Dunn Carney Allen Higgins & Tongue LLP ATTORNEYS AT LAW

# Memorandum

**To:** John Miller **Date:** August 29, 2013

**From:** Susan C. Glen **File No:** SOU 47-1

**Subject:** South Beach Road Association

## I. Introduction

South Beach is a residential development the Neskowin area. One road serves as the sole ingress and egress between the South Beach community and Highway 101, and there are several roads within South Beach. The roads are privately owned. According to the April 24, 1995 letter from Robert Fultz of Seabreeze Associates Limited Partnership ("Seabreeze") to Fred Terrill, different parts of the roadway system are owned by different owners, including Seabreeze, L-E-W Engineering ("L-E-W"), a Mr. Ziegler, and others.

According to Mr. Fultz's title research, the lots in South Beach were not all granted easements in a consistent manner and some lots may have easements over certain roads and not others.

South Beach Road Association ("SBRA"), a non-profit mutual benefit association, was formed in 1988 to address the need for maintenance and management of the roads and related improvements, including a bridge and gate near the entrance to the South Beach community from Highway 101. To fund road maintenance, SBRA began assessing a modest road maintenance fee on all lots in the South Beach community. The current assessment amount is $250/year for undeveloped lots and $500/year for developed lots.

SBRA is a voluntary association. Unlike in most more-recently created residential developments that include private roads, there are no CC&Rs that (a) make the lot owners, automatically, by virtue of their lot ownership, members of the association, (b) grant uniform road easements for the benefit of all lots, and (c) authorize levying assessments on all lots and their owners for the cost of maintaining and repairing the private roads.

The need for road maintenance is ongoing, and the bridge that allows for the only ingress and egress from the community will eventually need to be upgraded or replaced. SBRA enjoys a high level of compliance with the road assessments, but at least one lot owner has

protested the fee and sought legal advice to support the position that her lot should be assessed a lower fee, proportional to her use of the roads. SBRA would like to strengthen its authority to levy reasonable assessments and enforce payment, in order to ensure that future maintenance and repairs can be timely performed and to avoid ill will between residents that can arise if some residents are perceived as paying less than a fair share of common costs.

## II. Questions Presented

A. Under ORS 94.550 through 94.783 (the Oregon Planned Community Act or "PCA"), can a portion of the lot owners in South Beach establish CC&Rs that are binding on all lots?

B. Under ORS 105.170 through 105.190, can SBRA require that all lot owners pay an equal share of the maintenance costs (or require that all owners of developed lots pay one road maintenance fee and all owners of undeveloped lots pay another road maintenance fee)?

C. Are there other mechanisms that might be used to create a binding obligation on all lot owners to pay road maintenance costs?

## III. Short Answers

A. No. South Beach is not a "planned community" as defined in the PCA, and, in any event, the PCA contains no mechanism for a portion of the lot owners in a given area to vote-in and require recording of CC&Rs that would be binding on all of the lot owners, including ones who do not desire to be bound by the CC&Rs.

B. Probably not. ORS 105.175 provides that factors such as the easement holder's frequency of use, vehicle size and weight, and distance of normal travel on the private road are relevant factors to weigh in allocating the cost of maintaining a private road among easement holders. This suggests that ORS 105.170 through 105.185 does not provide a solid basis for requiring all owners of lots in South Beach to pay a road maintenance assessment that is uniform for all lots or even a road maintenances assessment that is based on only two categories.

C. Yes. ORS 371.305 through 371.385 authorize the creation of "special road districts" under certain circumstances.

## IV. Discussion

### A. Oregon Planned Community Act

The PCA governs "planned communities," which are defined as follows:

> "any subdivision under ORS 92.010 to 92.192 that results in a pattern of ownership of real property and all the buildings, improvements and rights located on or belonging to the real property, in which the owners collectively are responsible for the maintenance, operation, insurance or other expenses relating to any property within the planned community, including common property, if any,

or for the exterior maintenance of any property that is individually owned." ORS 94.550(18)(a).

