

Bay Breeze Point

May 21, 2010

Re. Black Metal Fence and White Masonry Fence/Wall Legal Statuses

Attention: All Bay Breeze Point Lot Owners

Over the past seven years there have been numerous positions espoused regarding the legal status of the white masonry fence/wall that runs along 30th Bay and around the community entrance at Pleasant Avenue. The current Bay Breeze Point (BBP) Board of Directors (BOD) put together a group to research and identify the legal status of this white masonry fence/wall, as well as the black metal fence that runs behind several Bay Point Drive homes. The group presented its findings to the BOD on May 17, 2010. A copy of the group's executive summary is attached for your review, plus a copy can be found on our community website

The group concluded that the BBP HOA neither owns nor has any legal responsibility to maintain the black metal fence that is installed on US Government property or the white masonry fence/wall that is installed on City of Norfolk and private homeowner properties. Once you have reviewed all of the group's executive summary, I'm sure most of you will be asking the question, "Now that the legal status of the white masonry fence/wall has been clarified, what happens to it?" The BOD would like to put together another group of HOA members to address this question by identifying white masonry fence/wall potential options for the entire HOA to evaluate. If you would like to participate on this group and/or provide suggested white masonry fence/wall options, please contact our HOA Management Company: Ms Kimberly Cox at The Property Shoppe, 3149 Shore Drive, Virginia Beach, VA 23451 or 757-496-1986.

The BOD has scheduled a special HOA-wide meeting for September 9, 2010 at 6:30 PM at the Ocean View Library (Mary D. Pretlow Anchor Branch Library) in meeting rooms 1&2 to formally discuss the results of both group's efforts.

See you at the September 9, 2010 meeting.


Vern Aunchman
HOA President

Executive Summary of

Bay Breeze Point Homeowners Association's Fencing Study Group

January - May 2010

Introduction: The legal status of the white masonry fence that runs along 30th Bay and around the Pleasant Ave entrance to Bay Breeze Point (BBP) has been in question since the homeowners took over control of the HOA in late 2002/early 2003. Over the last seven years, fencing positions have been espoused which were sometimes based on emotion and/or confusing and often contradictory information. These positions which were attributed to: the developer; builders; property managers; individual members, and others. Although these positions and the persons espousing them appeared to be fair, the results were less than optimum and sometimes led to faulty assumptions and expenditure of HOA funds. Given this situation, the 2010 Board of Directors (BOD) decided to research the fencing issue and identify the legal owner(s). To help them accomplish this task, the BOD established a "Special HOA Fencing Study Group" composed of six members: Jerry Baker, John Bergman, Jim Casey, Fred Sciulli, Fran Scott, and Steve Woll. This study group held six group meetings between the January-May 2010 and expended over 120 man-hours researching and discussing fencing legal status. The group presented the results of their study to the BOD on May 17, 2010. In turn, the BOD will ensure all HOA lot owners are aware of the study results and allow each member ample time to review the study results before scheduling a HOA-wide special fencing meeting in September 2010.

Study Group Objective: Identify the legal status of two fencing arrays: 1) the black metal fencing that runs along the waterway behind several homes on Bay Point Drive; and 2) the white masonry fencing that runs along 30th Bay behind several homes and the Bay Breeze Point entrance on Pleasant Avenue.

Study Group Process: The following guidelines were established by the Study Group:

- Study results will be based on facts not opinions
- Study will identify legally binding items

The group went back-to-the-basics and reviewed what matters - legally binding documents that have been recorded with proper authorities, e.g., Plats, Deeds, Titles, HOA Covenants and BYLAWS. Non-legally binding opinions and plans as well as; personal positions, property manager declarations, legal letters of opinion without reference to legal documentation, unofficial opinions of City of Norfolk personnel, emails, etc., were not used to develop the results of this study effort.

