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Del Wallis, President
Odd Fellows Sierra Recreation Association, Inc.
PO Box 116
Long Barn, CA 95335

RE: Termination of Water Service

Dear Del:

You asked me to research whether the Association would be legally justified in shutting off water service to a Lot Owner who was delinquent in paying the assessments, part of which includes payment for water service. Since the consequences for error could be quite expensive, I have done extensive research to support my analysis and conclusions.

Opinion

Non-payment of assessments would justify the termination of water service upon reasonable advance written notice. There are certain risks associated with terminating water service, but in my opinion, these risks are manageable and do not change my opinion about the justification and prudence of terminating water service for non-payment.

Facts

The Odd Fellows Sierra Recreation Association, Inc. ("Association") procures and distributes domestic water for the use of the residents under a Water Use Agreement, dated October 12, 1986 ("Agreement"). The Agreement commits the Association to furnish to the Odd Fellows Sierra Homeowners' Association ("Homeowners"), such water as may be necessary for the domestic use of their members, subject to certain terms and conditions.

The Agreement specifically states, and my research confirms, that the Association is not a public utility and that it agrees to furnish water to the Homeowners' members only in accordance with the Agreement. Further, the Agreement provides that neither Homeowners nor any of its members has any right, title or ownership interest in or to any of the water so provided.

The only payment provision in the Agreement states that the Homeowners shall pay a flat sum for all water delivered to the Homeowners. There is no provision for payments from individual members under the Agreement. If the Homeowners Association fails to pay the annual charge, then the

Association may discontinue service to the Homeowners Association under the Agreement, but there is no similar provision for the default of an individual member.

The Declaration of Covenants, Conditions, and Restrictions for the Association (CC&R's) require the Association to acquire and pay for certain "vital services" for the "owners." Among these vital services is water. There is no provision in the governing documents for any individualized charge for water services and you have confirmed that charges for water service are an undifferentiated part of the overall assessment. The CC&R's simply provide that, "The Association shall have the power to establish, fix, and levy assessments against the Lot Owners...." The CC&R's also establish the available remedies against a Lot Owner who fails to pay assessments. Such remedies include an action for damages to recover the amount owed or to foreclose the assessment lien against the property and purchase the property for the amount owed at the foreclosure sale. Interruption of water service is not one of the listed remedies for non-payment.

Under the CC&R section relating to discipline of members, the Association has the right to suspend the Lot Owner's voting rights, privileges for use of the Recreation Area, or to impose monetary penalties. However, the CC&R's limit the available discipline, "Except under the provision of Article IV of this Declaration, relating to foreclosure for failure to pay assessments, or as a result of the judgment of a court or a decision arising out of arbitration, ***the Association shall in no way abridge the right of any owner to the full use and enjoyment of his Lot***." It is uncertain whether shutting off the water would be considered to "abridge the right of any owner to the full use and enjoyment of his Lot.

There is no agreement between the parties to provide water for any particular purpose except for general domestic use. In particular, there is no assurance of any minimum amount of water and no agreement to supply sufficient amounts to suppress fire.

For purposes of this analysis we have assumed that Lot Owners pay for their water service as part of their annual fees and that the Association contemplates interrupting water service only after notice to the Lot Owner.

Analysis

Most of the law in this state which deals with the interruption of water service deals with municipal or private water companies operating as public utilities. (See i.e. Public Utilities Code §779.) However, the Odd Fellows water service is supplied by the Association to its own members. This relation makes the Association a "mutual water company." There were significant changes in the applicable statutes in 1998 which bear mentioning.

Prior to 1998, a mutual water company could supply whatever amount of water it contracted to provide its customers and for whatever purposes the parties designated. However, starting in 1998, a mutual water company was required to furnish adequate potable water for domestic use and fire

suppression. Interestingly, the requirements of the law are mandatory for mutual water companies formed on or after January 1, 1998, but only voluntary for those formed prior to 1998. Thus, you are not bound by these new laws unless you voluntarily submit to them and from what I understand, you have not done so.