"Common property" is defined as "any real property or interest in real property within a planned community which is owned, held or leased by the homeowners association or owned as tenants in common by the lot owners, or designated in the declaration or the plat for transfer to the association." ORS 94.550(7).

The definition of "planned community" is not a model of clarity. One can reasonably conclude, however, that South Beach is not a "planned community" as defined in the PCA. There is no "common property" as defined in the PCA. Furthermore, it appears there is nothing about the subdivision plats that created South Beach that made the lot owners collectively responsible for the maintenance, operation, insurance or other expenses relating to property within the subdivisions. Rather, it appears the subdivision plats created private roads over which various easements when lots were deeded to buyers.

The PCA does contain a provision allowing owners of lots in a subdivision where there is no association to form one upon the majority vote of a majority of the owners under certain circumstances. See ORS 94.527(1)(b). This provision applies to "planned communities" where the "governing documents" do not provide for the formation of an association. Since South Beach is not a "planned community" and has no "governing documents," as defined in the PCA (an "instrument or plat relating to common ownership or common maintenance of a portion of a planned community and that is binding upon lots within the planned community"), this provision does not apply.

In addition the PCA contains no mechanism for a portion of the lot owners in a given area to vote-in and require recording of CC&Rs that would be binding on all of the lot owners, including the ones who do not desire to be bound by the CC&Rs.

B. Easement Owner Obligations – Private Rights of Way (ORS 105.170-105.190)

ORS 105.170 through 105.190 governs the obligations of holders of interests in easements to use private rights of way. This statute requires the holders of such easements to maintain the easements "in repair." The statute further requires that "in the absence of an agreement and in the absence of maintenance provisions in a recorded instrument creating the easement" the cost of maintaining the easement in repair shall be shared among the easement holders "in proportion to the use made of the easement by each holder of an interest in the easement."

The statute continues:

"Unless inconsistent with an agreement between the holders of an interest in an easement or a recorded instrument creating the easement, in determining proportionate use and settling conflicts the following guidelines apply:

(a) *The frequency of use and the size and weight of vehicles used by the respective parties are relevant factors.*

"(b) *Unless inappropriate*, based on the factors contained in paragraph (a) of this subsection or other relevant factors, *costs for normal and usual maintenance* of the easement and costs of repair of the easement damaged by natural disasters or other events for which all holders of an interest in the easement are blameless *may be shared on the basis of percentages resulting from dividing the distance of total normal usage of all holders of an interest in the easement into the normal usage distance of each holder of an interest in the easement.*

(c) Those holders of an interest in the easement that are responsible for damage to the easement because of negligence or abnormal use shall repair the damage at their sole expense."

Thus the default position under this statute, unless "inappropriate," is to consider the distance of "normal usage" in the private right of way, and also to consider the frequency of use of the road and the size and weight of the vehicles used. There are no reported cases in Oregon in which this statue was held to justify imposing a uniform road maintenance assessment on all lots within a platted development. Where, as in South Beach, there are significant differences in the road use among owners (e.g., year round residents vs. part-time residents, developed lot owners vs. undeveloped lot owners), it will be difficult to enforce payment of a uniform maintenance fee by all owners based on this statute. Even where differences in road use are less pronounced, the implication that each easement holder's use may be weighed in a fairly detailed way against the use of all other holders of easement rights in a particular road, invites disputes that may be costly to resolve.

C. Special Road Districts

Special road districts are a mechanism for imposing mandatory assessments, for road maintenance purposes on all property within a geographic area. Special road districts are municipal corporations that have the power to assess, levy and collect taxes on real property within the district for road maintenance purposes.

At least one other Oregon community, Sandpiper Village, in the Waldport area, formed a special road district because of frustration within the community about the level of compliance with voluntary road maintenance fees. See http://svsrd.org/home/ (copy attached). Larger special road districts with larger budgets and broader responsibilities have also been formed in Oregon. For example, Government Camp voters approved a special road district last year, which reportedly covers a 563-acre area in which 160 permanent residents and 750 seasonal and weekend residents reside.