Chronology of Key Events relating to BBP : The group identified and highlighted a brief chronology of some key BBP related events/actions:

- Circa 1989 -- Developer Moore was in charge of future BBP property
- Circa 1990 -- Developer Moore dedicates property by Pleasant Ave Entrance to the City of Norfolk for a pumping station and obtains an easement for wall and landscaping on that property
- Circa 1994 -- Developer Moore constructs a white masonry fence along 30th Bay from Pretty Lake Ave up to Pleasant Ave and four (4) sections north of Pleasant Ave
- Circa 1998 -- Developer Letchworth takes over the future BBP property
- Circa 2000 -- Black metal fence installed by Developer Letchworth
- Circa 2002 -- White masonry fence extended from four (4) sections north of Pleasant Ave to Lot 86 (9629 Dolphin Run)
- Circa 2003 -- BBP homeowners take over the HOA and establish a BOD using the same Management Company as Developer Letchworth had used as the Declarant
- Circa 2004 -- HOA funded a major repainting of the white masonry fence

Information at start of study: At the start of the study, some basic information was gathered to support group activities and research:

- Black metal fence
 - Fence runs behind eleven (11) homes and one (1) lot on Bay Point Drive (9574BP, 9578BP, 9582BP, 9586BP, 9590BP, 9594BP, 9598BP, 9602BP (vacant lot), 9606BP, 9610BP, 9614BP, & 9618BP)
 - Fence was installed by community developer
 - Fence is similar to the metal fencing that runs along the waterway for the neighboring community (Bay Point)
 - In some cases, fence has been altered by adding gates, etc.
 - HOA maintains an insurance policy that includes this fence

- White block fence
 - Fence runs behind fourteen (14) homes and on one (1) lot (9547BP, 9551BP, Lot #30 BP, 5044OW, 5045OW, 5048OW, 5049OW, 9601DR, 9605DR, 9609DR, 9613DR, 9617DR, 9621DR, 9625DR, & 9629DR) and around the BBP Pleasant Ave entrance
 - Fence was installed by the community developer
 - HOA funded a major repainting of the white fence
 - HOA maintains an insurance policy on the fence

- Bay Breeze Point approved covenants, restrictions, & reservations contains guidelines for ownership and maintenance of HOA common areas
 - ARTICLE I of the BBP Covenants, Restrictions, Reservations, & Easements provides "DEFINITIONS" of key terms, e.g., Section 1.8. "Common Area" means (i) all of the real estate specifically designated as "Common Area" on recorded plats of the Properties, in any Supplemental Declaration, or in any amendment of this Declaration or in any other instrument executed by Declarant and recorded in the Clerk's Office; (ii) private streets or rights-of-way, designated on recorded plats of the Properties and conveyed by deed to the Association, if any; and, (iii) all other real property and improvements or facilities now or hereafter owned by the Association which are intended to be devoted to the common use and enjoyment of the Owners. The Common Area includes or may in the future include, without limitation, open space, private parks, a lake or other water bodies, a swimming pool, club house, areas set aside for pedestrian and /or bicycle paths and other recreational facilities intended to be used by the Owners, which may be submitted to the provisions of this Declaration. (iv) Property designated as Beach Access common area shall be specifically designated in the recorded plat of the Property.
 - ARTICLE IV of the BBP Covenants, Restrictions, Reservations, & Easements provides information on "COMMON AREA", if it applies, e.g., Section 4.1 Obligations of the Association. The Association, subject to the rights of the Members set forth in this Declaration, shall be responsible for the maintenance, management, operation and control, for the benefit of the Members, of the Common Area conveyed to the Association and all the improvements thereon, (including fixtures, personal property and equipment related thereto), and shall keep the Common Area, and the improvements thereon in accordance with the requirements of the Zoning Ordinance, this Declaration and any applicable Supplemental Declaration, and the Association shall keep the same in good, clean, and attractive condition, order and repair. The Association shall be responsible for the management, control and maintenance of all street intersection signs, direction signs, temporary promotional signs, plantings, street lights, entrance features and/or "theme areas", lighting, sprinkler systems, stone, wood, or masonry wall features and/or related

landscaping installed or planted in the Common Areas, or in any street or right of way, by the Declarant or the Association, for the benefit of the Members or the Association; provided such items are not maintained by the applicable municipality or the Virginia Department of Transportation at its expense.

- Exhibit C, "Common Area" -- none listed.

