

**#2**  
**LBA/LBWID Liability Regarding the Dam & Parcel 165**  
**Questions Submitted by Lake Barcroft Residents & Answers**  
**(10/30/2024)**

1.

Question: Could WID take down the dam and return streams to natural state?

*Answer: LBWID could not take down the Dam because that would be outside the scope of their authority. Under Virginia law, a watershed improvement district can be established for “water management” ... that “will be promoted by the construction of improvements to check erosion, provide drainage, collect sediment or stabilize the runoff of surface water.” VA Code, Title 10.1-614. Consistent with this WID statute, the Circuit Court of Fairfax County formally established the LBWID in 1973, and in doing so affirmed LBWID’s purpose, as “repairing, restoring and improving the Lake Barcroft Dam and removing silt from the bed of Lake Barcroft, all for the purpose of checking erosion and stabilizing the runoff of surface water...” Nothing in this Court Order permits the LBWID to remove the Dam.*

*In addition, because LBA’s predecessor BBI owned the lakebed and Parcel 165, which included the Dam, it was necessary for BBI and LBWID to enter into a contract that, among other things, gave LBWID access and the right to operate on BBI’s property so that LBWID could repair and reconstruct to Dam, operate and maintain it after reconstruction, and remove silt from the lakebed. In that 1973 contract BBI expressly ceded to LBWID “the sole right to make all determinations relative to the operation, maintenance, repair, inspection, and testing of the Dam where such determinations are reasonably related, in the sole determination of the WID, to its soil and water conservation functions and duties under the WID Act.” LBWID also expressly agreed in that 1973 contract that BBI retained “all rights not inconsistent with those herein granted to the WID and specifically retains the right to use the Lake and the beaches adjacent thereto for private recreational purposes.”*

*Given this backdrop, if the LBWID were to decide to “take down the Dam and restore streams to their natural state, there would be no erosion control, stabilization of runoff, or an improvement, i.e., a dam. As such, LBWID would be taking an action that is contrary to its statutory purpose of constructing and maintaining a dam to check erosion and stabilize surface water runoff. It would be contrary to its court-ordered purpose of maintaining the Lake Barcroft Dam to check erosion and stabilize runoff. And it would be contrary to the contract between LBWID and BBI (now LBA) allowing LBWID to perform LBWID’s statutory functions of erosion control, sediment collection and stabilization of run-off through operation of the Dam and that preserves the Lake for the private recreational use by LBA member households. Thus, any such action by LBWID to take down the Dam so as to return the streams to their natural state could be challenged in court (and politically) on the grounds that it violates the statute, the court order, and the 1973 contract. Moreover, because any plan to take down the Dam would ultimately result in the dissolution of LBWID, such a plan could preemptively trigger the reversion clause in the deed whereby ownership of Parcel 165 and the Dam would revert to LBA. Thus, even though the LBWID has the*

*sole right to make all determinations relative to the operation, maintenance, repair, inspection, and testing of the Lake Barcroft Dam, it does not have the authority to take actions beyond its intended statutory and court-ordered purpose and its contractual rights.*

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2.

Question: Who has control/influence on the hiring of WID staff?

*Answer: LBWID Trustees make all hiring and staffing decisions.*

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3.

Question: It seems like the restrictions on the LBWID's use of Parcel 165 after transfer of ownership do not cover all possibilities.

*Answer: Respectfully, this statement is too vague to give a meaningful response. The deed will prohibit the property from being:*

- 1. Used for recreational purposes, or used to access the Lake for recreational purposes;*
  - 2. Sold or transferred to a third party;*
  - 3. Encumbered with a deed of trust (e.g., a mortgage); or*
  - 4. Used for residential purposes.*
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4.

Question: Your posted materials suggest you want to push this to a vote by the end of the year. Why so quick if you have only now begun to inform the community?

*Answer: We believe that there will be sufficient time before a vote is taken in December to allow thorough consideration and discussion within the community of the issues. Because LBA does not have liability insurance for the Dam, we do not believe it is in the best interests of the community to delay unduly a decision on the recommended transfer.*

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5.

Question: What is the timeline for the approval vote and transfer?

*Answer: LBA will hold one more Community Information Session on Sunday, November 3, from 2:00-4:00 p.m., at the Mason District Government Center. Around that date, the LBA will officially notify residents of a Special Meeting of the Membership during the first or second week of December. Members can attend the meeting to cast their vote for or against the transfer, or vote via absentee ballot. LBA will provide further information on this process with the official meeting notice.*

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6.

Question: If the WID is sued, wouldn't LBA be liable if WID ceases to exist?

