November 20, 2020

Creekside II, The Farm at Creekside
Homeowners Association, Inc.
c/o Board of Directors
1067 S. Hover St., Unit E-131
Longmont CO 80501

Denver Office
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Re: Opinion Letter re: Authority to Repair Fence
Our File No. 3687.0006

Dear Members of the Board:

Altitude Community Law P.C. has been retained by Creekside II, The Farm at Creekside ("Association") to provide an opinion regarding authority and recommendations for moving forward with replacement of fence. This letter is in response to that inquiry.

QUESTIONS *and* SHORT ANSWERS:

1. *Is there any direct legal authority in the governing documents or statutes for the Board of Directors to replace a fence that is not part of the Common Area?*

No. Not from our research of the Declaration, Plat, Articles of Incorporation, Bylaws, Rules/Regulations or Design Guidelines of the Association ("Governing Documents") or statute (i.e., the Colorado Common Interest Ownership Act or "CCIOA").

2. *Is there any general legal authority in the governing documents or statutes for the Board of Directors to replace a fence that is not part of the Common Area?*

Yes. The Declaration allows the Association to levy assessments to promote the welfare of the residents. This authority, coupled with the past actions, representations, and expectations set by both the homeowners and the board (current and past), provides some support for a decision to expend the monies collected for over 10 years to replace the fence.

However, while the decision to spend funds to replace the fence might be supported, it does not eliminate the problem with lack of easement authority to do so. Accordingly, and as previously recommended, if the Board moves forward with replacement it should not do so without first obtaining consents from the perimeter Lot homeowners to enter onto their Lot in order to replace the fence to eliminate the trespass claim.

3. *Should the Association replace the fence? Refund the Money? Hold a Vote?*

While it is our opinion that there is support to spend money to replace the fence, and to enter onto the Lots for that purpose after obtaining consent, given no direct authority we provided some alternative options to replacing the fence. And, while our office cannot make this decision for the Board, we have also provided the standard of care by which you must make your decision, and against which any court will review your decision if challenged.

4. *What is the hierarchy of the governing documents?*

We responded to this question in a prior email, and have restated that prior email below, along with some additional comments.

FACTS:

We understand a fence runs along the perimeter of Creekside II ("Fence"). The Fence was installed by the developer. The Fence is not located on Common Area; it is located on number of Lots that border the Creekside II community and that are adjacent to public roads. Approximately 10 years ago the Association paid for and replaced the Fence based on monies collected in a reserve fund for such purpose. To the best recollection of a current Board member, the Fence reserve fund was created based on homeowners discussing and agreeing, at an annual meeting of the Members that occurred in either 2003 or 2004, that the Association had easements over the Lots to maintain the Fence and/or owned the Fence, that it would look better if the Fence was maintained by the Association, and that a reserve fund should be set up for such purpose. It was also agreed at the time to double the annual assessment to $120 per Lot in order to set aside half of such annual assessment ($60) for the Fence replacement.

Since then, the Fence reserve monies have been collected equally from all 184 Lots. In 2008, the first section of the original Fence was replaced using the Fence reserve fund monies. Subsequently, the Association has continued the collection of monies for future Fence replacements. To the best of the Board's current knowledge, the reserve fund line item (of ½ the yearly annual assessment) has been disclosed to the homeowners every year in the annual budget.

The fence is now starting to deteriorate. Posts are breaking and strong winds could topple some sections of the fence. The Board is prepared to move forward with the Fence replacement using the Fence reserve monies collected; however, it has come to question the appropriateness of this action given the Fence is not located on Common Area. The Board wants to know whether it has authority to replace the Fence and an easement over the Lots to perform the Fence replacement work. The Board wants to be prudent in its actions and not be in the position of having to defend its actions without asking the membership to revote on the replacement issue.

ANALYSIS:

1. **<u>No Direct Authority in the Governing Documents or Statute</u>**

As stated in my prior email dated 9/13/20, there is no direct legal authority to replace the fence in any of the governing documents or statute.

