after removal from the provisions of ORS 91.500 to 91.671 and 91.990.”

Thus, the statute cited in the Declarations as authority for conveying common areas to the HOA provided a means to remove property from a condominium. By 1999, when the Declaration of Merger was recorded, the removal of property from the condominium was governed by ORS 100.600 to 100.620 (as it is today, although there have been some amendments since then). In 1999, as today, ORS 100.600(1) provided for the termination of the entire condominium, while subsections (2) and (3) allowed a portion of the property to be removed from the condominium. Termination of the entire condominium required all of the unit owners and their lienholders to execute and record a document removing the condominium from unit ownership. The effect of this is to vacate the plat for the condominium (ORS 100.600(1)(b)) and convert the entire property, units as well as common elements, into common ownership by all unit owners. ORS 100.610(1). That means that each former unit owner would own an undivided

interest in the entire complex, and would no longer have sole ownership of his or her former unit. Obviously, that was not what the Declaration of Merger intended.

Removal of a portion of the property from the condominium, such as the common areas, was very complicated. That required the execution and recording of an amendment to the declaration and an amended plat of the condominium. Both of these documents were required to include specific information. It would serve no purpose to detail all of those requirements here. Suffice it to say, the amendment to the declaration had to be "approved and executed by all owners and lienholders and acknowledged in the manner provided for acknowledgment of deeds." ORS 100.600(2)(e).

It is clear that these requirements for the removal of common area from the condominium, so it could be conveyed to the HOA, were not satisfied. No amendment to the Declarations or to the plats for the condominium were executed or recorded. The Declaration of Merger does not purport to amend the Declaration, and it is not executed by the unit owners or any lienholder (discussed further below).

Without first validly removing the common area from the condominium, it was not possible for these areas to be conveyed to the HOA. ORS 100.515(3), provides (then as well as now):

"The undivided interest in the common elements **shall not be separated** from the unit to which it appertains and shall be conveyed or encumbered with the unit even though such interest is not expressly mentioned or described in the conveyance or other instrument." (emphasis added)

As explained in Section 2 of this letter, the Oregon Condominium Act provides that the provisions and rights provided by those statutes "shall not be varied or waived except as expressly provided in those statutes." The purported conveyance of the unit owners' undivided interest in the common areas to the HOA (without first properly removing the common areas from the condominium) clearly violates that prohibition and is null and void.

In addition, even if it was possible for the unit owners to convey their interest in the common elements apart from their units, they did not do so. They did not sign the 1999 Declaration of Merger. Section 1 of that document, quoted above, states that the conveyance was "pursuant to written approvals by each of the owners, said written approvals being attached to this Declaration and incorporated herein." However, there are no such approvals attached to the recorded Declaration of Merger.

Further, the COA had no authority to convey the owners' interests as their agent. The condominium Declarations, as quoted above, do state that title to all common areas may be deeded to the HOA upon the affirmative vote of all unit owners, but that does not mean that the COA is authorized to make that conveyance as the agent of the unit owners. Article III, Section 6(n) of the Bylaws of the COA, in defining the powers and duties of the Board of Directors, states that they include:

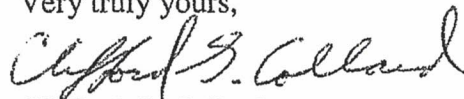
“Upon the affirmative vote of all condominium unit owners, acting as agent of the unit owners in exchanging common property land of the same size and value with the little Whale Cove Homeowners Association for development of common amenities available for us by all property owners in the Project pursuant to ORS 91.584 and 91.527.”

That provision thus limits the Board’s authority by requiring that there be an exchange in which the COA receives property from the HOA of the same size and value as the property conveyed to the HOA. The Declaration of Merger does not indicate that the COA received any property in exchange. Therefore, even if it was possible for unit owners to convey their undivided interests in the common areas of the condominium to the HOA (without first removing that property from the condominium), neither the COA or the Board of Directors had the authority to do so as agent of the unit owners.

In conclusion, it is my opinion that the both the purported merger of the COA into the HOA, and the conveyance of the common areas from the unit owners to the HOA, were invalid and ineffective.

Based on this conclusion, I want to make it clear that I undertook this review and analysis on behalf of the Little Whale Cove Homeowners Association, and not as attorney for the now unincorporated Little Whale Cove Condominium Owners Association. I anticipate that there will be further questions, particularly as to where to go from here, and I will be happy to assist the Board regarding those questions.

Very truly yours,



Clifford G. Collard

CGC/cgc

Attachment: Declaration of Merger