*Answer: Any judgment against LBWID for exposures arising out of or relating to the Dam would be against the LBWID alone. As a political subdivision of the Commonwealth, a judgment against LBWID would not attach to its land, i.e., Parcel 165, including the Dam. Thus, if the LBWID ceases to exist and Parcel 165 reverts to LBA under the reversion clause in the deed, LBWID's liability does not get transferred to LBA. LBA also does not inherit that liability as a legal successor to LBWID. LBA is a separate private homeowners association; it would not be a government-entity successor to LBWID.*

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7.

Question: If the government were to terminate WID, would the dam revert to LBA? And could any government entity change the trustee appointment system to allow non-Lake resident trustees.

*Answer: Yes, the ownership of Parcel 165 and the Dam would automatically revert back to the LBA if the government were to terminate the LBWID.*

*Virginia statutes specify how WID trustees are appointed. As such, any change could only be done by a majority vote by both branches of the Virginia General Assembly (House of Delegates and the Senate) and ratified by the Governor.*

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8.

Question: How does WID determine its tax? Are there increase limitations? Does fundraising for the overflow project affect the WID tax?

*Answer: The LBWID determines the tax rate that it assesses by determining the total annual amount of tax revenue that is needed to fund the services that it provides to its constituents and to fund the reserves needed to implement capital projects. The LBWID does not have any limitations on its annual tax rate. However, the LBWID is required to get its annual budget approved each year by the Northern Virginia Soil & Water Conservation District and the Virginia Soil & Water Conservation Board. Lastly, if LBWID were to receive grants or specials appropriations for capital projects, those funds would offset the amount of tax revenue that LBWID would need to collect from its taxpayers to fund such projects.*

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9.

Question: Has the proposal been run by any insurance companies?

*Answer: The proposal has been run by LBWID's insurance provider. They have informed us that the transfer of Parcel 165 to LBWID will not alter its coverage of LBWID as the primary insured or of LBA as an additional insured. There is no need to discuss the proposed transfer with LBA's insurer.*

LBA currently has no insurance for the Dam, so transferring it to LBWID will not change the status quo.

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10.

Question: What is the minimum number of votes to pass this?

*Answer: In order to vote on this matter, we must have a quorum of 10 percent of the membership either present at the meeting or participating by casting absentee ballots. There are currently 1042 homes in Lake Barcroft that are eligible to vote, so a quorum would be 105 member households represented. To approve the transfer, we will need a simple majority of those attending the meeting or casting absentee ballots. The minimum number of votes needed to approve the transfer would vary based on the number of members voting. But if we had only 105 members participating, we would need 53 votes to approve the transfer.*

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11.

Question: Can the LBA have a veto on any change of use or new use by LBWID?

*Answer: LBA's veto authority of certain "changes of use or new use" of Parcel 165 will take the form of restrictions in the deed that will prohibit the property from being:*

- 1. used for recreational purposes or to access the Lake for recreational purposes;*
- 2. sold or transferred to a third party;*
- 3. encumbered with a deed of trust (e.g., a mortgage); or*
- 4. used for residential purposes.*

*In contrast, LBA cannot have veto authority over what LBWID is obligated to do by statute or court order, or over contractual rights it now has to maintain and operate the Dam consistent with the LBWID's statutory and court-ordered purposes. Specifically, under Virginia law, a watershed improvement district can be established for "water management" ... that "will be promoted by the construction of improvements to check erosion, provide drainage, collect sediment or stabilize the runoff of surface water." VA Code, Title 10.1-614. Consistent with this WID statute, the Circuit Court of Fairfax County formally established the LBWID in 1973, and in doing so affirmed LBWID's purpose, as "repairing, restoring and improving the Lake Barcroft Dam and removing silt from the bed of Lake Barcroft, all for the purpose of checking erosion and stabilizing the runoff of surface water..." Because LBA's predecessor BBI owned the lakebed and Parcel 165, which included the Dam, it was necessary for BBI and LBWID to enter into a contract that, among other things, gave LBWID access and the right to operate on BBI's property so that LBWID could repair and reconstruct to Dam, operate and maintain it after reconstruction, and remove silt from the lakebed. In that 1973 contract BBI expressly ceded to LBWID "the sole right to make all determinations relative to the operation, maintenance, repair, inspection, and testing of the Dam where such determinations are reasonably related, in the sole determination of the WID, to its soil and water conservation functions and duties under the WID Act." BBI also in that 1973 contract retained "all rights not inconsistent with those herein granted to the WID and specifically retains the right to use the Lake and the beaches adjacent thereto for private recreational purposes."*

*Given this statutory, court-ordered and contractual backdrop, LBWID can institute a “change in use or new use” of the Dam so long as it is consistent with these statutory and court-ordered purposes and contractual rights. LBA cannot through the deed or otherwise veto such a “change in use or new use” because doing so would violate the statute, court order and/or the 1973 contract. A broad veto authority in the deed would also violate a separate requirement in the 1973 contract that any transfer of Parcel 165 not derogate the rights given to LBWID in the 1973 contract to maintain and operate the Dam consistent with its soil and water conservation functions. That said, if LBA believes any such “change of use or new use” of the Dam is not consistent with LBWID’s statutory or court-ordered responsibilities, e.g., to check erosion and stabilize run-off, LBA could challenge such LBWID planned action in court or politically.*

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12.

