



MARK K. PAYNE
mpayne@wlpplaw.com
www.cohoalaw.com

July 22, 2009

Via e-mail: mikem@builderpurchasingservices.com

Board of Directors
Trailmark Homeowners Association, Inc.
c/o Hammersmith Management
Attn: Beth Lovato
5619 DTC Parkway, #900
Greenwood Village CO 80111

*Re: Authority of TrailMark Metropolitan District to Construct Additional
Recreational Facilities*

Dear Members of the Board of Directors:

We have been asked to provide our opinion on behalf of the TrailMark Homeowners Association, Inc. ("Association") concerning the following questions raised by the Association's Board of Directors.

1. What general latitude does the Trailmark Metro District (TMMD) have in spending the tax dollars or special assessments as contributed by the homeowners of Trailmark? Specifically, can the TMMD spend surplus funds (e.g., those in their general or reserve accounts) on projects they solely deem appropriate for TMMD projects? If appropriate, what situation would require additional approval by the homeowners or the HOA?

Colorado special districts and their creation and operation are creatures of statutory authority. Colorado has a limited amount of judicial review of special district formation and activities. Generally, special districts are formed under the authority of C.R.S. 32-1-201. They have all rights and powers necessary or incidental to or implied from the specific powers granted to the district. However, such powers may not be used to go beyond the express powers granted. The express powers granted are those set out in the district's service plan.

Mike McMahon, on behalf of the Board, has provided us with the a copy of the Amended and Restated Service Plan for Chatfield Green Metropolitan District, dated October 1998 ("Service Plan"). The Service Plan was amended by a court order dated March 1, 1999 to change the name to TrailMark Metropolitan District. Our opinions here are based on the Service Plan,

1660 Lincoln Street
Suite 1550
Denver, Colorado 80264
303.863.1870
303.863.1872 Fax
www.cohoalaw.com



Focused on Communities



Board of Directors
Trailmark Homeowners Association, Inc.
July 22, 2009
Page 2

and assume that there have been no other changes to the Service Plan. Relevant parts of the Service Plan provide as follows:

- Under the heading “Description of Proposed Services”, paragraph A, the Service Plan provides that the District plans to provide for the design, acquisition, construction, installation, and financing of certain . . . park and recreation improvements and services within and without the boundaries of the District. This Service Plan describes with specificity those improvements anticipated for construction in the development. . . . A general description of each type of improvement and service to be provided by the District follows this paragraph, and Exhibits D through G list the improvements currently planned to be provided relating to each type, the phasing of construction of such facilities, and the costs in current dollars (the “Improvements”). An explanation of the methods, basis, and/or assumptions used to prepare the above estimates is also included in Exhibits D through G. The Improvements generally depicted and described in Exhibits E through G have been presented for illustration only, and the exact design, subphasing of construction and location of the Improvements will be determined at the time of platting and such decisions shall not be considered to be a material modification of the Service Plan.
- Subparagraph 5, under paragraph A (recited above), provides as follows:
 5. Park and Recreation. The District shall have the power to provide for the design, acquisition, construction, completion, installation, operation and maintenance of parks and recreational facilities and programs, including but not limited to, . . . community recreational centers, water bodies, swimming pools, tennis courts . . . and other active and passive recreational facilities and programs, and all necessary and appurtenant facilities, . . . Subject to the conditions set forth in that certain Intergovernmental Agreement dated November 11, 1998, SSPRD consents to the District’s provision of park and recreation facilities and services.
- Under the heading “Financial Plan/Proposed Indebtedness”, paragraph A, are the following statements:
 - . . . it has been decided that the provision of facilities by the District



Board of Directors
Trailmark Homeowners Association, Inc.
July 22, 2009
Page 3

will be primarily financed by the issuance of General Obligation bonds, secured by the ad valorem taxing authority of the District with limitations as discussed below. . . .

- The District may also issue revenue bonds, notes, certificates, debentures or other evidences of indebtedness.
 - The District shall be authorized to issue bonds in the total principal amount not to exceed \$8.5 million dollars subject to the mill levy cap discussed below. . . . However, the District shall not have the authority to issue more than \$8,500,000 in bonds.
 - The District will have a mill levy assessed on all taxable property in the District as a primary source of revenue ***for repayment of debt service and for operations and maintenance*** (emphasis added).
- Exhibit D is a description of Facilities and Costs. The exhibit does not list community center, swimming pool or similar facilities in the facilities to be constructed, and notably, the cost of the facilities described is nearly \$8.5 million, being the maximum amount of the bonds that the District is authorized to issue.