The procedures for forming a special road district are fairly elaborate. An election during the County's regular May or November election can be required in some circumstances. However, if 100% of the property owners in the proposed district approve, or if the County initiates the formation of the district, the process may be simpler. The attached Appendix contains a general summary of the procedural requirements. The following link provides additional information about the evolution and applicability of the statues authorizing and governing the formation of special road districts:
http://www.aocweb.org/aoc/Portals/0/CRP%20Page/RoadManual/Chapters/Chapter12.pdf

The SBRA should consider appointing a committee to evaluate the technical, economic, and political feasibility of forming a special road district. As initial steps, at relatively time and expense, the committee could contact representatives of the Sandpiper Village special road district to learn how that district was formed as well as the Special Districts Association of Oregon for information on other special road districts in Oregon and contacts who can provide information.

## V. Conclusion

As a legal structure for addressing SBRA's road maintenance cost allocation issues, a special road district may be a good fit. It is worth investigating whether formation of a special road district would be a cost effective approach and whether formation of such a district would be legally and politically feasible.

# Appendix

## Special Road Districts

The property in a proposed special road district must be contiguous and must lie within a county but not be incorporated within the limits of a city. ORS 371.305. Aside from these preliminary requirements, special road districts are created through the procedures set forth in ORS 198.795 through ORS 198.845. The process for creating a special road district is generally as follows:

(1). **Where to petition.** The "county board" (defined as the county court *or* the board of county commissioners, ORS 198.705(6)) where the petition is filed has original jurisdiction in a "formation proceeding." ORS 198.795. The petition shall be filed with the clerk of the county board of the "principal county" (i.e., the county where the to-be-formed district is located). ORS 198.800(1); ORS 198.765(1).

(2). **Requirements of a petition to form a special road district.** To start the process, the "chief petitioner(s)" must file a petition to form the district. The petition must satisfy all of the requirements found in ORS 198.800(1). The "chief petitioner" must be one, two, or three individuals. ORS 198.760(3). The main requirements are summarized below:

> ***(a) agency approval, if required***: "Before the petition is filed, the petition must be endorsed by any agency required by the 'principal Act' to endorse or approve the petition." ORS 198.800(1). The "principal Act" is the statute defining the powers and operation of a district; in this case, ORS 371.305 through ORS 371.360. It appears that for a special road district, no agency approval would be required.
>
> ***(b) file prospective petition***: Before circulating the petition, the petitioners must file a prospective petition that describes the proposed district's boundaries with the county clerk of the principal county. ORS 198.748.
>
> ***(c) economic feasibility statement***: Before circulating the petition, the chief petitioner(s) must complete an "economic feasibility statement," as described in ORS 198.749.
>
> ***(d) contents of the petition***: Certain required information must be contained in the petition, as described in ORS 198.750. Importantly, the petition must include a proposed permanent rate limit for operating taxes sufficient to support the services described in the economic feasibility statement, unless no tax revenue is needed to support the services described in the economic feasibility statement. ORS 198.750(1)(g).
>
> ***(e) number of signatures***: 15 percent of the electors or 100 electors (whichever is greater) *registered in the territory subject to the petition* must sign the petition. ORS 198.755(1)(a). Alternatively, 15 owners of land or the owners of 10 percent of the acreage (whichever is greater number of signers) *within the territory subject to the petition* must sign the petition. ORS 198.755(1)(b); *see also* ORS 198.760(1).
>
> **(f) time within which signatures must be obtained**: All signatures must be received within a period of six months. ORS 198.765(1). Also, *if* the petition includes a proposed permanent rate limit for operating taxes, the petition must be filled at least 180 days before the date of the next May or November election at which the petition will be voted on. ORS 198.765(1).

**(g) signature requirements**: ORS 198.760 describes technical requirements of the petition signatures (printed name, signed, dated, information qualifying the signer as an elector or landowner, etc.).