Question: Will the community be able to review the deed covenants before the vote so we know what we are voting on rather than relying on oral assurances?

Answer: Yes.

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13.

Question: What discussion has there been of increasing the number of WID trustees to 5?

*Answer: There have not been any discussions about increasing the number of LBWID Trustees from 3 to 5. The Virginia Code pertaining to Watershed Improvement Districts states “The directors of the soil and water conservation district or districts in which the watershed improvement district is situated... may appoint, in consultation with and subject to the approval of the Virginia Soil and Water Conservation Board, three trustees who shall be owners of land within the watershed improvement district” (Va. Code, § 10.1-623). Any change in the number of Trustees would require legislation.*

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14.

Question: Absentee or proxy or both?

Answer: Absentee ballots only.

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15.

Questions: How would this transfer affect the legal standing of the LBA or individual lot owners if we wanted to sue either the LBWID, state, or federal government? For example, if they decided to drain the Lake? Would a hypothetical lawsuit to prevent that be dismissed for a lack of standing?

*Answer: Although standing can be a complicated issue, we fully expect that a court would consider LBA as the owner of the lakebed to have standing. Because of the direct effect on homeowners, we would expect them to have standing as well.*

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16.

Question: The lake is the heart of living in Lake Barcroft. The new owner could potentially divert the water and dry out the lake. And there's nothing we the residents of LBA could do about it. Is saving the cost of insurance worth the possibility of losing the lake?

*Answer: As for the LBA proposing the transfer of ownership of Parcel 165 and the Dam to save money on insurance, this is an incorrect assertion. LBA is unable to acquire liability insurance for the Dam because insurance companies will not offer it to the LBA. So LBA is not transferring Parcel 165 and the Dam to save on insurance premiums, but rather, the liability that might attach to owning the Dam should downstream flooding occur.*

*Regarding the concern about diverting the water and drying out the Lake, Under Virginia law, a watershed improvement district can be established for "water management" ... that "will be promoted by the construction of improvements to check erosion, provide drainage, collect sediment or stabilize the runoff of surface water." VA Code, Title 10.1-614. Consistent with this WID statute, the Circuit Court of Fairfax County formally established the LBWID in 1973, and in doing so affirmed LBWID's purpose, as "repairing, restoring and improving the Lake Barcroft Dam and removing silt from the bed of Lake Barcroft, all for the purpose of checking erosion and stabilizing the runoff of surface water..." Nothing in this Court Order permits the LBWID to divert water and dry out the lake, which would result in no need for the Dam.*

*In addition, because LBA's predecessor BBI owned the lakebed and Parcel 165, which included the Dam, it was necessary for BBI and LBWID to enter into a contract that, among other things, gave LBWID access and the right to operate on BBI's property so that LBWID could repair and reconstruct to Dam, operate and maintain it after reconstruction, and remove silt from the lakebed. In that 1973 contract BBI expressly ceded to LBWID "the sole right to make all determinations relative to the operation, maintenance, repair, inspection, and testing of the Dam where such determinations are reasonably related, in the sole determination of the WID, to its soil and water conservation functions and duties under the WID Act." LBWID also expressly agreed in that 1973 contract that BBI retained "all rights not inconsistent with those herein granted to the WID and specifically retains the right to use the Lake and the beaches adjacent thereto for private recreational purposes."*

*Given this backdrop, if the LBWID were to decide to "divert the water and dry out the lake," LBWID would be taking an action that is contrary to its statutory purpose of constructing and maintaining a dam to check erosion and stabilize surface water runoff. It would be contrary to its court-ordered purpose of maintaining the Lake Barcroft Dam to check erosion and stabilize runoff. And it would be contrary to the contract between LBWID and BBI (now LBA) allowing LBWID to perform LBWID's statutory functions of erosion control and stabilization of run-off through operation of the Dam and that preserves the Lake for the private recreational use by LBA member households. Thus, any such action by LBWID to divert the water and dry out the lake could be challenged in court (and politically) on the grounds that it violates the statute, the court order, and the 1973 contract. Moreover, because such diversion would result in no need for a dam would ultimately result in the dissolution of LBWID, such a plan could preemptively trigger the reversion clause in the deed whereby ownership of Parcel 165 and the Dam would revert to LBA. Thus, even though*