- City of Norfolk related items
 - No documentation had been located within the Clerk's office that transferred ownership of the fencing or property the fencing is located on to the BBP HOA
 - BBP HOA pays no property tax to the City of Norfolk

- Prior Bay Breeze Point Boards of Directors Actions
 - White masonry fence legal status has been an issue since the HOA transition from community developer circa 2002/2003
 - Prior fence legal status research on behalf of the BOD appeared to follow earlier management company guidance
 - **Prior legal opinions appeared to be based on potential intentions and selected statements, not documents filed within the Clerk's Office.** For example, a 2007 effort to have legal counsel clarify legal questions regarding the white masonry fence legal status only provided questionable results/opinions. HOA's management company forwarded a "legal" response/opinion to the BOD that stated: "Section 4.1 of the Declaration of Covenants, Restrictions, Reservations and Easements of Bay Breeze Point makes the HOA responsible for maintenance of the masonry wall." The Management Company further summarize this legal review with the following statements:
 - "The wall (masonry fence) was on the property prior to April 1994 and was subject of a maintenance easement involving an association called at the time Bay Point Association."
 - "It appears that the wall (masonry fence) marks the western boundary of the HOA."
 - "The wall (masonry fence) was on the property before the first home was built which would make it a part of the common elements."
 - "If the above three statements are true, then the masonry wall would legally be the property of the HOA and is a common element."

Study Group Actions:

- HOA Insurance Agent -- Study group members met with Bay Breeze Point HOA's insurance agent (State Farm Insurance) on two occasions. Key discussion questions and/or topics follow:
 - State Farm initiated HOA coverage late 2002/early 2003
 - At that time, State Farm questioned the legal status of the white fence. State Farm was told by Bob Smith of United Properties Association (UPA) that "Property Developer Moore constructed the white fence to the south of Pleasant Ave and Property Developer Letchworth constructed the white fence to the north of Pleasant Ave and that the HOA was responsible for both sections of white fence." State Farm used Mr. Smith's statement to support initiating insurance coverage of the white fence.
 - Black metal fence was treated the same way with UPA stating that the HOA was responsible for it.
 - An in-depth discussion of fencing legal status and responsibilities followed, i.e.,
 - The fact that the black metal fence is installed on Federal Property (circa 2000) and is only available to eleven (11) lot owners (Note: One of the twelve lots with black metal fencing was found to have been installed by the lot owner vice community developer (9618BP)).
 - The fact that the white fence from Pleasant Ave south and four (4) sections north of Pleasant Ave were constructed prior to BBP development (circa 1994).
 - The fact that the white fence from Pleasant Ave north excluding the four (4) sections discussed above was constructed circa 2002.
 - The facts that the white fence now stands on properties owned by individual BBP lot owners and/or City of Norfolk (around the pumping station near the entrance to BBP -- south side).
 - The fact that BBP HOA has no common area(s).
 - The fact that BBP pays no property taxes.
 - State Farm Agent stated that it appeared that most of the fencing (except for several sections constructed on what is now City of Norfolk property) should be insured/covered by individual HOA member's insurance policies.
 - State Farm Agent was asked if an accident occurred with resulting damage to the currently insured fence would State Farm cover the damages -- he stated they would given the policy has been in place for several years, etc. He did state, that his original estimate on the fences values appeared to be quite low. Current coverage is \$104.2K for all fencing with annual premiums of about \$1 per \$1K of value.
 - State Farm Agent suggested that the HOA get back with him once a decision was made on insurance requirements.

- Lastly, State Farm Agent stated that there may be a requirement to have insurance coverage for the City of Norfolk when City property is used to maintain a neighborhood identification sign, i.e., temporary encroachment. More specifically, the four (4) sections of white fence on the south side of Pleasant Ave at the BBP entrance is located on City of Norfolk property. (Note: A study group member formally discussed the potential requirement to insure the fence located on City of Norfolk property with a Deputy City Attorney. Deputy City Attorney stated that in this case, there was no requirement for BBP HOA to obtain insurance that would cover the City of Norfolk for the fencing located on City property.)
- Norfolk Clerk's Office -- A study group member visited the Norfolk Clerk's Office on February 8/9, March 25/26, and April 8 to search appropriate Bay Breeze Point related documents that may have been filed with the Norfolk Clerk's Office.
 - Documents/areas searched:
 - Files for: Bay Point, Bay Point Association, Bay Point HOA, Bay Breeze Point Association, Bay Breeze Point HOA, RMI Corporation, Robert M. Letchworth, plus any other related areas.
 - Documents found:
 - Declaration of Covenants, Restrictions, Reservations and Easements of Bay Breeze Point (Item # 990005632).
 - Deed of Gift (Item # 030019110) -- this item transferred beach and access ownership from the Declarant (RML Corporation) to City of Norfolk -- 9 April 2003.
 - Numerous plats depicting both Phases 1 & 2.
 - Documents not found:
 - No documents that discussed any BBP "common area" that was transferred to the BBP HOA.
- Legal Counsel (past opinions) -- A study group member attempted to contact the legal counsel that provided the latest masonry fence opinion to HOA's management company in 2007. More specifically, the counsel was told: "To better understand your findings and opinions regarding the masonry wall, we ask that you review the following facts and either confirm your earlier findings or alter your opinions":
 - Section 4.1 of the Declaration of Covenants, Restrictions, Reservations and Easements of Bay Breeze Point which can be found on our HOA website: baybreezepoint-norfolk.org, then open the folder titled "Rules and Regulations", then select "Bay Breeze Covenants" Comments: This Section applies to "Common Areas" and appears to be boilerplate guidance given all of the requirements identified, e.g., maintenance of street signs, street lights, etc.
 - In addition, the same Covenant document defines "common area" in Section 1.8.
 - Bay Breeze Point HOA has no "common areas" that have been conveyed to the HOA.
 - There are no recorded documents within the Clerk's office conveying real property to the HOA.

