

---

----- Forwarded message -----

**From:** Jessica H. Miller <[jessica@jhmillerlaw.com](mailto:jessica@jhmillerlaw.com)>

**Date:** Tue, Mar 12, 2019 at 3:07 PM

**Subject:** Alternative plan

**To:** Ted Bertele <[director.ted@rooseveltridgehoa.com](mailto:director.ted@rooseveltridgehoa.com)>

Dear Ted,

Yesterday, on the phone we discussed an alternative to the proposed process of having the Association annex the lots with the consent of the annexed owners. You asked that I provide an opinion about whether it would be possible for the annexed owners to consent to the annexation but have the lots be annexed by the declarant (instead of the Association).

This alternative approach would work under the terms of the Declaration "Section 13.1 of the Declaration provides that Property located within the Annexable Area may be annexed to the Project Area and made subject to the Declaration by Declarant at any time and from time to time, without the consent of the Association or Owners."

In the annexation statute, I have underlined some language that implies the declarant is the owner of annexed property but it does not explicitly state this as a requirement for declarant annexation. § 38-33.3-210 (1) provides: "To exercise any development right [such as annexation] reserved under section 38-33.3-205(1)(h), the declarant shall prepare, execute, and record an amendment to the declaration and, in a condominium or planned community, comply with the provisions of section 38-33.3-209. The declarant is the unit owner of any units thereby created...."

The concurring opinion in the Ryan Ranch case (attached) makes my analysis a little less clear. Concurring opinions are not binding precedent, but concurring opinions can sometimes be cited as a form of persuasive precedent. The concurring judge in the Ryan case wrote: "Beyond the requirement of recording an amendment, however, section 210 permits a declarant to add units according to its development rights, and therefore without the approval of the existing unit owners, only to the extent it is the owner of the units to be added. § 38-33.3-210 ("The declarant is the unit owner of any units thereby created.")..., I consider it beyond challenge that the statutory scheme requires the declarant to be the owner of any unit so added, or that unit may not be added by the declarant at all. While the opinion of the court limits itself to holding annexation by deed insufficient in the absence of some recorded reallocation of interests, I would make express that the statutory scheme does not permit a declarant to add units that have been conveyed to someone else without a prior or at least contemporaneous amendment meeting the requirements of the statute." This concurring opinion in Ryan is implying that the declarant may only annex prior to or at the time of the sale of the lot by a recorded amendment, but this opinion is not binding. Also, this concurring opinion is not considering a situation where the lot owner is providing his/her consent to being annexed.

While the new alternative process is not as unassailable as the approach of having the Association's approval for the annexation, it would likely be viewed favorably by a Court if challenged since the annexed lot owners are giving their own consent. However, there is some additional risk, but balanced against that is the consideration

that we may not get enough participation from the general membership to obtain approval for the annexation for by the Association. So it is far better to attempt this approach than not doing anything at all.

The new documents would look more like the supplemental declaration recorded for lot D/lot 24 (attached). Since these lots were created through differently plats (aka in 3 batches) there will be 3 different versions of the new document depending on what batch each lot was created in. I will be working on drafting these in the next few days unless I hear otherwise.

--

Sincerely,

Jessica H. Miller  
Attorney at Law  
The Law Firm of Jessica H. Miller, LLC  
Canyon Professional Building  
595 Canyon Boulevard  
Boulder, Colorado 80302  
Tel: (303) 443-0568  
[jessica@jhmillierlaw.com](mailto:jessica@jhmillierlaw.com)

CONFIDENTIALITY STATEMENT This communication contains information which is attorney-client privileged and confidential, and which is intended for the sole use of the named recipient. If you are not the intended recipient, you are notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify The Law Firm of Jessica H. Miller, LLC by telephone at (303) 443-0568. TAX ADVICE DISCLAIMER: Under applicable U.S. Treasury Regulations, we are required to inform you that any U.S. tax advice contained in this email or any attachment hereto is not intended or written to be used, and cannot be used, either (i) for purposes of avoiding penalties imposed under the U.S. Internal Revenue Code, or (ii) for promoting, marketing, or recommending to another party any tax-related matter addressed herein.