*the LBWID has the sole right to make all determinations relative to the operation, maintenance, repair, inspection, and testing of the Lake Barcroft Dam, it does not have the authority to take actions beyond its intended statutory and court-ordered purpose and its contractual rights.*

*In addition, as a factual matter, diverting the water from the incoming stream beds (Tripps Run and Holmes Run) would be a monumental and extremely expensive undertaking. We cannot perceive of any realistic reason why the County or State would consider diverting the water when there is a Lake Barcroft and Dam to receive and stabilize that water.*

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17.

Question: Why transfer the lot parcels? Why not just transfer the dam?

*Answer: (As an initial clarification, this question assumes that more than one parcel will be transferred. In fact, the proposal is to transfer only one parcel: Parcel 165.)*

*We are recommending that instead of just transferring the Dam structure to LBWID, all of Parcel 165, including the Dam that is located on the Parcel, be transferred to LBWID. This recommendation avoids potential huge litigation risks as well as litigation costs, and conversely, there is no benefit to LBA retaining any portion of Parcel 165.*

*Specifically, the Dam Safety Act makes clear that whoever owns the impounding structure “shall be responsible for liability for damage to the property of others or injury to persons, including the loss of life resulting from the operation or failure of an impounding structure.” VA Code § 10.1-613.4.A. Therefore, as long as LBA owns any land that might be found in a lawsuit to make up the “impounding structure,” LBA would be at risk of liability.*

*There are two earthen embankments on either side of the concrete and stone material that likely would be considered part of the “impounding structure” that is the Lake Barcroft Dam. . In addition, the overwhelming majority of Parcel 165 is highly influenced/affected by the operation of the Dam and/or is used to support the operation of the Dam. Retention by LBA of a subdivided portion of Parcel 165 (hereafter an “outlot”) would likely present significant costs and litigation risks. Initially, there would be significant engineering and legal costs to parse out the property and subdivide it into the outlot that LBA would retain versus the rest of Parcel 165 that LBA would transfer to LBWID. If downstream flooding occurs or any other injuries result that might be claimed by a plaintiff’s to have been caused or contributed directly or remotely by the retained outlot, LBA could be sued for such injuries and damages. To be dismissed from the lawsuit, LBA would likely have to show that the outlot it retained is not associated with the operation of the Dam and did not otherwise cause or contribute to the injuries and damages. At a minimum, this would entail expert witnesses and significant litigation defense costs. If that defense is not convincing, LBA would be at risk of incurring the liability for the injuries and damages, which could be massive. These downsides are significant.*

*In contrast, there is little or no upside to LBA subdividing Parcel 165 and retaining a portion of it. There would be no access to the outlot (other than through the WID compound), so no one other than the WID could effectively use it. Other than the portion of the property that the LBWID’s compound resides on, the terrain of the rest of the property is either extremely steep or in a flood plain. Most importantly, Parcel 165 already has a deed restriction on it disallowing any portion of it*

*to be used for residential purposes. Thus, this outlot could not be sold for residential development or sold to the current neighboring property owners for expansion of their residential lots. As such, retention of an outlot on Parcel 165 would have no value to LBA. In contrast, LBWID might beneficially use the outlot as a laydown area for materials during the armoring project, and to protect against any intruders who could do harm to the Dam, or who could be harmed by the Dam. In sum, since LBA cannot secure any liability insurance for Dam-related claims, it is in the best interest of the LBA to not own title to the entirety of Parcel 165.*

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18.

Question: Do you have any cases showing that sovereign immunity is always a successful defense for state entities?

*Answer: Sovereign immunity was a successful defense in the following Virginia cases, among many others. Citations of cases are :*

*199 Va169, 98 S.E. 2d 515 (1957)*

*86 Va.195, 9 S.E. 1004 (1889)*

*40 Va. Cir. 156 (1996)*

*26 Va. Cir. 329, 1992 WL 884516 (1992)*

*268 Va. 624 (2004)*

*259 Va. 493, 527 S.E. 2d 778 (2000)*

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19.

Question: Can LBA be liable for damages if we pay for and allow all improvements recommended by the WID?