The issue raised is whether the expenditure of excess tax revenues generated constitutes a material modification of the Service Plan. Obviously, the general broad language of the Service Plan gives the District the authority to construct recreational facilities, including specifically community recreational centers and swimming pools. However, it is clear that, notwithstanding such broad authority, such facilities were not contemplated at the time the Service Plan was adopted. Significantly, as provided in "Description of Proposed Services", paragraph A, identification of additional Improvements at the time of final platting is not considered a material modification of the Service Plan. The converse would then be that any Improvement not specifically identified the final plats in the community would constitute a material modification of the Service Plan.

Furthermore, the specific statement in the Service Plan that the mill levy assessed on all taxable property in the District is the primary source of revenue for repayment of debt service and for operations and maintenance would also seem to lead to the conclusion that those revenues could not be used for other purposes. There is no other statement in the Service Plan of how revenues will be used. Design and construction of new facilities would clearly not fall within either repayment of debt service (as the original \$8.5 million was used for other installations as itemized in Exhibit D), or operations or maintenance. Had the intent of the



Board of Directors
Trailmark Homeowners Association, Inc.
July 22, 2009
Page 4

Service Plan been to allow tax revenues or special assessments to be used to fund any of the other functions that the TMMD was authorized to carry out, it would have been fairly simple to say that in the Service Plan.

There is no case law in Colorado that provides any assistance in interpreting these provisions. However, in a somewhat similar situation, the Colorado Attorney General responded to an inquiry from the then Executive Director of the Department of Local Affairs by written opinion. In that situation, the question posed and answered was whether an unexpected substantial increase in property tax revenues for use by a metropolitan recreation district created an “unreasonable departure” from the original service plan. The Attorney General responded that his opinion was that it did not. However, in discussing the district’s financial projections, he noted that

. . . it is obvious that these financial projections are important considerations of the county commissioners whose counties are affected in approving the initial service plan. . . . After the initial service plan is approved by the county commissioners, material modifications of the plan are required with regard to changes of a basic or essential nature. Modifications shall not be required for changes of a mechanical type necessary only for the execution of the original plan. . . . The fact that these approval statutes require such extensive financial data in the original service plan leads me to the conclusion that any substantial change in that data is a change of a “basic or essential nature,” requiring a modification to the original service plan.

In the present case, the Service Plan is confusing at the very least, as to what is allowed, and how it is to be funded. While an argument can be made that the TMMD has the necessary authority to construct the community center and swimming pool, the question is how it would that be funded, and whether funding from excess tax revenues or special assessments is permitted in light of the original financing projections set forth in the Service Plan. The prudent course of action would be to seek a modification of the Service Plan to specifically authorize the expenditure of the excess revenues for the purposes described.

Modification of the Service Plan requires compliance with Colorado statutes in the same fashion as is required for approval of an original service plan. The statutes are very specific, and we do not have the expertise to advise the Association about this process. We recommend that the Association consult with an attorney who does have that expertise to determine the necessary process.



Board of Directors
Trailmark Homeowners Association, Inc.
July 22, 2009
Page 5

2. Is §§32-1-107(3) C.R.S. (Colorado Revised Statutes), or any other Statute, violated or in conflict by the TMMD managing and financing the design and construction of a clubhouse and pool? Specifically, the South Suburban Park and Recreation District (SSPRD) as a recreation district already provides similar services for the benefit and use of the Trailmark community. Does this violate any premise related to or deemed a “double taxation?” Please provide some scenarios of what would be, or not be, considered “double taxation.”

C.R.S. 32-1-107(3)(b) provides that an overlapping special district may be authorized to provide the same service as the existing special or metropolitan district provides if: (1) the governing body of the municipality approves by resolution the inclusion of such service as part of the service plan of the overlapping district; (2) the improvements or facilities to be financed, established or operated by the special district to not duplicate or interfere with any other improvements or facilities already constructed or planned to be constructed in the overlapping area; and (3) the Board of Directors of the special district authorized to provide the service within the overlapped area consents to the overlapping special district providing the same service.

It appears that these requirements have been met, as the Service Plan provided for the overlapping service at the time of its original approval, and the First Amended and Restated Intergovernmental Agreement between TMMD and South Suburban Park and Recreation District dated December 14, 2005 expressly permits the overlap, but does provide that any new park and recreation improvements are subject to the reasonable consent of South Suburban. It is our understanding that South Suburban’s consent to the new improvements is being sought. While such consent would not necessarily be an express acknowledgment that there is no duplication or interference with South Suburban’s other improvements or facilities, that would certainly be a reasonable inference. Otherwise, South Suburban would likely not agree to TMMD constructing its own, similar facilities.

