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VIA EMAIL AND U.S. MAIL

Board of Roosevelt Ridge HOA
C/O Jessica H. Miller
The Law Firm of Jessica H. Miller, LLC
595 Canyon Boulevard
Boulder, Colorado 80302
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Re: Roosevelt Ridge Subdivision – Annexation of Undersized Lots and Fire Mitigation Expenses

Dear HOA Board/Ms. Miller:

As you know, our law firm represents Raj and Kathy Sharma who are homeowners in the Roosevelt Ridge Subdivision. I am in receipt of your September 9 response to my July 3, 2019 letter. The Board's recent actions and failure to timely and thoroughly respond to my clients' legitimate questions have only increased our concern about the current state of affairs with this Association and how, exactly, that state of affairs came to be. The Board's short, vague, and borderline obfuscatory responses to the Sharmas' legitimate questions raise the unfortunate possibility that the current Board is more interested in providing cover for the developer and past boards than in truly representing the owners of Roosevelt Ridge.

While the Board is not *obligated* to pay an attorney to respond to my letter, in my 16 years of practicing common interest community law in Colorado, I have never experienced a board choosing to attempt to address complicated legal issues without the direct assistance of legal counsel. I have reached out to Ms. Miller a number of times with no response. I do not know whether she represents the Association or if you have no current legal representation. To the extent the Association still has legal counsel, I request the courtesy of a direct communication from such counsel so that I may know to whom I should be directing my correspondence.

In your response, you fail to adequately explain the Association's position on several important matters. Each of those issues is laid out in turn below:

The Date Declarant Control Ended

The Declaration mimics C.R.S. 38-33.3-303(5)(a)(I) of the Colorado Common Interest Ownership Act (the "Act") in requiring that the Declarant control period ends no later than 60 days after the earliest of the following events: "conveyance of seventy-five percent of the units that may be created to unit owners

other than a declarant, two years after the last conveyance of a unit by the declarant in the ordinary course of business, or two years after any right to add new units was last exercised.” The Sharmas are unsure of when the period of control ended because it appears that at least two years lapsed between the conveyance of any parcels well before 2018, thus possibly triggering the turnover of declarant control under the second or third clauses of the Act. The Board is presumably in possession of records showing if the declarant ever ceased conveying or adding new lots for any two-year period. If the Association is not keeping records required by the Act, and therefore is not capable of responding to this question, please let me know.

However, even if the Board believes the period of declarant control ended based on the sale of 75% of the lots, and not based on some other triggering event, it should have a date certain when the period ended. It is not acceptable for the Board’s answer on such a simple and straightforward question to be, essentially: “you do the math.” The simple fact is the Board is in possession of all documents and records necessary to determine a date certain as to when the declarant control period ended and this date should not be in doubt or up to interpretation. Each member of the Board also has a fiduciary duty to the Association and its members. The fact that the Board is either unable or unwilling to provide this specific date raises considerable questions about whether the declarant still has de facto control over the Board, whether it improperly maintained direct control much longer than what was called for under the Declaration and CCIOA or, alternatively, whether the existing Board is simply failing in its duties owed to the members of the Association.

Just as importantly, how can the Board accurately oversee the compliance with the Declarant’s obligations relating to the turnover of declarant control without actually asserting when the end of control occurred?

Please identify the specific date that the declarant control period ended and the Association’s legal basis for the Board’s determination of that date. This issue really shouldn’t be in contention.

Turnover of Association Records and Financial Audit following turnover of the Board from Declarant

While we are unclear what the Board’s exact position is on when the period of declarant control ended, we do know that it ended prior to February 2018 (per the Board’s letter to me). Under Colorado law, upon the turnover of control to an elected board, the Declarant must provide certain documents and an audit pursuant to C.R.S. §38-33.3-303 (9)(b). Clearly, in order to adequately enforce this provision against the Declarant, the Board must decide when the period of declarant control ended. In your response to my initial letter, you state that the Board has requested the required audit from the Declarant “on more than one occasion via e-mail” but none has yet been provided. Please provide me with all documents wherein the Board requested this audit and the developer’s response to such requests.