The case law prior to 1998 held that the failure of a water company to provide sufficient water to suppress a fire was not compensable unless the water company specifically contracted to provide water for that purpose. (See i.e. *Niehaus Brothers Company v. Contra Costa Water Company* (1911) 159 Cal. 305.) In 1955, the California Supreme Court held that "...[A] water company is not liable for damages resulting from a failure to supply water for a particular use in the absence of a specific undertaking to supply water for that use." (*Gelhaus v. Nevada Irrigation District* (1955) 43 Cal.2d 779, 782.) In *Gelhaus* the loss was from hatchery fish which died when *irrigation* water was interrupted.

In a more recent case, the Second District Court of Appeal reaffirmed these holdings and held that, "...a water company cannot be held liable for failure, from whatever cause, to have a supply of water available on a consumer's premises for use in fire protection unless it expressly assumes the liability." (*Lainer Investments v. Dept. of Water & Power* of L.A. (1985) 170 Cal.App.3d 1, 9.) The *Lainer* court explained that the leading cases in this area "hold that liability for loss resulting from fire is not an incident of the *ordinary* relation of water distributor and consumer, but such liability on the part of a water company can only be created by an *express private contract whereby the water company agrees to furnish water as a protection against fire.*" (*Supra.* at p. 10.)

The Association has contracted to provide domestic water only. There is no agreement to supply any particular amount for any purpose other than ordinary domestic purposes. There is no mention of fire suppression in any of the governing documents or contracts. Accordingly, in my opinion, the only damages the Association would likely encounter from its interruption of water service are those for which it has contracted. Since the contract was merely to provide domestic water, then it is the value of water as a commodity which would constitute the Association's exposure to damages for failure to deliver. The most serious potential liability the Association would probably encounter from interrupting a customer's water supply would be damage or destruction from fire, including the possibility of personal injuries. However, since this exposure to liability is not present under current law, the exposure to damages is small as the value of water as a domestic commodity is very modest.

The 1998 changes in the water law included a provision which allows certain water companies to terminate water service for non-payment of assessments. Corporations Code Section 14303 states:

> A corporation organized for or engaged in the business of selling, distribution, supplying, or delivering water for irrigation purposes or domestic use, and not as a public utility, may levy assessments upon its shares, whether or not fully paid, unless otherwise provided in its articles or bylaws. If any shares of the corporation that have been made appurtenant to any land as provided in this chapter, become delinquent in the

> payment of assessments, the right to receive water or dividends thereon may be denied, and they may be sold and transferred without those lands as if not appurtenant thereto, and the purchaser shall acquire the right to receive water as provided in the articles or bylaws of the corporation, or they may be forfeited to the corporation.

The general case law supports the right of the water supplier to terminate service for non-payment. The United States Supreme Court held that a customer's right to continued utility service is conditioned on payment of charges properly due. (*Memphis Light, Gas & Water Div. v. Craft* (1978) 436 U.S. 1, 11.) The California Supreme Court held that nonpayment of charges properly due is justification for discontinuance of service in *Schultz v. Town of Lakeport* (1936) 5 Cal.2d 377.

In the *Town of Lakeport* case, the court stated at page 381:

> The right of a water company, whether privately or publicly owned and operated, to require compliance with reasonable rules and regulations for service to customers and the payment of sums due for such service, and to provide for the discontinuance of the service for the violation thereof, has been generally recognized and may not be disputed. [Citations omitted.]
>
> The summary power of shutting off the water to coerce payment of current bills or water rent is conceded to be vested in the company furnishing such commodity so as to afford it a means of conducting its business in an orderly, efficient and economical manner, without the expense attendant upon litigating numerous small claims as to which there can be no dispute or question of their correctness. (*Schultz v. Town of Lakeport* (1936), Supra at p. 383.)

However, the right to terminate service for non-payment cannot be used to coerce the Lot Owner into paying a bill which is unjust or which is disputed in good faith, if the Lot Owner agrees to comply with current rules for continuing service. Thus, if there is some good faith dispute and the Lot Owner agrees to pay all charges which are not disputed, then the Association should continue service until the dispute is resolved.