*Answer: Clarifications are needed: First, LBA does not pay for improvements to the Dam; individual Lake Barcroft homeowners in the LBWID taxing district pay for improvements to the Dam. Second, LBA does not allow improvements to the Dam. Rather, LBWID decides on what improvements should or must be made to the Dam, consistent with its statutory and court-ordered authority and the 1973 contract between BBI (now LBA) and LBWID.*

*More generally, meeting the federal and state requirements and the improvements administered by the LBWID does not shield the owner (currently LBA) or the operator (LBWID) of the Dam from liability. For example, The Dam Safety Act states, “[c]ompliance with this article does not guarantee the safety of an impounding structure or relieve the owner or operator of liability in case of an impounding structure failure. VA Code, Title10.1-613.4. A. Compliance with the state and federal regulations, however, is often an important factor in demonstrating that the operation of a dam was not negligent. Conversely, failure to comply with federal or state standards where such failure causes or contributes to the injuries or damages will also be an important factor in establishing liability.*

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20.



Question: Does any part of the earthen section of the dam exist on private properties adjacent to lot 165? If so how to handle that?

*Answer: Yes, there is a part of the earthen structure that is on private (non LBA or LBWID land). Once the dam embankment armoring project is completed that private land will be protected. The LBWID is including the armament of that private land in the overall dam embankment armoring project. LBWID has an easement to access that land and install armoring there.*

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21.

Question: Was LB sued in '72 when the dam failed? What happened with that lawsuit?

*Answer: Yes, the LBA (technically BBI, the predecessor to LBA) was sued in 1972 and BBI's insurance paid the settlement.*

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22.

Question : If title/ownership of the dam and the parcel it occupies were to be transferred to the WID could the WID decide to decommission the dam or lower the water level of the dam or make a V-Notch in the dam or other means to take down the lake Barcroft dam without approval of the Lake Barcroft Association or riparian owners of lakeside property?

*Answer: With regard to the hypothetical of the WID decommissioning the Dam or taking the Dam down, please see the response to Question #1.*

*With regard to lowering the water level, LBA cannot include a restriction in the deed that limits LBWID's discretion over water levels. Regardless of whether ownership of the Dam is transferred to LBWID, determining appropriate water levels is now and, in the future, will continue to be inherently a responsibility of the WID as manager of the Dam. LBA explicitly acknowledged in the 1973 contract that LBWID, in its sole discretion, manages the operation of the Dam. Moreover, the statute authorizing creation of a WID assigns to a WID the duty of water management. There may be situations where the LBWID needs to draw down the Lake. For example, it would be entirely within LBWID's proper Dam management responsibilities to draw down the Lake if needed to reconstruct or repair the Dam. There may be other emergency events that require the water level to be reduced, such as after an earthquake, or to flush out contaminated lake water. These would be legitimate reasons to draw down the Lake. The deed cannot prevent LBWID from carrying out these necessary functions. That said, if the WID were to attempt to draw down the water level in the Lake for any reason that it could not justify as proper water or dam management, LBA could seek to stop or reverse such a drawdown with a court challenge and/or a political challenge.*

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23.

Question : What are the major downsides to the proposal?

For example, FAQ #26 includes the reversion clause, if the LBWID were to be dissolved.

*Answer: LBWID is obligated under the statute and a court order to maintain the Dam so as to stabilize the runoff of surface water, and LBWID has done so since its inception. There is no reason to believe that LBWID would ever operate differently. That said, the working group and the outside law firms that have been assisting the LBA and LBWID have attempted not only to identify and evaluate the upside benefits of the transfer, but also to consider what hypothetical events might give rise to concerns within the community. Where there might be hypothetical downside risks, restrictions or other language have been added to the deed to safeguard against such risks. This is why there is a reversion clause to address what happens if the LBWID is dissolved. This is why there are restrictions in the deed that will state that the property cannot be used for recreational purpose, be used to provide access to the Lake for recreational purposes, be sold or transferred, be used for residential purposes, or be mortgaged. To ensure that LBA can continue to use the property to store its maintenance supplies and equipment, there will also be a license contemporaneously entered into giving LBA perpetual rights for such storage. There are also statutory, court-ordered and contractual limitations on what LBWID can do with the transferred property that also protect against the downside risks. These safeguards and limitations should ensure, as much as possible, that the Lake Barcroft Community can continue as it has since its inception in 1950 to enjoy the private recreational use of the Lake, the beaches, and other common properties.*

*We also see no downside to LBWID as a result of the transfer. Transferring ownership of the Dam to LBWID does not increase its potential liability because it is already exposed to that liability as the current operator of the Dam. Although the LBWID's sovereign immunity liability protection may not be 100% and its insurance has limits, LBWID's defense and insurance are without a doubt more robust than that of the LBA, which has neither a sovereign immunity defense nor insurance.*