This issue was discussed at some length in a Colorado Supreme Court opinion, with limited discussion of taxation. (Double taxation would only seem to be the result of two special districts or municipal entities providing duplicate services). The court said the issue was not one of constitutional limitation, but a “practical consideration that intolerable confusion instead of good government, almost inevitably would attain in a territory in which two municipal corporations of like kind and powers attempted to function coincidentally.” In that particular case, the court discussed a number of cases from other jurisdictions where what would appear to be duplicative special districts (or special districts and municipalities) provided the same services, including sanitation districts, drainage districts, school districts



Board of Directors
Trailmark Homeowners Association, Inc.
July 22, 2009
Page 6

and a forest preservation district. In each case, the deciding courts found that the services were not duplicative. There are no other reported cases in Colorado that give any guidance about what could or would be considered duplicate services. In the present case, whether the services to be provided would be found to be duplicative would be determined on a facts and circumstances basis by a reviewing court.

3. What is the responsibility of the HOA to the community of Trailmark in providing oversight of actions taken by the TMMD? Does the HOA have any authority to insert itself into any process involving the spending of TMMD funds by the TMMD?

The Association's power and responsibility to provide oversight of actions taken by the TMMD would be governed by the Declaration of Covenants, Conditions and Restrictions for Chatfield Green ("Declaration") and the Association's Articles of Incorporation. The duties and powers of the Association are set out in Article 8 of the Declaration, and are very broad. Section 8.1 provides

The Association has been formed to further the common interests of the Members. The Association, acting through the Board of Directors or Persons to whom the Board has delegated such powers, shall have the duties and powers hereinafter set forth and, in general, the power to do anything that may be necessary or desirable to further the common interests of the Members, to maintain, improve and enhance the common interests of the Members, to maintain, improve and enhance the Association Properties and to improve and enhance the attractiveness, aesthetics and desirability of the Common Interest Community.

There is no express duty or power to oversee the actions of the TMMD. We believe that this is the case, in part if not completely, because the TMMD board is itself elected by the same members of the community and is required to act in their best interests. It would be unusual at the very least for one entity, whose charge is to further the common interests of the members, to be responsible for overseeing another entity that has the same charge.

However, given the broad authority of the Association, the Board could undertake to provide oversight in connection with TMMD activities. Whether this is the best or most direct approach is probably open to debate, given that TMMD board members are also elected by the same constituents as make up the members of the Association. Nevertheless, the Association's Board would have the right to exercise its business judgment as to the extent that it wanted to provide oversight. Business judgment requires that the Board act in good faith, within the



Board of Directors
Trailmark Homeowners Association, Inc.
July 22, 2009
Page 7

express powers of the Association, and in a manner that is in keeping with good business judgment.

Section 302 of the Colorado Common Interest Ownership Act allows the Association to “institute, defend or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community.” While this section expressly allows Associations to act on behalf of its owners, we are aware of courts that have disallowed Associations taking action on behalf of the owners in their communities. Further, to the extent that the special district statutes require interested parties to be taxpayers in the district, the Association would be excluded, as all of its property is exempt from assessment and taxation.

4. Does the HOA’s Design Review Committee (DRC) have the authority to require approval of properties that are within the community but do not pay assessments to the HOA or TMMD? Examples would include property owned by Jefferson County (e.g., school site), South Suburban Parks and Recreation District and commercial property owned by Shea Homes at the entrance to the Trailmark community? That is, can these entities build whatever they deem appropriate regardless of the design standards as outlined by the HOA covenants?

Section 4.1 of the Declaration provides that “[t]he approval of the Design Review Committee shall be required for any Improvement to Property on any Lot except: (a) any Improvement to Property made by Declarant; . . .” The term “Lot” is defined in Section 2.27 of the Declaration to specifically exclude “(a) any property owned by a public body; or (b) Association Properties.” In other words, Design Review Committee approval requirements are not linked to whether a property owner pays assessments or not. Rather, it is determined first by whether a parcel of property constitutes a “Lot” under that term’s definition, and then whether there is a specific exemption.

TMMD is considered a public body (a quasi-municipal corporation) by Colorado statute and case law. Property owned by a public body, such as TMMD and South Suburban, would be exempt from having to obtain Design Review Committee approval of improvements. In addition, by the express provisions of the Declaration, Shea Homes is exempt from having to obtain Design Review Committee approval for any improvements made by it.



Board of Directors
Trailmark Homeowners Association, Inc.
July 22, 2009
Page 8

Please let me know if you have any questions concerning the foregoing.

Very truly yours,

WINZENBURG, LEFF, PURVIS & PAYNE, LLP

MARK K. PAYNE

MKP/kp