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August 30, 2004

Mark R. Shapiro, Esq.
Mark R. Shapiro, P.C.
1650 38th St., Ste. 103
Boulder, CO 80301

Re: Northridge Subdivision Filing No. 3
Town of Erie, Colorado

Dear Mr. Shapiro:

This letter shall serve to introduce my firm as counsel to Tim Kelley, who is the owner of Lot 8, Block 1, in Northridge Subdivision Filing No. 3. I have been asked to comment upon your legal memorandum to the Board of Trustees for Town of Erie, Colorado, dated July 14, 2004 (the "Memorandum").

In the Memorandum, you stated that all three filings for Northridge Subdivision are subject, or could be subjected, to what would effectively be a master homeowners association. After reviewing the governing documents for Northridge Subdivision Filing No. 3 ("Filing No. 3"), along with applicable provisions of the Colorado Common Interest Ownership Act (the "CCIOA"), however, I have reached a different conclusion.

While the recital paragraph in the Declaration of Covenants, Conditions and Restrictions for Northridge Subdivision—Filing No. 3 (the "Filing No. 3 Declaration") refers to "All Lots in Accordance with the Recorded Plat of Northridge Subdivision" in the generic, this one line cannot be relied upon as support for the argument that the lots in all three Northridge filings are subject to its terms (including the provisions applicable to formation of a homeowners association). Indeed, this argument is refuted by the Filing No. 3 Declaration's own title, which states that it is applicable only to *Filing No. 3*, and the fact that the plat is referred to in the singular (i.e., "*the* Recorded Plat").

There is ample evidence that the Declarant never intended for the three Northridge filings to be subject to a single declaration or homeowners association. First, and most obvious, is the fact that each filing was subjected to a separate declaration, none of which made any reference to

the other filings. Had the Declarant intended for all three filings to be part of a single common interest community, it would likely have recorded only a single declaration, and annexed successive filings into the common interest community as the plats were recorded.

Even more compelling, however, is the fact that, when the Declarant formed Northridge Homeowners Association, Inc. (the "Association") in 2002, it only referred to the "Declaration of Covenants, Conditions and Restrictions for Northridge Subdivision, Town of Erie, State of Colorado, filed with the Clerk and Recorder of Weld County, Colorado on May 6, 1996 at Book 1546, Page 118, Reception No. 2489489" in the Association's Articles of Incorporation and Bylaws. This particular declaration **does not apply to Northridge Subdivision Filing No. 3** (*see* Schedule B-2 to Land Title Guarantee Company Order No. FC192451, attached hereto, issued on February 8, 1999 for Mr. Kelley's property, which makes no reference to the aforementioned declaration).

Had the Declarant intended for the Association to govern Northridge Filing No. 3, it would have been easy for it to reference the Filing No. 3 Declaration—which was recorded a little over five years earlier—in the Association's Articles of Incorporation and Bylaws (copies enclosed). While this could be argued as a mere oversight by the Declarant, it must be noted that the Declarant was represented by counsel in forming the Association, and should therefore be presumed to have included in the Association only that community it *intended* to be governed by the Association.

Lastly, it must be noted that, even if the Declarant *had* intended to create a master homeowners association to govern all three Northridge Subdivision filings, it is precluded from doing so under the CCIOA. This is because the Declarant never reserved the special declarant rights to "make the common interest community subject to a master association" or "to merge or consolidate a common interest community of the same form of ownership" in the Filing No. 3 Declaration. *See* C.R.S. § 38-33.3-103(29) and C.R.S. § 38-33.3-205(1)(h).

Accordingly, for any merger of the common interest communities created for each of the Northridge Subdivision to occur, the provisions of C.R.S. § 38-33.3-221 (entitled "Merger or consolidation of common interest communities") must be complied with. For such a merger to occur, it would need to be ratified by agreement of Lot owners to which at least sixty-seven percent of the votes *in each filing* are allocated.

While my client has no objection to enforcement of the Filing No. 3 Declaration as written, he is opposed to participating in an association with responsibilities that extend beyond Filing No. 3. As a result, if a merger or consolidation of Filing No. 3 with the other filings in Northridge Subdivision is attempted without the statutorily required vote of the Lot owners in each filing, my client will be forced to consider pursuit of his legal remedies, including but not limited to injunctive relief and a claim for slander of title.

As a collateral matter, my client is also concerned about the references made in the Memorandum to the responsibility of the "North Ridge Home Owners' Association" to maintain trails and parks owned by the Town of Erie. While Section 2 the Filing No. 3 Declaration makes reference to this responsibility, you will note that the definition of "Trails and Parks" is specifically limited to real property owned by Erie "for the common use and enjoyment *of the Northridge Subdivision home owners* (emphasis added)."

In reviewing the Warranty Deed (copy enclosed) conveying Tracts A-C (the "Trail to Cottonwood Extension Ditch," the "Detention pond," and the "Tot lot") to the Northridge Subdivision Filing No. 3, however, I noted that there are no limitations placed on the conveyance. In other words, the Warranty Deed does not limit the parties entitled to use of these Tracts only to the "Northridge Subdivision home owners," but would appear to be a conveyance to the general public. This is consistent with the original Subdivision Agreement for Northridge Filing No. 3 (copy enclosed), which provided that the Town of Erie was to take ownership of the aforementioned Tracts via a "Public Use Dedication" upon "final acceptance" of the improvements to be constructed thereon. *See* Subdivision Agreement §§ 1.7 and 4.1.

Final acceptance of these Tracts occurred in the Settlement Agreement between the Town of Erie and Northridge Development, LLC, dated March 15, 2002 (copy enclosed). Given the acceptance of the Tracts by the Town of Erie for public use, it would be inappropriate and a taking for the Town to require the Northridge Subdivisions home owners to foot the bill for maintaining them.

I appreciate your consideration of my client's position on this matter. Thank you.

Sincerely,

FOLKESTAD & FAZEKAS, P.C.

John C. Clark

Enclosures

cc: Tim Kelley (w/out enclosures)

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