*In contrast, the upside benefits of the proposed transfer are real and significant. Under the Dam Safety Act, an owner of a dam, even one that complies with all of the requirements of the Act, "shall be responsible for liability for damage to the property of others or injury to persons, including loss of life resulting from the operation or failure of an impounding structure." VA Code Title 10.1-613.4. LBA does not have insurance to help cover these potential liabilities because our prior carrier dropped us, and other carriers have unanimously declined coverage. Even if our insurance policy could one day provide coverage for liabilities resulting from a dam failure, the limits would likely not be sufficient to cover the potential losses based on the inundation map of the flooding that would occur. Should LBA suffer a judgment for downstream liabilities, in order to satisfy the liabilities, LBA likely would have to sell its assets, such as the beaches and other common areas that the LB homeowners now privately enjoy. By transferring the Dam to LBWID, these LBA assets should not be at risk.*

*In sum, the benefits of the transfer are enormous, and the downsides are very speculative and are being addressed with safeguards.*

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24.

Question: Why did the community decide NOT to transfer the dam and land to WID in 1973-74?

*Answer: We do not know the answer to this. We could only speculate. That said, according to our review of the records, LBA and its predecessors were historically able to obtain insurance for exposures relating to the Dam. That is no longer the case.*

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25.

Question: If we sell the property will there be some clauses that require WID to keep up the dam? If it is left to their discretion, could they abandon the lake and it would not be available to residents anymore?

*Answer: Please see response to Question #1 . Abandonment of the Dam that is asked about here is counter to the LBWID's statutory responsibilities and court-ordered purpose and could be challenged in the same manner as taking down the Dam that is asked about in Question #1.*

Question: Second, would LB residents still have seats on the WID board (to protect against the above?)

*Answer: The Virginia Code pertaining to Watershed Improvement Districts states "the three trustees who shall be owners of land within the watershed improvement district "(VA, Code § 10.1-623) This would not change as a result of transferring ownership of Parcel 165 and the Dam to the LBWID.*

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26.

Question: Given the apparent import of this proposed transfer ownership of the parcel from the LBA to LBWID, can we the residents of Lake Barcroft, prior to voting, receive an independent third-party legal assessment of the benefits and costs, risks and consequences, intended and potentially unintended, of this decision?

It would benefit all of us to have a legal review by legal experts not beholden to either LBA or LBWID.

*Answer: Both LBA and LBWID sought advice from their outside counsel to evaluate the proposed transfer. The advice we received was based on the counsels' objective, independent expertise and judgment. The law firms were not asked to provide advice that would support or oppose the transfer. LBA, as elected officials of the community, represents the interests of its homeowner members, and as such, the advice LBA received is in the best interest of LBA's homeowner members. Although LBWID is a Political Subdivision of the Commonwealth, the three LBWID Trustees agreed, as Lake Barcroft homeowners, that they would accept the transfer of Parcel 165 if the LBA membership votes to transfer it to LBWID. Given this backdrop, neither LBA nor LBWID believe that they should engage another law firm and pay for a third legal opinion. Of course, if one or more individual homeowners wish to engage counsel and pay for another opinion, he/she is free to do so.*

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27.

Question: Is all of parcel 165 currently being used by the dam? It seems like it may be larger. If this is the case and it is larger, could the parcel be subdivided, and the dam section be given to LBWID?

Answer:

*We are recommending that instead of just transferring the Dam structure to LBWID, all of Parcel 165, including the Dam that is located on the Parcel, be transferred to LBWID. This recommendation avoids potential huge litigation risks as well as litigation costs, and conversely, there is no benefit to LBA retaining any portion of Parcel 165.*

*Specifically, the Dam Safety Act makes clear that, whoever owns the impounding structure “shall be responsible for liability for damage to the property of others or injury to persons, including the loss of life resulting from the operation or failure of an impounding structure.” § 10.1-613.4.A. Therefore, as long as LBA owns any land that might be found in a lawsuit to make up the “impounding structure,” LBA would be at risk of liability.*

*There are two earthen embankments on either side of the concrete and stone material that likely would be considered part of the “impounding structure” that is the Lake Barcroft Dam. In addition, the overwhelming majority of Parcel 165 is highly influenced/affected by the operation of the Dam and/or is used to support the operation of the Dam. Retention by LBA of a subdivided portion of Parcel 165 (hereafter an “outlot”) would likely present significant costs and litigation risks. Initially, there would be significant engineering and legal costs to parse out the property and subdivide it into the outlot that LBA would retain versus the rest of Parcel 165 that LBA would transfer to LBWID. If downstream flooding occurs or any other injuries result that might be claimed by a plaintiff’s to have been caused or contributed directly or remotely by the retained outlot, LBA could be sued for such injuries and damages. To be dismissed from the lawsuit, LBA would likely have to show that the outlot it retained is not associated with the operation of the Dam and did not otherwise cause or contribute to the injuries and damages. At a minimum, this would entail expert witnesses and significant litigation defense costs. If that defense is not convincing, LBA would be at risk of incurring the liability for the injuries and damages, which could be massive. These downsides are significant.*

