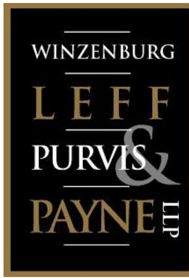

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Via email: DandABryan@aol.com

March 5, 2015

Board of Directors
RCR-Newton Property Owners Association
c/o Alice Bryan, President
702 Newton Road
Pueblo, CO 81005

Re: Applicability of Colorado Common Interest Ownership Act; Written Ballots

Dear Members of the Board:

We have been asked to provide you with our opinions regarding the following matters:

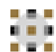
1. Whether the community known as RCR-Newton is subject to the Colorado Common Interest Ownership Act ("CCIOA");
2. Whether the request for Owner approval of a proposed Restatement of Declaration of Covenants, Conditions and Restrictions and Easements for RCR-Newton Property ("Proposed Amended Declaration") complied with the requirements of Colorado law; and
3. Whether the recording of the draft Proposed Amended Declaration before its required approval by the required percentage of owners was appropriate.

For purposes of our opinions, we have reviewed, and are relying on the Declaration of Covenants, Conditions, Restrictions and Easements for Red Creek Ranch Phase V (State §§ 16, 36) recorded in the office of the Clerk and Recorder of Pueblo County, Colorado on March 15, 1996 at Reception No. 1113858 ("Declaration"), as amended by that particular Order Approving Amendment issued by the District Court in Pueblo County, Colorado dated November 23, 2004 which was recorded in the office of the Clerk and Recorder of Pueblo County, Colorado on November 30, 2004 at Reception No. 1596457.

1. <u>Whether the community known as RCR-Newton is subject to the Colorado Common Interest Ownership Act ("CCIOA")</u>?

CCIOA was adopted by the Colorado legislature and became effective July 1, 1992. In general, it provides that it applies to all common interest communities formed on or after July 1, 1992, with certain exceptions. CCIOA defines a common interest community as:

> "Common interest community" means real estate described in a declaration with respect to which a person, by virtue of such person's ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration.



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While there has been much debate, discussion and court opinions over the years about what this means, it is pretty clear from certain Colorado court opinions that if, by virtue of a declaration, an owner of real estate in the community has an obligation to pay assessments, and the assessments are used for maintenance of other real estate, then a common interest community exists. The Declaration creates an obligation on the owners whose property is subject to the Declaration to pay assessments, and the assessments levied by the Association must be used for the improvement and maintenance of non-public roads within the community and for other allowed purposes. Based on these provisions, it is our opinion that the community is a common interest community as defined by CCIOA. Indeed, Section 1.1 of the Declaration states that the common interest community created by the Declaration is a planned community as defined in CCIOA.

But, even though the community is a planned community as defined by CCIOA, the question remains whether it is subject to all of the provisions of CCIOA. Section 116 of CCIOA provides for an exception to its applicability for small and limited expense planned communities. Subsection (1) of that section provides:

> . . . <u>If a planned community created in this state on or after July 1, 1992, but prior to July 1, 1998</u>, contains no more than ten units and is not subject to any development rights <u>or if a planned community provides, in its declaration, that the annual average common expense liability of each unit restricted to residential purposes, exclusive of optional user fees and any insurance premiums paid by the association, may not exceed three hundred dollars, it is subject only to sections 38-33.3-105 to 38-33.3-107, unless the declaration provides that this entire article is applicable</u>. (Emphasis added)

In other words if:

(a) a planned community is formed between July 1, 1992 and before July 1, 1998; and
(b) the annual average common expense liability of units restricted to residential purposes, exclusive of optional user fees and insurance premiums, do not exceed $300,

then it is only subject to certain sections of CCIOA, unless the Declaration provides that it is subject to all of CCIOA. Based on the language of the statute, if the community meets the stated criteria, it is automatically exempt from the provisions of CCIOA, unless the Declaration says otherwise.

The introductory paragraph of the Declaration says: "The purpose is to exempt the Property (as defined below) from the Colorado Common Interest Ownership Act." Further, Section 8.5(a) of the Declaration provides for an initial annual Common Assessment of no more than $150 per Lot, and Section 8.5(b) provides: "Notwithstanding the foregoing, the maximum annual Common Assessment may not exceed $300 per Lot or the maximum allowed by law to remain exempt under the Colorado Common Interest Ownership Act." Based on these provisions, it is our opinion that the RCR-Newton community is exempt from the application of CCIOA as provided in Section 116. However, Section 116, quoted above, does not exempt the community from all provisions of CCIOA. The provisions of Sections 105 to 107 still apply. In general terms, these sections address:

1. That any common areas owned by the Association are exempt from county taxes;
2. That, just because a community is a common interest community, it cannot be treated any

differently from other physically identical developments for purposes of enforcing local ordinances, regulations and building codes;

3. There are certain types of restrictions that are considered against public policy, and therefore common interest communities' ability to regulate them are limited, such as the right to display the American flag and service flags, the right to post political signs, the right to park emergency service vehicles, the right to install solar energy devices and implement energy efficiency measures and to install electric vehicle charging systems (please note that the rights created by these sections are not unlimited, and can be regulated to certain degrees by the Association); and
4. The effects of an eminent domain (condemnation) proceeding by an authorized governmental entity.

Accordingly, it is our opinion that the community is exempt from all of CCIOA except Sections 105 to 107.

2. Whether the request for Owner approval of a proposed Restatement of Declaration of Covenants, Conditions and Restrictions and Easements for RCR-Newton Property ("Proposed Amended Declaration") complied with the requirements of Colorado law?

