

MFR
CLEG
Opinion on
Underdrains
02.19.20

Betty Sutton

From: David A. Closson <DClosson@altitude.law>
Sent: Wednesday, February 19, 2020 11:18 AM
To: Betty Sutton
Subject: Melody at Fox Run - underdrain questions - requesting legal opinion (9368.0001)
Attachments: 20110131134203696(1).pdf; Letter to Mr. Bartz-Fox Run Sub SSO.PDF

Hi Betty,

As a preliminary matter, we sent over some files on this matter back in 2016 (we may have resent in 2019) so I want to make sure you have all of that documentation. I have attached some of that information and I can sent the rest over if you don't have it. It looks like the issues with the underdrain system date back years before the 2010 incident. There are some documents attached speaking to the developer's turnover of the system to the Association, the Association's responsibility for maintenance/repair of the system, and an Acceptance Letter from October. 29, 2003. There is also a letter from the developer from 2003 to the Association stating "We also recommend that the Association follow the recommendations given to them from our geotechnical company for maintenance." See the first page of the attached document. Does the Association have those maintenance recommendations? It may be prudent to locate those recommendations and engage that company (or another qualified company) to review them, evaluate the current state of the system, and to prepare an updated recommended maintenance schedule and program for the system and in making those reco0mmednation they could consider the previous recommendations.

In terms of your questions, I believe an engineering firm would need to be engaged to answer some of these questions. For example, with respect to the required and recommended maintenance of the system and whether alterations to the system (or if the system could be capped off) would first need to be evaluated by a qualified engineering firm. We could then determine what types of permits and governmental approvals may be necessary to make such changes and it would be dependent upon the nature of the changes. The engineering firm may also be familiar with the necessary requirements and approvals and may be able to provide some advice and information on that process. I do not have any information regarding how many other associations have underdrain systems and/or information concerning how those systems are maintained.

I believe the Association is responsible for the maintenance and repair of the underdrain system including components of the system that are outside the boundaries of property owned by the Association. Specifically, see Article VIII, Section 1(b) of the Declaration which states that the Association shall provide maintenance, repair, and replacement of the main lines of the underdrain system in the Community whether such main lines are located on Lots, Common elements, and/or on publicly dedicated property. Article VIII, Section 1(c) of the Declaration speaks to homeowner responsibility for service connector lines for the underdrain system located on individual Lots. I would like to discuss the configuration of the system. Where does it outlet and/or does it connect into another system? If it connects into another system serving other property outside the community there may be some type of joint maintenance obligations. Does the Association have plans and drawings for the system?

Article IX, Section 1 of the Declaration provides an easement in favor of the Association over individual lots within the community as necessary for the Association to perform and satisfy the Association's maintenance, repair, and replacement obligations. If the Association needs access to property that is not owned by the Association and not subject to the Declaration then the Association would need an easement to access such property. If that is the case, then I suspect that such easements may have been previously obtained before, or at the time, the system was initially constructed. However, would need to know the specific location of the property in questions and then we could perform research to confirm if such easements exist. There may also be development agreements with the Town that outlined or contained such easements. We could start researching the issue to determine what documents may exist with respect to the system. The Association likely also has files and documentation related to the system given the historical issues. Locating prior documents and agreements may be an undertaking given the length of time that has passed since initial construction.

I am not clear on the last bullet point on your questions related to the Town's meter. Can we touch base after you have a chance to review this email?

MELODY
HOMES

a DR HORTON company
America's Builder

October 29, 2003

Fox Run Board of Directors
c/o Management Specialists, Inc.
390 Interlocken Crescent, Suite 500
Broomfield, CO 80021

RE: Outfall Underdrain

Dear Members of the Board:

Please be advised that Melody Homes has done extensive investigation and repair work to solve a problem of water backing up in the outfall underdrain system from Fox Run to the outlet 1/2 mile west of WCR 11 and WCR 20. What we found was the underdrain was cut or damaged at various points along the sanitary sewer outfall after installation of the underdrain system. This damage occurred after Melody completed its work in the area. Melody will not charge the Association for any cost associated with these repairs. However, any future repairs will be at the Association's volition and expense.

We recommend that the Association check the underdrain manhole on the west side of the intersection of Fox Run Boulevard and Coyote Drive every three to four months to make sure the underdrain system is functioning normally. It should be running smoothly through the flow line in the bottom of the manhole. We also recommend that the Association follow the recommendations given to them from our geotechnical company for maintenance.

Melody further encourages that the St. Vrain Sanitation District to be cautious when working around the outfall line. We would recommend that if construction or adjustments to the outfall sewer lines are made that a representative of the Sewer District inform the contractor of the necessity of keeping the underdrain system functional.

Thank you for the opportunity to be of service.