The Declaration, at Article 7, Section 7.2, provides that the assessments and charges levied by the Association are used "…in particular for the improvement, operation and maintenance <u>of the Common Area</u>…"

The Declaration does not contain any provisions requiring the Owners to maintain their Lots or the improvements thereon (such as the Fence). However, CRS 38-33.3-307(1) of CCIOA provides that (with certain exceptions) "each unit owner is responsible for maintenance, repair, and replacement of such owner's unit." The same provision provides that "the association is responsible for maintenance, repair, and replacement of the common elements."

Additionally, while CCIOA grants the Board the power (without the need for express authorization in the Declaration) to maintain, repair, replace, modify and add improvements to the Common Elements, it does not grant the same automatic authority with respect to the Lots.

Finally, while the 2016 Design Guidelines state that "the perimeter fencing will be maintained by the HOA" and consistently refer to the Fence as the "HOA perimeter fence," the *Design Guidelines* cannot grant authority to the Association to replace the Fence. The Design Guidelines are simply rules and regulations adopted by the Architectural Control Committee ("Committee") for the purpose of governing the review and approval process for architectural review submissions. The Design Guidelines do not establish maintenance authority or obligation, and the inclusion of such language is inappropriate in such document. See our general comments regarding the Design Guidelines in the Hierarchy section below.

Reading all of the above provisions together, the Association has both the authority and obligation to maintain the Common Area and improvements thereon. Since the Fence is located on a number of perimeter Lots of the community, then the Owners have the authority and obligation to maintain the Fence located thereon. The Association has no such direct authority.

[Note that we have not researched whether the developer installed the Fence as a *condition of development* required by the county. If so, then the Association is *obligated* to maintain the fence pursuant to CRS 38-33.3-307(1) and (2) of CCIOA. If the Association wishes us to conduct this more in-depth research, let us know.]

2. **General Authority in the Governing Documents, Coupled with Actions/Representations/Expectations**

That being said, the Association has *general* authority under Article 7, Section 7.2 of the Declaration to levy assessments"…. for promoting the recreation, health, safety and welfare of the residents of the property…" [Emphasis added.]

Association governing documents often contain the above type of statement to provide general authority for the Board to act in ways that are not expressly authorized in the governing documents. This is because not every type of action can be stated in the governing documents, even though it may be in the best interest of the Association.

Using such authority in this instance, the Fence is a perimeter fence that, arguably, provides a general benefit to the community. A perimeter fence is the first thing that people see, and its aesthetics and general state is often perceived as representative of the community therein. Should the fence become dilapidated and run down, or should only some homeowners maintain the fences on their Lots while others fail to do so, resulting in a hodge-podge unharmonious look to the fence, arguably this could bring down the general property value of the community.

This may have been the type of discussion that occurred during the 2003 or 2004 annual meeting, at which the homeowners agreed to the creation of a reserve for the sole purpose of replacing the Fence. This was, indeed, a topic of discussion at the Feb 15, 2014 annual meeting, at which there was a discussion of whether those Lot Owners on the perimeter should be assessed more than the rest of the Lots based on the assertion that "they get a benefit for not being responsible for their fence repair and replacement". During such meeting it was resolved not to pursue this course

action based on, in part, that "the entire neighborhood benefits from a well maintained perimeter fence."

Regardless of the general authority to act for the welfare of the residents, it is our opinion that this authority, by itself, is not enough to authorize the Association to maintain/replace the Fence. However, such authority coupled with the past actions, representations, and expectations of the homeowners and boards, over the past 15 years, provide some support for a decision to spend money to replace the Fence. The general list of prior actions/homeowner expectations that inform our opinion:

