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November 7, 2019

Eric Jaworski
1750 N. High Street
Denver, CO 80218

Via U.S. Mail

Re: Raj and Kathy Sharma; Roosevelt Ridge Homeowners Association

Dear Mr. Jaworski

This law firm represents the interests of the Roosevelt Ridge Homeowners Association. I am in receipt of your correspondence dated October 4, 2019.

The current Board of Directors was elected by the Association's members. It is my understanding that on or about April 2018, an election took place where the members elected the entire Board and Declarant Lone Pine Real Estate, LLC ceded control of the Association's Board. Your correspondence indicates that 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." There is not a legal requirement that the Board provide a legal analysis of its records. C.R.S. § 38-33.3-317. However, to be effective, the Declarant must record all records related to any annexation or conveyance of property related to the Association with the Gilpin County Clerk and Recorder and, therefore, all of these records are publically available.

The Declarant has communicated to the Board that it has retained a firm to provide an audit, with the stated goal to complete the audit by year's end. When the Board receives the audit being prepared by the Declarant, the Board plans to provide it to the members.

However, your correspondence does not accurately represent Colorado law when you assert that: "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 only time § 7-128-401 mentions the word "fiduciary" is in subsection 6, which provide: "A director or officer of a nonprofit corporation, in the performance of duties in that capacity, shall **not** have any fiduciary duty to any creditor of the nonprofit corporation arising only from the status as a creditor."

Likewise, you cite *McDonnell v. Colo. Real Estate Comm'n*, 361 P.3d 1138, (Colo.App. 2015), even though this case is not relevant. This is a case where the Colorado Real Estate Commission enforced violations of the Colorado Real Estate Broker License Law against a licensed real estate broker by censuring the Realtor-licensee as punishment for, while serving as the president of the HOA, the licensee wrote four checks totaling \$10,000 on the HOA's account payable to himself or to his business. This case is not relevant to whether a homeowners association has a duty to enforce any other type of obligation, including any duty to enforce a declarant providing an audit.

Actually, your characterization of the law is in direct conflict with the Colorado Common Interest Ownership Act ("CCIOA"), which provides:

"Except as otherwise provided in subsection (2.5) of this section:

- (a) If appointed by the declarant, in the performance of their duties, the officers and members of the executive board are required to exercise the care required of fiduciaries of the unit owners.
- (b) If not appointed by the declarant, no member of the executive board and no officer shall be liable for actions taken or omissions made in the performance of such member's duties except for wanton and willful acts or omissions." C.R.S. § 38-33.3-303(2).¹

Also, your characterization of Colorado law ignores the most relevant provision of the Colorado Non-Profit Act relating to the business judgment rule. C.R.S. § 7-128-401(1). *See, e.g., Rywalt v. Writer Corp.*, 34 Colo. App. 334, 526 P.2d 316 (1974) (good faith acts of corporate directors that are within powers of corporation and exercise of honest business judgment are valid and courts will not, at instance of stockholders or otherwise, interfere with or regulate conduct of directors in reasonable and honest exercise of their judgment and duties).² Despite the assertions in your letter, your letter does not provide any authority that the law or the Association's governing documents requires the "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."

¹ "With regard to the investment of reserve funds of the association, the officers and members of the executive board shall be subject to the standards set forth in section 7-128-401, C.R.S." C.R.S. § 38-33.3-303(2.5).

² *See also*, the Association's Declaration Section 16.14 Limitation on Liability. "The Association, the Executive Board, the Architectural Review Committee, Declarant and any Member or member, agent or employee of any of the same shall not be liable to any Person for any action or for any failure to act if the action or failure to act was in good faith and without malice."

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Your clients object to the Declarant exercising its development rights under Section 12.2 of the Declaration. Section 12.2 of the Declaration provides that annexing property is a Special Declarant Right and provides the Declarant with:

- (i) the right to supplement or amend this Declaration and Plat to add all or any portion of the Annexable Property to the Project Area;
- (ii) the right to amend this Declaration to create additional Lots and additional Common Area on all or any portion of the Annexable Property; provided, however, that the maximum number of Lots that may be created under this Declaration shall be twenty-eight (28)....
- (v) the right to reconfigure (including changing the size of) and/or replat any Lot or Lots owned by Declarant, including Lots created by subdividing and/or combining

Colorado law is clear that a Declaration is interpreted in accordance with the plain and ordinary meaning of its terms rather than your assertion that the Associations should seek redress against the Declarant for “a violation of the spirit of the Declaration’s requirement of 17.5 acre parcels.”

The Board is still evaluating the Declarant’s obligation to pay for cisterns and/or reimburse the Association for any cost it expends installing cisterns.

Sincerely,

THE LAW FIRM OF JESSICA H. MILLER, LLC



Jessica H. Miller