Sincerely,



Roger G. Hollard
Vice President Land Development

cc: St. Vrain Sanitation District
Dick Leffler, Town of Frederick
Brian Matte, Melody Homes Customer Service Manager
Toby Terhune, Melody Homes Executive Vice President

From: David Closson <DClosson@hindmansanchez.com>
To: abartz@msiho.com
Date: 02/14/2011 11:33 AM
Subject: FW: Melody at Fox Run
Attachments: image001(0).jpg

Allen,

Per our discussion from last Friday, below is a brief summary of the 1/28/11 meeting with representatives from the St. Vrain Sanitation District and the Town. First, a brief slide show was given containing pictures regarding the damages caused on December 28, 2010. The pictures show how the underdrain system connects to a manhole and apparently a loose cap from the underdrain system dislodged and blocked the sewer line which resulted in damages that the District repaired. The District reached its conclusion regarding the cause of the damages after the line was cleared and the cap from the underdrain system was found lodged in the line. They did not actually show pictures of the cap lodged in the line but that was the conclusion given at the meeting. An invoice in the amount of approximately \$1,800 was given to the Association along with a request for reimbursement. I did not receive a copy of the invoice. Various alternatives were discussed for possible solutions to the problem including permanently attaching the caps, using a pump system, re-routing the drains, and permanently tying the drains into the sewer system. Some of the alternative may require the purchase of taps and may be cost prohibitive. The District was willing to give the Association contact information for recommended professionals that could evaluate the problem and provide recommendations regarding fixing the problem. Both the District and Town indicated that they have no liability with respect to the problem, that the Association is responsible for the repairs, and that the issue was ultimately caused by the developers initial construction of the underdrain system.

Also, discussed at the meeting was the broader issue that the underdrain system should not be tied into the manholes and that repairs are needed to the underdrain system. Apparently the tie-ins to the manholes should have only been used as temporary measure during construction of the project and they are not intended to be part of the permanent system. A representative from the District stated that the underdrain system improperly ties-in to the man holes in at least six (and maybe more) locations. This is not consistent with the developers plans for the system. It is unclear as to how many locations need repair/re-routing and unclear as to how many (and which) homes these underdrain serve within the community. It was also discussed that the Town had a deficient inspection process in place at the time of the construction of the underdrain system and that had the Town known of the improper tie-ins, the Town would not have issued certificates of occupancy for the project. It was not clear if the Town had actual notice of the tie-ins to the six specific manholes, but it seemed that the Town had general knowledge of the practice. The Town and District both indicated a willingness to help the Association discuss the issue with the developer. The District also mentioned that it would not take collection action against the Association for at least 6 months.

After the meeting I recommended to the Board that they enlist the services of professional engineering firm to evaluate the extent of the problem and obtain cost estimates for repairs. The Board should also scrutinize the invoice provided by the District and ask for supporting documentation. We also discussed the statute of limitation/statute of repose issues regarding bringing a claim against the developer. It is my understanding that you are going to contact the developer to see if they are willing to work with the Association in addressing the issue.

From a legal standpoint, I do not believe the Association can bring a claim against the developer for the improper/defective construction of the underdrain system. This is consistent with Eric's email below and further supported by the timeline that you provided. From that timeline, it is evident that issues with the underdrain system were known as far back as 2005 and they continued in 2006, 2007, and 2008 even after repairs were performed by the developer in 2005. It also appears that in July 2008, the Association enlisted the services of Borne Engineering to evaluate the underdrain system. Should the Association wish to obtain a second opinion regarding a potential construction defect action against the developer, I recommend the Association immediately contact Scott Sullan (303-0077). Additionally, I am not aware of any basis for a claim against either the Town or the District as neither is responsible for the design, construction, repair, or maintenance of the system (absent some type of dedication as mentioned in Eric's email). Although the Town did admit to a lax inspection process, I do not believe the Association would prevail on any claim against the Town as I do not believe the Town, via its inspection process, is intended to act as a guarantor regarding improvements. Additionally, the Town and District (as a quasi-governmental agency) are afforded significant protections under Colorado's Governmental Immunity Act which would further limit the

Association's ability to bring suit against those entities.

At this time I would reiterate my recommendations that the Association: (i) seek supporting documentation regarding the District repairs; (ii) contact the developer and inquire as to whether they would be willing to look at and/or fix the underdrain system; and (iii) contact an engineering firm (perhaps Borne Engineering as they are already familiar with the project) to provide professional recommendation regarding the extent of the problem and potential solutions. Even if the developer is willing to make repairs, it is likely prudent for the Association to have its own engineering firm evaluate and inspect such repairs.

Let me know if you have questions or would like to further discuss.

David A. Closson

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From: Allen Bartz [<mailto:abartz@msiho.com>]
Sent: Monday, January 31, 2011 2:32 PM
To: David Closson
Cc: Eric R. McLennan
Subject: RE: Melody at Fox Run

Hi David,

Nice meeting you as well. I did receive your email with the attachment.