1. Homeowner action at 2003 or 2004 Annual Meeting – homeowners agree to and direct Board to set up reserve fund for replacement of Fence (it would be best if the Board could find the minutes of this meeting to support such action by the homeowners).
2. Board actions from 2004 through today – boards include as part of the annual budget, every year, an amount to be set aside for the Fence replacement reserve, and collect such monies every year
3. Homeowner actions from 2004 through today - homeowners fail to reject the budgeted amount on an annual basis, and voluntarily pay into the Fence reserve fund, for more than 15 years.
4. Association action in replacing the first part of the fence that needed replacing in 2008.
5. Minutes for the past several years from both Annual and Board meetings reiterating the Association's ownership and obligation to maintain the Fence. This likely created an expectation in the owners of the perimeter Lots that they would not have to budget for replacement of their fence. It also may have created an expectation in all current owners, and future owners who may be evaluating whether to buy into the property, that the Fence is an amenity of the Association that is to be maintained/replaced by the Association to ensure the aesthetics of the Community perimeter are maintained appropriately.
6. Design Guidelines stating that the Association is to maintain the perimeter Fence.

The historical practice, representations and expectations of the homeowners and boards, coupled with the general authority to promote the welfare of the residents, provide support for a decision to spend the Fence reserve money on replacing the Fence.

3. **Continued Problem of No Easement Authority/Potential Claim of Trespass**

Even if the Board could defend a decision to spend the money in the reserve to replace the Fence, there is still the problem with lack of easement authority to enter onto the perimeter Lots. This, as initially discussed, raises the challenge of trespass. Given the potential claim of trespass, if the Board decides to move forward with the Fence replacement, we do not recommend doing so without getting consent from the owners of the perimeter Lots upon which the Association will have to enter to replace the Fence. The permission for entry will eliminate any trespass claim.

4. **Standard of Care**

As discussed above, the Association has some support to spend the collected money to replace the Fence, and may enter onto the Lots for the Fence replacement project with consent from the perimeter Lot Owners. If the Board moves forward with the Fence replacement project, it will be protected from liability if it has made its decision in good faith, prudently, and in the best interest of the Association. This is the standard of care by which the Board's decision, if challenged, will be

reviewed against by the courts. Courts don't want to second guess voluntarily board members who are acting in a good faith, informed decision, and in the best interest of the Association.

Acting in "good faith", simply means not acting in bad faith or maliciously or wantonly. The Board's actions should be open, honest, and sincerely for the Association.

To be prudent means to make an informed decision. The Board has done this by conducting its research on the historical practice/expectations of the homeowners/board, reviewing the governing documents and maps, and, ultimately, seeking out a legal opinion from an HOA attorney. In making such decision, the Board should also consider other circumstances such as whether there's a high or low risk of challenge on either side (i.e., to replace the Fence or NOT to replace the Fence), and the time and money that will need to be spent if there is a legal battle. And, the Board should keep a paper trail showing that it made such an informed decision.

Finally, the Board's action should be in the best interest *of the Association* (i.e., the corporate entity); not in the best interest of the perimeter Lot homeowners, or the homeowners in general, or the Board.

Assuming the Board acted in good faith, prudently, and in the best interest of the Association, the Board will be protected from liability.

5. **Alternative Options for Consideration:**

While the Association has some support for the Fence replacement project, in the exercise of utmost caution and to avoid any legal battles, you should consider the following alternative approaches:

1. Communicate to the homeowners that, regardless of historical practice/expectation, the legal documents do not provide direct authority to replace the Fence. Given this, the Association wishes first to amend the Declaration to include such authority. Then pursue amendment before doing anything else, while retaining the funds in the reserve pending outcome of the amendment.

   Amendment is the recommended approach, as you can resolve the Fence problem once and for all. And, you could also add other language to reflect today's needs (see our discussion below regarding provisions currently in the Design Guidelines).

   Per paragraph 13 of the Declaration, amendments may be "approved by the Association executed by its President and attested to by its secretary." However, there is no express Association approval requirement for the amendment. Typically, a majority of at least a quorum of Members must approve a proposed Association action. However, this is inconsistent with CCIOA which prescribes, at CRS 38-33.3-217(1), that the Declaration "may be amended only by the affirmative vote or agreement of unit owners of units to which more than fifty percent of the votes in the association are allocated or any larger percentage, not to exceed sixty-seven percent, that the declaration specifies." [Emphasis added.]