*In contrast, there is little or no upside to LBA subdividing Parcel 165 and retaining a portion of it. There would be no access to the outlot (other than through the WID compound), so no one other than the WID could effectively use it. Other than the portion of the property that the LBWID’s compound resides on, the terrain of the rest of the property is either extremely steep or in a flood plain. Most importantly, Parcel 165 already has a deed restriction on it disallowing any portion of it to be used for residential purposes. Thus, this outlot could not be sold for residential development or sold to the current neighboring property owners for expansion of their residential lots. As such, retention of an outlot on Parcel 165 would have no value to LBA. In contrast, LBWID might beneficially use the outlot as a laydown area for materials during the armoring project, and to protect against any intruders who could do harm to the Dam, or who could be harmed by the Dam.*

*In sum, since LBA cannot secure any liability insurance for Dam-related claims, it is in the best interest of the LBA to not own title to the entirety of Parcel 165.*

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28.

Question: (1) what sort of legal entity is LBA?

Answer (1): LBA is a Virginia non-stock corporation.

Question: (2) The response to FAQ no. 17 states that the WID has sovereign immunity. However, the response also states that the WID might be found not to have sovereign immunity. In addition, an attorney has questioned WID's sovereign immunity on Lake Link. What is the basis of the Board's contention that the WID will be able to invoke sovereign immunity if the dam is breached?

*Answer (2): A 1986 Opinion of the Attorney General of Virginia confirms that when a WID performs its governmental functions, it is protected from liability for tort claims under the doctrine of sovereign immunity. Virginia case law also makes clear that such tort claims include claims of negligence. There are some limited exceptions when that defense is not applied. For example, the defense of sovereign immunity would not protect a WID from liability if it were to breach a contractual obligation to pay a vendor that has performed a governmental service for the WID. The response to FAQ #17 addresses what would happen in the unlikely event that a court did not accept the defense of sovereign immunity, and instead, a judgment is entered against the LBWID. There is no question that LBWID can invoke the defense of sovereign immunity, and that defense likely would protect the LBWID from incurring liability for downstream flooding.*

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29.

Question: Are the 2 legal opinions of LBA and WID counsel available for review?

*Answer: If a lawsuit were ever brought against LBA or LBWID for downstream flooding or otherwise, plaintiff's counsel likely will attempt to seek all documents reflecting advice LBA and LBWID received regarding their potential liability and defenses. Plaintiff's counsel will use statements in the documents that are produced to strengthen its case and weaken the defense of LBA and LBWID. Consequently, it is imperative and quite normal that such opinions be protected from disclosure under what is called the "attorney-client privilege." Making these opinions available for review to other Lake Barcroft homeowners would "waive" the privilege, which would result in the opinions having to be turned over to plaintiff's counsel if requested in their discovery. Consequently, these opinions cannot be made available for review.*

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30.

Question: The reversion clause seems like a good idea. However, is that considered in law to be a contingent ownership interest that would leave LBA liable anyway? Thank you for all your efforts in connection with this matter.

*Answer: LBA's interest in Parcel 165 following the deed's execution is called a "possibility of reverter" or "reversionary interest." The Virginia Supreme Court has held that this interest is not a vested estate, but rather a possibility of an estate, the vesting of which is conditional upon the happening of an event that may never occur. The holder of a possibility of reverter does not have the power to exercise dominion and control over the property or any other rights to the property until the happening of this condition, nor may they be held liable for the actions of the present estate holder.*

*See Copenhaver v. Pendleton 155 Va. 463 (1930); Hamm v. Hazelwood 292 Va. 153 (2016)*

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31.

Question: Answers to prior questions refer to covenants in the deed, "other restrictions," and "certain safeguards." The inclusion of these is intended to protect the community's interests and mention of these is intended to help us feel more comfortable with the conveyance. When will we be provided with the exact terms of the conveyance/deed? Making it available should be easy and providing it in advance with enough time for individual review is required in order to make an informed vote.

Answer: The draft deed will be made available for review by LBA membership by November 2, 2024. The draft deed will be posted on LBA's and LBWID's website.

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32.

Question: Were you able to get a quote for insurance to cover dam related liabilities at any price? Or did the insurers refuse to take on the liability at all? If you got any quotes, please let me know what they were. I think the cost to insure against the liability is one way to quantify the risk we are facing.