- The masonry wall is located on private properties (individual HOA member properties) or City of Norfolk property.
- HOA pays no property taxes.
- The original developer might have planned for the fence to be "common area" but no formal actions were taken to complete that plan, in fact, just the opposite actions occurred -- the developer identified fifteen (15) individual lot boundaries so as to include the fence and extend six inches beyond the fence -- hence the fence was located/placed on privately owned properties not properties that were to be transferred to the HOA via legal filings with the clerk's office.

Legal Counsel was told that the study group really needs to clarify prior positions on the following:

- What legal guidance was used to form your opinion?
- What was the legal rationale for stating (according to management company) that the HOA owns the fence?
- What was the legal rationale for stating (according to management company) that the HOA must fund maintenance on the fence as a common area?

Summary: To date, Legal Counsel has not responded to group's request.

- Legal Counsel (current opinions) -- Study Group forwarded a letter to Norfolk's City Attorney discussing the group's actions and desire to identify fence legal status and any liabilities and responsibilities associated with that fence legal status.
- Group members:
 - Met with numerous HOA members
 - Reviewed community related documents, BOD minutes/notes/correspondence
 - Used the City of Norfolk's website that shows all pertinent real property information by street address.

Study Group Findings:

- **Black metal and white masonry fence legal status has been an issue since the HOA transition from Declarant to homeowners**
- **"Common Elements" -- an essential feature of a condominium development, are all portions of a condominium other than the units that are used by all the unit owners. BBP is not a condominium within the meaning of the Virginia Condominium Act because there are no undivided interests in common elements vested in the unit owners.**

- Bay Breeze Point has no common areas as defined by "Declaration of Covenants, Restrictions, Reservations and Easements of Bay Breeze Point".
- NO documents could be located within the City of Norfolk Clerk's office that passed any real or personal property to the Bay Breeze Point HOA by Developer Letchworth.
- It appears from City of Norfolk documents that Developers' Plat for Phase 1 had individual lots depicted with the white masonry fence located within the boundaries of these lots not as separate common areas. Plat for Phase 2 did not initially depict the white masonry fence north of Pleasant Ave (with the exception of the four sections that were constructed circa 1994) given the white masonry fence in this area was only added circa 2002 by the Developer -- this new white masonry fence was constructed within the boundaries of individual lots not as separate common areas.
- Bay Breeze Point pays no property taxes.
- Bay Breeze Point HOA obtained insurance coverage on both the black metal fence and the white masonry fence in 2003 based on guidance from Bob Smith (UPA Property Manager). This insurance coverage has been continued since that time without identifying fencing legal status.
- Bay Breeze Point HOA's Board of Directors approved a major repainting of the white masonry fence circa 2004. Legal status of the fence and responsibility for its maintenance had not been formally established.
- Bay Breeze Point HOA Board of Directors (2008) approved a white block fence resolution (#92208-2) on September 22, 2008. Key sections of that Resolution follow:
 - White fence legal status remains in question
 - HOA pays no property taxes
 - White fence will need some maintenance in the future
 - Resolution stated that due to lack of clear ownership and responsibility, future directions relating to the white fence should be presented to the entire HOA membership for discussion and formal HOA vote. Resolution also stated that no HOA funds will be programmed or set aside for white fence maintenance -- if funds are needed , they will be approved by the entire HOA then funded via special assessment.
- Bay Breeze Point HOA annually funds landscaping/lawn care for the areas immediately around the Pleasant Ave entrance. These actions are preformed on City of Norfolk and private property not HOA property.
- The latest HOA Reserve requirements was based solely on white fence repairs/maintenance.