Please also let us know what steps you have taken, or plan to take, to adequately protect the Association from the Declarant’s failure to provide an audit. At a *minimum*, the Board members’ fiduciary duties to the Association and its members require that you insist on and enforce this obligation. See, C.R.S. §7-128-401; *McDonnell v. The Colorado Real Estate Comm’n*, 361 P.3d 1138, 1141 (Colo. App. 2015). The Board simply cannot perform its operational and financial duties to the members without having at least a base

from which to work. It has been *at least* a year and a half (and maybe more) since this obligation came due. Yet it sounds like your only action has been to send a couple of emails to the Declarant. And now, instead of taking reasonable steps to enforce this obligation of the Declarant, you are considering a special assessment of thousands of dollars on an infrastructure improvement that was required to be installed by the Declarant, but that the Declarant and the Association appear to have represented as having been installed long ago.

Given the very legitimate concerns raised by the Sharmas and several other owners in Roosevelt Ridge about the Declarant and past board's actions, what steps will the Board take to ensure that a comprehensive financial audit of the declarant control period is performed **before** any special assessment is issued to homeowners for installation of any new major improvements? This audit will be essential in evaluating the community's obligation to pay for infrastructure improvements that might have been the Declarant's sole obligation or could have been paid for out of funds that were previously in the Association accounts. This accounting must be performed by an independent certified public accountant per C.R.S. §39-33.3-303(9)(b). Your failure to insist on the immediate completion of the audit is contrary to your fiduciary obligations to the members. C.R.S. § 7-128-401(1)(b)-(c).

The Annexation/Subdivision of Undersized Lots.

The Board appears to accept the Developer's analysis of its "right" to "annex" undersized lots at face value in spite of numerous, repeated references to a minimum lot size of 17.5 acres in both the governing documents and references to parcels "averaging 20 acres" in the county resolution approving the initial development plat. See, Declaration at Section 12.2(a)(iii), Section 15.16(a); Gilpin County Resolution No. SBE 05-01. I believe these provisions create an enforceable right to prevent the annexation or absorption of undersized lots, regardless of how they are characterized. *S. Creek Assocs. v. Bixby & Assocs., Inc.*, 781 P.2d 1027, 1034 (Colo. 1989) (PUD adoption creates enforceable right). In other words, the annexation of smaller parcels to a community that is explicitly designed for larger-sized parcels (minimum of 17.5 acres/average of 20 acres) is a clear violation of both the letter and the spirit of the Declaration.

The Board, whose fiduciary obligation is to all of the owners, cannot simply allow a developer to violate the declaration to get every last dollar out of its initial investment and then hide behind the statement that "individual owners are free to pursue action against the developer." The Board has a fiduciary duty to protect the values of all properties in the community and to uphold the purpose of the Declarations. C.R.S. § 7-128-401(1)(c). It cannot ignore a blatant violation of the Declaration that fundamentally alters the nature of the community simply by shifting the burden of enforcement to the individual homeowners. This Board's fiduciary duty includes utilizing the powers of the Board to obtain compliance from the Declarant in order to protect the community and enhance property values and to stop such violations before they occur. *Id.*

Once again, please provide the Board's formal position on whether or not the annexation of smaller lots to the Community has a negative impact on the community as a whole, impacts overall property values, and/or is a violation of the spirit of the Declaration's requirement of 17.5 acre parcels.

The Developer's Obligation to Pay for Cisterns

In my July letter I raised the possibility that the Developer is responsible for the cost of installing fire mitigation cisterns. While I believe this issue has been raised to the Board previously by several homeowners, you stated that you were unaware of such an argument and would welcome information on that issue. Accordingly, here is my brief analysis of the issues relating to the Developer's obligation to install the cisterns that could cost more than \$200,000 to install, should two cisterns be required.

A. Gilpin County Board Resolution No. SBE05-01- Order approving Roosevelt Ridge Preliminary Plat August 23, 2005 (Recorded Sept. 15, 2005 Rec# 127419)

As part of this initial approval of the preliminary plat of Phase I of the Roosevelt Ridge Subdivision, the following condition was placed on approval by the County: "Applicant shall be required to petition for annexation into a fire district *and the applicant must complete any code improvements required by the district.*" (emphasis added). The "applicant" for this resolution was "Lone Pine Real Estate, LLC," which is also the Declarant for the Covenants of Roosevelt Ridge.