In a municipal water utility case, the California Supreme Court held that since California law does not permit the termination of utility service to a customer without good cause, the customer must be given adequate notice and an opportunity to resolve any good faith dispute prior to actual termination of service. (*Perez v. City of San Bruno* (1980) 27 Cal.3d 875, 894.) "The form of notice required in such cases is one which is 'reasonably calculated' to inform [customers] of the availability of 'an opportunity to present their objections' to their bills [Citation omitted]; the necessary hearing is one which provides 'an opportunity for the presentation to a designated employee of a customer's complaint that he is being overcharged or charged for services not rendered [Citation omitted]. (*Supra.* at pp. 893-894.)

If the Association chooses to terminate service and the Lot Owner believes this action is unwarranted, damages may yet be unavailable unless he acts reasonably to minimize his damages. The *Town of Lakeport* case makes it clear that a customer is expected to pay small amounts in dispute in order to continue service and resolve the dispute later. Otherwise, a customer might dispute and refuse to pay a trivial sum and then claim enormous sums as damages from the wrongful termination of service which could have been easily avoided.

Lot Owner Defenses

In the event the Association terminates water service for non-payment, the Lot Owner has several alternatives. First, he could pay the assessment without admitting its correctness, then litigate whether the amount was correct. This would at least continue his service while the dispute is being resolved.

Next, the Lot Owner could file an action for an injunction to order the Association not to terminate water service. Such an injunction might be temporary where it is intended to preserve the status quo while the underlying dispute is being resolved. Or, the injunction might be permanent if the plaintiff can show he is entitled to such relief, but that is unlikely.

If the Lot Owner allows water service to be cut off, it is clear that he may not sue for fire damages which might result from loss of water service unless the Association specifically contracted with him to provide fire suppression water and agreed to assume the risk of harm for failure to do so. Since no such contract exists here, the risk of fire damage is not the Association's concern.

A Lot Owner might also claim that the only remedy available for non-payment of assessments is to foreclose the assessment lien or to file a damages action to collect the unpaid amount. The CC&R's have a provision which could be read this way, but it does not appear to override the general law of this State, because it is somewhat ambiguous whether it was intended to apply to water services as well. However, even if a Lot Owner was able to prevail on this point, the Association's exposure to damages for wrongful termination is very slight and any damages are likely to be very modest. Further, the Lot Owner might not be heard to complain where he is guilty of "unclean hands" from his failure to pay proper assessments.

I could find no statutory or constitutional remedy for the Lot Owner to prevent the termination of service for non-payment. However, it appears that in some cases, the courts require, and I would urge you to provide, reasonable notice of the Association's intent to terminate water service for non-payment of assessments. The notice should also provide a dispute resolution mechanism and give the Lot Owner the names and numbers of persons to contract to resolve any such dispute. This process would further innoculate the Association against damages.

Conclusion

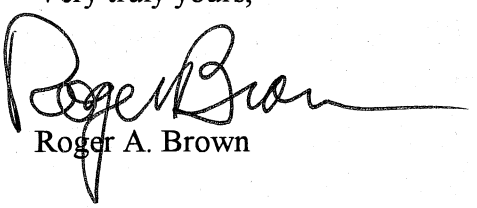
In my opinion, the Association would be justified in terminating water service to any Lot Owner who fails to pay assessments after proper notice and an opportunity to present and resolve any dispute

related to such assessments. There is a slight chance that a Lot Owner might convince a court that service termination is not a proper remedy under the CC&R's, but I doubt whether the defense would be successful. However, this is a risk you must assume if you choose to terminate service for non-payment. You might increase your chances of prevailing by amending your CC&R's to allow for termination or you could add service termination as a consequence of violating the Park Rules.

However, even if you were to be found liable for wrongful termination, the damages could not include fire losses and would most likely consist of the loss of plants and shrubs or other similar modest damages. Under these circumstances, I believe it would be a prudent risk for the Association to consider terminating water service for a Lot Owner's failure to pay assessments after timely and proper notice.

If you have any questions about these issues, please feel free to contact me at your convenience.

Very truly yours,



Roger A. Brown

RAB/hs