   Given the above, "more than fifty percent" of the total votes in the Association must approve such amendment. So, if there are 184 Lots, then 93 Lots must approve the amendment.

2. Communicate to the homeowners that the funds were collected with the expectation that the Fence would be replaced. To keep with the expectations of the homeowners, and because there is no

direct authority for the Association, *itself*, to replace the Fence, the Association will allocate to the Owners an allowance to redo their fence. The Association should request the Owners to present the Association with their contracts to replace their individual fences and, upon completion, the Association will make payment directly to the fence company for X dollars. The Board can also recommend "Fence Company X" (the company that the Board is currently considering for the job) as it will help facilitate cost savings and uniform appearance and scheduling to minimize the impact on the Community.

3. Ask all homeowners to affirmatively vote on spending money on the Fence replacement project. This, coupled with the consent of the perimeter Lots, will provide additional support to move forward with the Fence replacement project. Although it does not eliminate any legal challenge, such as with an amendment, it bolsters the Association's current position.

4. Credit the homeowners' accounts, but only after the Association has already paid or provided for its necessary common expenses, and only after it has prepaid or provided for reserves for replacement of those items, if any, the Association is required to replace on a periodic basis. This is based on C.R.S.§38-33.3-314 of CCIOA, which provides that unless otherwise provided in the Declaration: "…any surplus funds of the association remaining after payment of or provision for common expenses and any prepayment of or provision for reserves shall be paid to the unit owners in proportion to their common expense liabilities or credited to them to reduce their future common expense assessments."

   And, although CCIOA indicates that either a credit *or* payment to homeowners is authorized, arguably any direct payment violates C.R.S. §7-133-101 of the Colorado Revised Nonprofit Corporation Act. This provision prohibits distributions to its members, other than distributions made pursuant to the reasons stated in C.R.S. §7-133-102, which do not cover this scenario.

5. Keep the money and use it, instead, for some purpose under the governing documents that is directly authorized (i.e., other maintenance/replacement requirements?). This would reduce any future common expense liabilities.

6. **Hierarchy and the Design Guidelines**

As stated in our prior opinion dated 10/19/20, below is the hierarchy written in order of superseding document, which means to the extent of any inconsistencies between and among the docs, the higher one will always control. So, for example, if there's an inconsistency between the Declaration and the Articles, the Declaration controls. If there's an inconsistency between the Articles and the Bylaws, the Articles will control.

1. Statutes (State and Federal). Ultimately the statutes control. The main state statutes are CCIOA and the Colorado Revised Nonprofit Corporation Act. There are also various federal laws that apply to associations, such as the federal Fair Housing Amendments Act, federal regulations covering satellite dishes, and the federal Bankruptcy Code. However, depending on the provision in question, the statute might actually *defer* to your Declaration or Bylaws as controlling. An example would be that the Colorado Common Interest Ownership Act ("CCIOA") states that quorum for a Members' meeting is 20% *unless your Bylaws state otherwise*. Another example is that the CO Revised Nonprofit Corporation Act states that "*In the absence of any term state in the bylaws*, the term of each

director shall be one year."

2. Declaration/Plat. The Declaration (sometimes called the "Covenants" or "CC&Rs") and Plat(s) are considered the same document. So, to the extent of any inconsistency between the two, the more specific provision will control. If that doesn't solve the issue, then arguably the document with the earlier recording date will control. These documents are required to be recorded in the Clerk and Recorder's office.

3. Articles of Incorporation. This document is required to be filed with the Secretary of State's office and brings the corporation into existence. Plus it establishes the broad purposes of the Association.

4. Bylaws. This document is not recorded or filed anywhere. It is simply kept with the records of the Association. It includes the operational provisions of the documents (i.e. how to run meetings, how to elect directors, how to inspect records), plus the specific powers of the Board.