Thank you,

 n Bartz,
Community Manager

MSI, LLC

2725 Rocky Mt. Ave., Suite 330

Loveland, CO 80538


(970) 663-9681

abartz@msiho.com

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From: David Closson [mailto:DClosson@hindmansanchez.com]
Sent: Monday, January 31, 2011 1:50 PM

To: Allen Bartz
Cc: Eric R. McLennan
Subject: FW: Melody at Fox Run

Allen,

It was nice to meet you last Friday. Per our discussion, I reviewed our file regarding previous issues with the underdrains. In addition to the notice of claim that Eric forwarded, it appears that there were various issues with the drains back in 2003 and 2005. You may have additional information in your records, but I wanted to pass along the information we have in our file. Please confirm that you received this email (the attachment is somewhat large so if it gets blocked I can resend in multiple documents). Thank and have a great day!

David A. Closson

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From: Eric R. McLennan
Sent: Wednesday, January 12, 2011 2:38 PM
To: 'abartz@msiho.com'

9/1/2016

Subject: RE: Melody at Fox Run

1 J Allen:

I have spent a little time looking into the underdrain system issue. Unfortunately, its not looking real good at this point that the Association would be able to escape responsibility for the underdrain system. However, whether the Association was the cause of the Sanitation District's sewer overflow issue is a separate question. Here is what I have found:

1. The Association's Declaration clearly provides that the drainage structures and facilities, including the "maintenance, repair and replacement of...the main lines (not including the service connector lines to any of the Lots) of the underdrain system in the Community, whether such main lines are located on Lots, Common Elements, and/or on publicly dedicated property..." This is found in Article VIII, Section 1(b) of the Declaration. This is a pretty clear statement that the intent was for the Association to maintain this underdrain system.

2. There is one possibility that would change the above responsibility, and that is if the improvements have been dedicated to and accepted by the local government entity for the purpose of maintenance, repair and replacement or such has been authorized to be performed by a special district or other municipal entity. (Per Article VIII, Section 1(a) of the Declaration). However, this dedication is not indicated on the Association's Plat Maps (a place where it might typically be indicated). I have not done any additional research on this subject. Additional research would include checking the Association's records to see if any Agreement or Memoranda exist that have the effect of dedicating the underdrain system to the Town or the special district. Public records can also be searched to see if such a document was ever recorded. However, my guess, given the Town and the Sanitation District's stance on this matter is that no such public dedication was ever made nor would the Town or District have had any reason to accept such a dedication since the Declaration requires the Association to accept the underdrain system from the Declarant and maintain it thereafter. I would be somewhat surprised to find any document that requires the Town or the District to maintain and repair this underdrain system.

3. Attached is a copy of a letter that our firm wrote back in 2005 to Melody Homes demanding repairs to the underdrain system. This letter acknowledges that Melody Homes turned over the system to the Association and that it was defective. If no action was taken against Melody Homes on the defects, the statute of limitations would likely prevent such action at this time.

All of the above leads to the likely conclusion that the Association, unfortunately, is responsible for the maintenance and repair of the underdrain system (at least up to the point where the owners connect to the system).

^ " this being said, I think it is still a possibility to negotiate with the Sanitation District regarding their claim. There are probably a lot of factors that could have contributed to their sewer overflow issue, and I don't think the Association necessarily has to agree to pay all of the costs demanded unless causation can be proved to a reasonable degree. It may be wise to agree to check the caps in question and to make any repairs to those caps that are needed. However, I think the Association is within its rights to request that the Sanitation District provide proof that the Association's underdrain issues, if any exist, conclusively caused the problem which led to the emergency in question. The Association may

even want to get an engineer on board to review the proof that the Sanitation District presents (depending upon whether the amount demanded justifies such expense).

If the Board would like our further assistance in this matter, please let us know (i.e. writing a response to the Sanitary District, attending the meeting, etc.).

Thanks,

Eric McLennan

ic
3

From: Allen Bartz [mailto:abartz@msiho.com]
Sent: Friday, January 07, 2011 2:12 PM
To: Melissa Garcia
Subject: Melody at Fox Run

Hi Melissa,

9/1/2016

At Melody at Fox Run Board and I received a letter from the St. Vrain Sanitation District (See attached) the other day regarding a sewer line clean up that they addressed on December 28, 2010. The District is asking that the Association pay for the emergency cleanup and to make immediate necessary repairs to a cap that is used to gain access to the clean out of the Association's under drain system. In addition the District wants the Association to check each one of these caps and make sure they are glued down. The Board does not feel that these costs and maintenance responsibilities are solely the responsibility of the HOA. I know the under drain system has been an issue in previous years for the Association as Melody Homes installed this system and the Town of Frederick has stated this is an HOA responsibility. The Board also does not believe the Association should be liable for something Melody Homes installed.

The Board would like to have HindmanSanchez look into the responsibilities of the Association for the under drain system and the obligation of this request from the District. The Board I believe last spoke with Molly Foley-Healy with regards to this issue. They would like to address this quickly as the St. Vrain Sanitation District is requesting to meet with the Board as soon as possible. Also I have attached a synopsis of the under drain system for over the years.

Thank you,

John Bartz,

Community Manager

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