We understand that the Association attempted to obtain approval of the Proposed Amended Declaration by sending written ballots to owners with a letter dated November 15, 2014 requesting that owners sign and return the enclosed ballot "within the next five days."

Section 10.4 of the Declaration provides that ". . . any provision, covenant, condition, restriction or equitable servitude contained in this Declaration may be amended or repealed at any time after the Transfer of Control Date and from time to time thereafter upon approval of the amendment or repeal by Members with at least seventy-five percent of the voting power of the Association. For purposes of this Section 10.4, all Members shall be entitled to vote." Colorado courts have recognized the ability of associations to seek approval of amendments to declarations by written ballots. However, in order to do so, the association must follow the relevant provisions of the Colorado Revised Nonprofit Corporation Act ("Nonprofit Act").

Colorado Revised Statutes 7-127-109 (part of the Nonprofit Act) sets out the requirements to take action by written ballot. The solicitation for votes by written ballot must:

1. Indicate the number of responses needed to meet quorum requirements;
2. State the percentage approvals necessary to approve each matter other than the election of directors;
3. State the time by which a ballot must be received by the association in order to be counted; and
4. Be accompanied by written information sufficient to permit each person casting such ballot to reach an informed decision on the matter.

The letter sent on November 15, 2014 seeking approval of the Proposed Amended Declaration was flawed in a couple of respects. First, it does not indicate the number of responses needed to meet quorum requirements. While "quorum" is somewhat of an elusive concept when you need approval of 75% of your owners to

approve the Proposed Amended Declaration (as opposed to the 20% quorum to conduct a members' meeting), at the very least the letter should have advised that there were 100 lots in the community, and that owners of 75% of the lots must vote in favor of the Proposed Amended Declaration. Rather, the letter did not advise of the number of lots in the community, and incorrectly stated that approval was required of 67% of owners (apparently relying on a provision of CCIOA that reduces approval requirements to 67%, but as discussed above, this provision would not apply to the Association due to its exemption from CCIOA). In addition, the letter does not state the time by which the ballot must be received in order to be counted. Rather, it simply says "Please do so within the next five days." In light of a recent Colorado Court of Appeals decision, it is also likely that the minimum notice requirements under either the Nonprofit Act or the Association's Bylaws, whichever requires the greater amount of notice, would be required, and in neither case would five days be sufficient.

Accordingly, it is our opinion that the letter seeking approval of the Proposed Amended Declaration did not meet the requirements of the Nonprofit Act.

3. <u>Whether the recording of the draft Proposed Amended Declaration before its required approval by the required percentage of owners was appropriate</u>?

The Proposed Amended Declaration was recorded in the office of the Clerk and Recorder of Pueblo County, Colorado on November 4, 2014 at Reception No. 1989127, before the Proposed Amended Declaration was approved by the Owners. The recorded document was accompanied by a written statement signed by Mr. Donald Banner that the document is

> . . . being recorded, unsigned and ineffective, until approved by the proper percentage of Lot Owners in the RCR-Newton Property area governed by the RCR-Newton Property Owners Association, Inc. Once approved by the Lot Owners, it will be signed and recorded. Until that occurs, this document has no affect on the title to properties governed by the RCR-Newton Property Owners Association, Inc. and may be ignored for title purposes by all title companies and others interested in the state of title. . .

Presumably this was recorded to let owners or potential purchasers of property in the community know that an amendment was underway, and if successful, title to their lots would be encumbered by the approved Proposed Amended Declaration. While it contains a statement that it is ineffective until properly approved, and may be ignored by title companies, in fact, it was not ignored by title companies. As you know, one owner, through his attorney, threatened to bring legal action against the Association under Colorado's spurious document statute. That statute defines a spurious document as "any document that is forged or groundless, contains a material misstatement or false claim, or is otherwise patently invalid."

While the issue of whether this recording constituted a spurious document was not tested in legal action, and we do not know for certain what the outcome would have been, there remains the open question of whether the document constituted a spurious document. Had the matter been tested in court and the Association lost on the issue, it could have been required to pay the legal fees of the challenging owner, as well as court costs.

Colorado courts have not had any occasion to make a determination of whether a document such as the Proposed Amended Declaration constitutes a spurious document. The concern is that it could meet the requirements of "groundless" or "patently invalid" insofar as, by the statement attached to the document, it was ineffective until approved by the requisite number of owners. In other words, until approved, it was invalid, and the statement admitted as much.

Further, even though the statement advised title companies to ignore the document for title purposes, it has been our experience that title companies never ignore a document recorded in the chain of title. Rather, they disclose it, and then except it from coverage under the title insurance. In the present case, at least one title company refused to ignore it, and the result was that the Association either faced having to defend itself in a spurious document legal action, or take action that revoked the recording of the Proposed Amended Declaration. It is impossible to unrecord a document once recorded. Therefore, the recording of this document will likely continue to appear in title searches, but the statement of revocation recorded should assure any title examiners, and buyers, that the document is of no force or effect.

While the intent of the recording seems proper enough, it is our opinion that the document should not have been recorded. Rather, the Association could have advised owners in writing about the Proposed Amended Declaration, and its effect if approved and recorded. In addition, the Association could have advised owners that, if they were intending to sell their property, they should consider advising potential purchasers about the effect of the Proposed Amended Declaration, should it be approved.

Please let me know if you have any questions concerning any of the above.

Very truly yours,
WINZENBURG, LEFF, PURVIS & PAYNE, LLP

MARK K. PAYNE

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