5. Rules/Regulations/Design Guidelines. These documents are not recorded or filed anywhere. They are simply kept with the records of the Association. These documents are intended to clarify and supplement the other documents, but cannot conflict with the other documents or add new use restrictions or covenants that are not already stated in the Declaration.

Of the above documents, the only documents that need to/should be recorded with the Clerk and Recorder's office are the Declaration and Plats. If they are not recorded then theylikely have zero applicability to the community, and the hierarchy question is moot.

And, the act of recording of other documents does not raise their weight/authority in the eyes of the law. The Bylaws are still merely the operational/procedural document for the Association and the Rules and Design Guidelines are merely clarifications and supplementations of the authority already contained in the other documents.

That brings us to another problem. From our review of the past Association and Board minutes and Design Guidelines, it appears the Association may be using the Design Guidelines inappropriately.

Paragraph 6.1 of the Declaration establishes an Architectural Control Committee ("Committee") for the purpose of reviewing and approving proposed architectural and design modifications within the Creekside II community.

And, Paragraph 6.2 of the Declaration provides the following, with respect to the Design Guidelines:

> No dwelling or other improvements shall be constructed, erected, placed, maintained or permitted on any Lot or on the Common Area, nor shall any construction or excavation he commenced unless and until plans and specifications with respect thereto have been submitted to and approved in writing by the Architectural Control Committee in accordance with the Design Guidelines to be adopted by the Committee from time to time. The Design Guidelines, of even date, are currently in effect, shall govern the review and approval process and shall apply to each and every Lot subject to this Declaration, until

later revised and/ or amended. The Committee shall keep copies of the then-current Design Guidelines for review by any Owner or interested third party.

The sole purpose of the Committee is to review architectural and design submissions, and the sole purpose of the Design Guidelines is to govern the review and approval process for such architectural submissions. However, on brief glance, the 2016 Design Guidelines include provisions regarding parking and rentals. Neither of the foregoing provisions falls within the purpose of the Design Guidelines or the jurisdiction of the Committee. They are use restrictions that are required to be contained in the Declaration to be enforceable. We recommend removing such provisions from the Design Guidelines, as they are currently unenforceable.

Arguably any provisions that impose maintenance requirements are also inappropriate in the Design Guidelines, because they are unrelated to the architectural *review and approval* process.

If you decide to move forward with the amendment recommendation, now would be the time to review whether the Declaration should be amended to include other desirable provisions of the community, such as the parking and rental provisions or maintenance obligations, and to reflect what today's community wants.

Our recommendations and opinions are based on the facts stated or assumed and known to us as of the date of this letter, but are not a guarantee of results or a specific outcome.

We hope this satisfactorily addresses the question presented to us. Should you have any further questions or comments or desire further clarification, please do not hesitate to contact us.

Sincerely,

Melissa M. Garcia
Altitude Community Law P.C.

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SCHEDULE A

Documents Reviewed:

1. Colorado Common Interest Ownership Act and Colorado Revised Nonprofit Corporation Act.

2. The Declaration of Covenants, Conditions and Restrictions for Creekside II, The Farm at Creekside Homeowners' Association, recorded October 27, 1993 in the office of the Boulder County Clerk & Recorder, and multiple supplements and amendments.

3. Various plat maps, 1st through 6th filing, recorded on behalf of the Association in office of the Boulder County Clerk & Recorder.

4. Articles of Incorporation for Creekside II, The Farm at Creekside Homeowners' Association, filed October 1, 1993 with the Colorado Secretary of State.

5. Restated and revised Bylaws of Creekside II, The Farm at Creekside Homeowners' Association, adopted December 15, 1999 by the Board of Directors.

6. Drainage and Utility Easements recorded for Lots 1 through 6, 3rd Filing; Lot 1, Blocks 1, 5, and 7, 1st Filing; and Lot 8 block 1, 2nd Filing, recorded in the office of the Boulder County Clerk & recorder.

7. Design Guidelines, dated 12/2/2016 and excerpts from Design Guidelines from 1999.

8. Multiple Board meeting and Annual minutes, budgets, financial documents of the Association.