B. Gilpin County Resolution Number SBE 05-01A, August 30, 2005 (Recorded on September 15, 2005 at Reception No. 127422).

This County Resolution approves the Roosevelt Ridge Exemption Plat Final Plat upon the following conditions: "1. No building permits shall be issued until required conservation easement is fully executed. 2. No building permits shall be issued until fire district annexation and/or a temporary service agreement is fully executed. 3. No building permits shall be issued until a development agreement and sufficient bonding guaranteeing specified road improvement completion is fully executed. 4. Any prospective Phase I lot purchaser must sign a statement acknowledging notice of Conditions 1 - 3 above."

- a. The applicant for this exemption and plat approval is Lone Pine Real Estate L.L.C.
- b. The Developer caused the conservation easement to be executed and presumably submitted a development agreement with appropriate bonding requirements in relation to road improvements. However, it appears that the Developer did not immediately seek admission to any fire district.

C. Order for Inclusion of Real Property in the Colorado Sierra Fire Protection District, February 8, 2006, Gilpin County District Court Case No. 1971 CV 5727 (Recorded on February 21, 2006 at Rec. # 129088)

Approximately six months after the County approved the plat upon the condition of admission to a fire protection district and completing any code improvements necessary for such admission, the Gilpin County Court issued a court order approving the inclusion into the Sierra Fire Protection District (the predecessor to the Timberline Fire Protection District). The Court's Order states: "The Owners will construct two 30,000-gallon community water cisterns to be used for fire suppression. The first cistern shall be constructed prior to the completion of 25% of the homes on the Property and the second cistern shall be constructed upon completion of 50% of the homes on the Property. The location of the cisterns shall be pre-approved by the Fire Protection District."

It is unclear whether the Developer has any explanation for waiting several months to apply to a fire protection district, and it is even more unclear why it failed to take the required steps to install the first cistern at an earlier date. This Order shows that at the very least, every owner that was part of that petition, including the Declarant, knew that the cisterns were going to be required as early as February 2006. Given that the Declarant controlled the community at this time (and for some time after), the Board should investigate whether the Declarant and/or past HOA Boards actively concealed the requirement of the cisterns or was otherwise obligated to disclose the likely cistern cost as a potential special assessment to all potential new purchasers.

D. Declaration of Covenants of Roosevelt Ridge (Recorded on August 30, 2005 at Rec. # 127233).

Section XII of the Declaration relating to Special Declarant Rights states: "Declarant hereby reserves for itself, its successors and assigns the right, but is not obligated, to construct: (a) any improvements shown on any Recorded Plat of the Project Area, as the same may be amended from time to time. . ." The Developer has previously used this provision as the basis for its argument that it is not responsible for the cost of installing the cisterns. However, any improvements shown on the Plat are different and independent from the obligation to comply with the original zoning approval, which predated the Declaration and which clearly places the obligation to construct code improvements relating to admission to a fire protection district (including the cisterns) on the Developer.

Based on a review of the foregoing documents, there is a clear basis to assert that the Declarant is obligated to make the improvements required by the Timberline Fire Protection District based on the plain language of the initial Resolution approving the Roosevelt Ridge Plat. At a minimum, there is a strong argument that the Developer misled all current homeowners by failing to disclose the need for this expensive capital improvement when it knew about the requirement years earlier. Before the Board saddles its members with a special assessment to satisfy an obligation of the Developer, we hereby demand that the Association consider all of these issues and satisfy its duties to the owners by demanding the developer install the cisterns and immediately provide the lawfully-required audit. Your failure to do so would not only be in violation of your duties to the members, but the imposition of an improper special

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assessment on the community for basic infrastructure upgrades that are the responsibility of the developer may result in litigation. Please note that if any such litigation is pursued, any homeowner joining with the Sharmas to enforce the community's declaration will be entitled to an award of their attorneys' fees (and any special assessment to pay for such fees will *not* be able to be sought from such owners). C.R.S. §38-33.3-123(1)(d)(II).

Sincerely,

A handwritten signature in blue ink, appearing to read "Eric R. Jaworski". The signature is written in a cursive style with a long, sweeping underline.

Eric R. Jaworski