*Answer: No, the LBA was not able to obtain a quote for insurance to cover dam liabilities at any price. Insurers refused to cover liability insurance on the dam, and the LBA's insurance broker contacted a large number of insurance companies to inquire.*

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33.

Question: If a catastrophic event (North Carolina) destroyed the Dam, to what extent would LB homeowners be liable once LBWID's \$5M coverage was exhausted? Looking at inundation zone, \$5M would cover virtually nothing, especially if there is loss of life. Another answer states: homeowners should not have any direct liability; but does that mean they could be liable? Have limits been considered on mentioned special assessments and/or increases in membership dues that may be needed from homeowners?

*Answer: Because LBA is an incorporated association and LBWID is a political subdivision of the Commonwealth, individual Lake Barcroft homeowners should not have any direct liability for damages or injuries caused by a failure or malfunction of the Lake Barcroft Dam. However, because the LBA is currently the owner of the Dam, the LBA would be responsible for satisfying any judgment awarded by a court or paying any settlement amount to cover damages and or injuries caused by the Lake Barcroft Dam. As previously stated, the LBA does not have and cannot get liability insurance for dam related matters. The LBA's only current protection from liability related to the Dam is the LBWID's \$5 million liability insurance policy, and that only applies if the LBWID is named and remains in the suit. Please keep in mind that the LBWID is protected by sovereign immunity and in most instances would be dismissed from a suit. LBA is not protected by sovereign immunity. In light of these facts, the LBA would potentially be responsible for satisfying the entirety of any judgment that was awarded or settlement that is agreed to, even if it requires exhausting all reserve funds and liquidating all assets including the community's common grounds, such as the beaches. As such, while individual LB homeowners will not be legally liable to the plaintiffs if a judgment is rendered against LBA or a settlement is agreed to by LBA,*

*individual homeowners could lose their private use of the common property, and may also have to pay a special assessment or higher LBA dues to satisfy the judgment or settlement.*

*For limits on Annual Service Fees (LBA Annual Dues) and Special Assessments, see explanation below:*

- *Annual Service Fees (LBA Annual Dues) - Any cumulative increase in the amount of the annual service fee in excess of 25 percent over any three-year period shall require the approval of the membership by a majority of members attending the membership meeting considering such action.*
- *Special Assessments – Assessments other than membership fees, and annual service fees may be levied by a two-thirds vote of members attending a membership meeting considering such action.*

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34.

Question: One of my interests is keeping the lake private. In the Board proposed plan is there any possibility of the Lake becoming public? Can the Association incorporate to limit liability or is the Association already incorporated? After Agnes the lake residents financed the rebuilding of the dam through bonds; is this an option to bring the dam up to code?

*Answer: A primary goal of the LBA is avoid any possibility of the Lake becoming public. One restriction that will be included in the deed is that Parcel 165 cannot be used for recreational purposes or be used to allow access to the Lake. As such, the transfer of Parcel 165 to LBWID does not open up the Lake to use by non-LB households and their guests. The LBA would still maintain ownership of the Lake and all common grounds, and they would remain only accessible to Lake Barcroft members and their guests.*

*In contrast, and as explained in response to other questions, if the proposed transfer does not occur and LBA becomes liable for the extensive downstream damages and personal injuries that might result from a catastrophic flood, there is a real likelihood that to satisfy that liability, LBA would have to sell its common properties, which could result in the Lake no longer being private. e*

*As to the second question, LBA is incorporated.*

*Finally, the issuance of bonds is an option for financing the Dam armoring project.*

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35.

Question: I understand that in a 1977 Agreement, LBWID agreed to indemnify BARLAMA and BBI (now LBA) for claims arising from damage to persons or property as a result of flooding or operation of the Dam. Why would this indemnity not protect LBA from potential liability?

*Answer: We have been advised by outside counsel that because LBWID is a political subdivision of the Commonwealth, it had no authority and could not legally agree to indemnify another entity. Doing so would have amounted to LBWID waiving its sovereign immunity, and only the legislature*

*can waive the sovereign immunity of one of its political subdivisions. As such, LBWID's agreement to indemnify BARLAMA/BBI was not authorized, is therefore null and void today, and consequently, does not provide LBA with indemnity protection.*

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36.

*Question: Is Parcel 165 or Parcel B the property that will be transferred?*

*Answer: The Legal Description in the Deed of Gift identifies the property that will be transferred as "Parcel B." The reference to Parcel 165 is from the Tax Map Number, the last three digits of which are 165. For our discussion purposes, we have mostly referred to the Property as Parcel 165, but it is intended to be the same as Parcel B.*