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October 1, 2021

Members of Tahoe Donner Association

**Re: *Downhill Ski Lodge Building Renovation Issues
Tahoe Donner Association***

Dear Association Members,

This firm represents Tahoe Donner Association. We were recently engaged by the Association primarily to handle common interest development and property owners association matters such as interpretation and implementation of the governing documents, and compliance with the Davis-Stirling Act and the Corporations Code.

Please be assured that the Association's Board of Directors takes its responsibilities to the membership and the Association very seriously. In this context, the Board has sought my opinion as counsel to the Association, on matters concerning the upcoming replacement of the Lodge at Downhill Ski. *This* letter is a non-privileged communication summarizing for the membership a more detailed, confidential communication that I provided to the Board under the attorney-client privilege. While it is rare to issue such a non-privileged summary, the Board felt it appropriate to directly inform the membership on this important matter.

The Association is considering the replacement of the existing multi-story lodge building at Tahoe Donner Downhill Ski. In summary, the questions posed to me were: (1) Is membership approval (a vote) required for this project? (2) If membership approval is *not* required, can the Board seek member input anyway?

In summary, it is my opinion that

- a member vote is not required for the proposed replacement Lodge at Downhill Ski,
- Tahoe Donner's governing documents squarely put responsibility for decisions regarding such replacement upon the Board of Directors, and

- the Board's fiduciary duty includes making difficult decisions such as this at the Board level, and that it is advisable for the Board to seek member input as part of its reasonable inquiry in making those decisions.

With respect to the latter, my observation is that the Board has been exceptionally diligent, proactive, and comprehensive in its efforts to engage the members and seek their input on this very important project. Regarding member input, the important related question is, where does that member input fit into the Board's decision making process? I will address this first.

"Reasonable inquiry" does not extend to letting the members make the decision instead of the Board. It is the Directors' fiduciary responsibility to make decisions they sincerely and reasonably believe are in the Association's best interest.

Corporations Code Section 7231 addresses the standards of conduct of a board and directors in making decisions. Seeking input from the members is entirely consistent with Section 7231(a), because it is part of the "reasonable inquiry" required by that statute. Section 7231(b), though, designates "safe harbor" people on whose input Directors may safely rely in making their decisions. There is an important distinction between, on the one hand, seeking and listening to member input, and on the other hand, substituting what the members want or demand for what the Board and the Directors believe to be in the Association's best interest.

On a project of this magnitude, replacing the largest, and perhaps most operationally-complex, building within the Tahoe Donner development, when it comes to seeking meaningful input, I am a strong advocate of boards undertaking *multiple* methods of sharing information with, and hearing feedback from, the members.

Every association is different, as is every major project, but these methods usually include some combination of membership and board meetings, small workshops/discussion groups, website interactions (e.g., updates posted by the association, opportunities for members to submit comments online, FAQs, etc.), e-mails and newsletters. It is also important, as much as possible, to have board and committee planning discussions in open meetings rather than in executive sessions. The main point is that boards should engage in robust public outreach and should listen with an open mind to all comments, especially those that are critical and/or constructive.

Based on what I have seen, the Association has already done *all* these things (many of them numerous times). The Association has also done things I have not observed at other developments, such as numerous and frequent personalized tours of the existing lodge building, so members can see the issues first-hand and get real-time answers to questions, where possible.¹

Returning to the first question, "Is membership approval required for this project?" Tahoe Donner's governing documents contemplated, and accommodated, growth and maturation/evolution of the Tahoe Donner development and the eventual need for enhancement, as well as replacement, of the original amenities that are owned and managed by the Association.

Article IX, Section 2(a)(i) of the Bylaws specifically provides a funding mechanism for capital projects in the Development Fund, and expressly exempts such projects from member approval.

A few members have asked if this provision requires *all* the funds to be collected *in advance* of starting the project. It is my understanding that by the time the Association will need funds at various stages of the lodge building renovation project, enough money will have already been accumulated (in the Replacement Reserve Fund and the Development Fund) for the new lodge building, so no Special Assessment will be needed. Article IX, Section 2(a)(i) says, unequivocally, that the requirement for membership approval does not apply when the Board spends money that has been accumulated in any new capital improvements fund or development fund, for the purpose for which the fund was established.

I am not aware of any statute or Tahoe Donner governing document that requires the Association to have all funds in hand *before* it commences a capital improvement project, even one of this magnitude. Granted, most capital improvement projects are completed within a few months, and usually within a year. But some large projects span more than one fiscal year. There is no requirement that a capital improvement project that spans more than one year be fully pre-funded before it is commenced. Associations often fund multi-year projects with a

¹ I generally discourage undertaking or relying on informal, advisory, or non-binding votes and surveys because, in my experience, (1) it is difficult for organizations like homeowners associations to devise statistically-valid surveys, (2) in the other associations I represent, only a very small percentage of the membership usually responds, which makes it difficult to extrapolate the results to any statistically-meaningful conclusions, and (3) responses tend to favor whatever viewpoint is supported by those (usually few) people who have the time, energy and/or financial resources to ensure that their allies participate in the survey/advisory vote. I readily recognize that these limitations and ambiguities are not usually nefarious or done because of anyone's ill intent, but I am nonetheless always very cautious in analyzing, and drawing conclusions from, the data, because I am not convinced that it provides a reliable measure or indicator of the *overall* membership's views.

combination of the money they have in hand at commencement plus money obtained during the construction.

Article IX, Section 2(a)(ix) of the Bylaws requires a member vote under certain circumstances, while specifically exempting certain amenities from that vote requirement. The "exempt" amenities are listed in Article I, Section 10 of the Declaration of Covenants and Restrictions (the C&Rs).

The member approval requirements of Article IX, Section 2(a)(ix) of the Bylaws do not apply to the proposed major renovation/reconstruction of the downhill ski lodge building, because the entire downhill ski area (including the lodge building) is specifically described in Article I, Section 10 of the C&Rs.

Tahoe Donner's governing documents include these provisions because when the members adopted the documents in the early 1990s, they had the foresight to recognize that the Development was destined to substantial future build-out in the ensuing years, which would necessitate expansion of facilities to meet future needs. Just one example is Article VIII, Section 1(b) of the C&Rs, which provides in part, "Without limiting the foregoing, it is anticipated that the existing Common Facilities will require future expansion in order to accommodate increased Member usage as Residences are constructed on Separate Interests within the Properties."

As previously noted, the Board and the Directors have a fiduciary responsibility to make decisions that they believe are in the best interest of the Association and its ever-evolving needs. Exempting the Development's core amenities that are listed in Article I, Section 10 of the C&Rs ensures that such decisions will be made by an informed, elected board without being subject to personal interests or bias.

The Board and I thank you for taking the time to read this important letter.

Very truly yours,

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