**(h) clerk certification of signatures**: The clerk examines the signatures to ensure that they are qualified and certified signatures, have been recorded within 6 months since the first signature, and other technical requirements, per ORS 198.765 and ORS 198.770.

**(i) bond and deposits**: The petition must be accompanied by a bond, cash deposit or security deposit, as the county board requires, each at a maximum of $100 per precinct in the affected district and any territory to be included in the district or each at $10,000 maximum. ORS 198.775(1)(a)–(c). If the petition is ultimately successful and the special road district is formed, then the special road district is liable for the costs, and refunds the cash deposit and security deposit to the person who made those deposits. ORS 198.775(2). If, however, the petition is ultimately unsuccessful and the special district is not formed, then the county is entitled to recover the costs of the attempted petition from the deposit or bond posted by the chief petitioner(s) and, to the extent such amounts are insufficient, from the chief petitioner(s). ORS 198.775(3).

If the county board determines these nine requirements are satisfied, the county board sets a date for the first hearing on the petition 30-50 days after the petition was filed. ORS 198.800(1)(b).

(3). **The first hearing**. At the first hearing, the county board conducts a hearing to determine "whether the area could be benefited by the formation of the district." ORS 198.805. The county board makes this determination in accordance with the subjective criteria set forth in ORS 199.462. The county board "shall consider local comprehensive planning for the area, economic, demographic and sociological trends and projections pertinent to the proposal, past and past prospective physical development of the land that would directly or indirectly be affected by the proposed" special road district. ORS 198.805.

(4). **Result of the first hearing**. If the county board approves the petition, it enters an order declaring that fact and stating other content described in ORS 198.810(2). The order also sets a time and place for a **final hearing** on the petition, to be not less than 20 days nor more than 50 days after the date the order is entered. ORS 198.810(2).

(5). **Election required under certain circumstances**. An election on the issue of forming the district must be held if (A) 100 or 15 percent of the electors registered in the proposed district (whichever is less) request it in writing after the county board's order approving the petition and at or before the final hearing. ORS 198.810(2)-(3); or (B) the petition requires a permanent rate limit for operating taxes to be set. In this case, presumably the district tax is what would fund the operation of the district. Therefore, under the statute, it would be necessary for a rate limit to be set. Therefore it appears, in this case, the formation of the district would require an election regardless of whether the number of electors described above requested one. If so, the petition would need to be filed at least

180 days before the date of the next May or November election at which the petition will be voted on. ORS 198.765(1). The rules for such elections are described in ORS 198.815.[1]

(6). **Result of the election**. If a majority of the votes cast approve of the proposal, the county board shall enter an order forming the district; if a majority of the votes cast rejects the proposal, the county board shall enter an order dismissing the petition. ORS 198.820(1). If approved, the district is a municipal corporation. ORS 198.820(2).

(7). **If there is no election, then the final hearing**. If there was not an election, then the county board has a final hearing, where it shall enter its order creating the district. ORS 198.810 (2). In this scenario, the county board then orders an election for the members of the district's first board. ORS 198.825(1).

***

Special Scenario (1). ***All* landowners in the proposed district want to form the district, but the county does not.** There is a special procedure for this situation in ORS 198.830, which allows the landowners, if unanimous, to form a district themselves. This allows them to bypass the county board's approval, which is required in the first hearing in the normal process. However, given that under current the voluntary road assessment scheme at least one owner has resisted paying, obtaining unanimous approval to create a district may be unlikely.

Special Scenario (2): **The county wants to initiate the formation of a district.** If the county wants to initiate the creation of a district within its county, it has that power; in other words, a petition would not be required. ORS 198.835. If the county did this, it would be required to hold a public hearing on the proposal. ORS 198.835(1)(c).

[1] If a separate ad valorem tax for bonded indebtedness for capital construction is included in the petition, the election must have a separate question—apart from the question on forming the district—on whether to incur the bonded indebtedness. The bonded indebtedness question can be approved only if forming the district is approved. ORS 198.810(4)(b).