Specific Findings related to black metal fence:

- Fence runs behind eleven (11) Bay Point Drive lots (9574 BP, 9578 BP, 9582 BP, 9586 BP, 9590 BP, 9594 BP, 9598 BP, 9602 BP (vacant lot), 9606 BP, 9610 BP, & 9614 BP)
- Fence behind 9618BP was found to have been installed by the lot owner not the developer.
- Fence is located on Federal Government property.
- Fence was installed by community developer (Letchworth) as a border between the bric-brac bank and eleven (11) Bay Point Drive Lots.
- In some cases, fence has been altered by adding gates, etc.
- Fence location restricts its use to the eleven (11) lot owners identified above.

Specific Findings related to white masonry fence:

- Fence runs behind fourteen (14) homes and on one (1) lot (9547 BP, 9551 BP, Lot #30, 5044 OW, 5045 OW, 5048 OW, 5049 OW, 9601 DR, 9605 DR, 9609 DR, 9613 DR, 9617 DR, 9621 DR, 9625 DR, & 9629 DR)
- Fence was installed by community developers (Moore & Letchworth)
 - Fence at the entrance (four (4) sections - North of Pleasant Ave & four (4) sections - South of Pleasant Ave) was constructed circa 1994 by Moore
 - Fence running from the end of the four (4) sections south of Pleasant Ave to the south boundary of Bay Breeze Point was constructed circa 1994 by Moore
 - Fence running from the end of the four (4) sections north of Pleasant Ave to the north was constructed circa 2002 by Letchworth
- Fence is located on private properties and/or City of Norfolk property -- all of the fence is located on private properties except for the four (4) sections located on the south side of Pleasant Ave entrance. These four (4) sections are located on City of Norfolk property.
- Two wall and landscape maintenance easements were found -- both involve the first four sections of fence south of Pleasant Ave on City of Norfolk property. One easement was a variable four (4) foot wall and landscape maintenance easement and the other was a variable width perpetual easement for the installation and maintenance of a brick wall and landscaping.
- It should be noted that the white masonry fence was constructed prior to the City of Norfolk actions to cleanup and redevelop the area between 30th Bay and Shore Dr.
- Given the placement and timing of the white fence construction, some believe security and salability of properties influenced the decision to erect the fencing.

Study Group Conclusions:

- HOA has no "Common Area(s)" as defined by the Declaration of Covenants, Restrictions, Reservations and Easements of BBP.
- Black metal fence was built by the developer on Federal Government Property and has limited access.
- White masonry fence was constructed by property developers Moore & Letchworth on properties that were incorporated into individual lots (private properties) or property dedicated to the City of Norfolk for a pumping station.
- HOA has maintained the landscaping at the BBP Pleasant Ave entrance on City of Norfolk and private properties.
- Access to the white masonry fence located on City of Norfolk property was granted to the HOA via a variable perpetual landscape easement (adjacent to Pleasant Ave) and a four foot landscape maintenance easement (adjacent to 30th Bay).
- HOA should review its current insurance policies and consider future policy adjustments for fencing property coverages.

Study Group Overall Conclusions:

- HOA has **NO** ownership of, liability for, responsibility for, or access to the black metal fence behind the eleven (11) Bay Point Drive lots.
- HOA has **NO** ownership of, liability for, responsibility for, or access to the white masonry fence along 30th Bay and at the Pleasant Avenue entrance with the exception of the easement pertaining to the four (4) sections south of Pleasant Avenue around the pumping station.
 - Access to the white masonry fence located on City of Norfolk property was granted to the HOA via a variable perpetual landscape easement (adjacent to Pleasant Ave) and a four foot landscape maintenance easement (adjacent to 30th Bay).

Note: The next page provides a review of the white masonry fence study group conclusions.

In Summary: The study group researched the fencing legal status in-depth and has validated the fact that the HOA is not the legal owner of either fence.

Recap of White Masonry Fence Findings & Conclusions

