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Sent: Friday, March 08, 2019 4:49 PM

To: Tolp, Bud <Bud.Tolp@gcinc.com>

Subject: RE: Tonto Hills Improvement Assoc: Revised ACC Deposits, Fees Penalties

Bud:

In regards to enforceability, any provision/restriction/requirement that is in the DORs is always going to be more enforceable than a provision/restriction/requirement that is adopted by the Board or Architectural Control Committee (“ACC”), without approval of the membership. When reviewing and analyzing provisions/restrictions/requirements that are adopted by the Board or ACC, without approval of the membership, the most common issues that arise (which are also arguments that could be made by an owner raising a challenge/dispute) are (1) whether the provision/restriction/requirement is in conflict with the DORs; (2) whether the Board or ACC had authority to adopt such provision/restriction/requirement; and (3) whether the provision/restriction/requirement is reasonable. Ultimately, whether to proceed with implementing and enforcing rules without amending the DORs (and obtaining membership approval) is an exercise in assessing the potential risk and likelihood of a legal challenge, relative to the amount of risk the Board finds acceptable.

The DORs give the ACC clear and fairly broad over architectural changes in Paragraph 1 of the DORs, which states, “[n]o structure of any kind shall be commenced, placed or architecturally modified in Tonto Hills until the design, location, and the kind of materials to be used therein have been approved by a majority of the Architectural Control Committee of the Tonto Hills Improvement Association, defined below.” Since the DORs give the ACC clear and broad discretion over architectural changes, it is my legal opinion that the procedural aspects of the Architectural Control Committee Design Review Process and Procedures are not in conflict with the DORs, within the ACC’s authority and appear to be reasonable. In fact, clearly explaining the procedural aspects of the ACC process is beneficial to the ACC, Board and the membership.

My biggest concerns are the Appendix D Schedule of Deposits and Penalties.

Penalties: In regard to the penalties, please note that pursuant to Arizona law, “[a]fter notice and an opportunity to be heard, the board of directors may impose reasonable monetary penalties on members for violations of the declaration, bylaws and rules of the association.” There is also recent Arizona case law that suggests that Boards are required to adopt a schedule of fines/penalties prior to imposition of fines/penalties, and that failure to do so may render the fines/penalties per se unreasonable. As such, I feel that the Board has the authority (and in fact, I encourage my clients to) adopt a schedule of fines/penalties.

My concern with the Appendix D is that it provides for a \$10,000 penalty for any Owner who violates the ACC policies and procedures and/or the DORs. It is my legal opinion that a \$10,000 penalty for any violation is unreasonable. In order to establish a reasonable penalty/fine schedule, as a starting point, I recommend that the Board go through the process of determining the appropriateness of each penalty/fine, by taking into account (at a minimum), the impact that the violation may have on the community as a whole, including but not necessarily limited to, property values and aesthetics; the impact that the violation may have on individual members of

the community, including but not necessarily limited to, a negative impact on the quiet enjoyment of their property and/or the common areas; and whether the fine amount is sufficient to increase the likelihood of compliance and reduce the likelihood of recidivism. While a \$10,000 fine/penalty for an unauthorized new build may be found reasonable, a \$10,000 fine for a minor procedural violation almost certainly would be found unreasonable.

Deposits: While I understand the Board's desire to collect deposits in order to protect the Association, it is my legal opinion that such deposits are potentially subject to legal challenge on the basis that the Board and/or ACC does not have the authority to require deposits pursuant to the DORs. If this matter were to ultimately result in litigation, it is difficult to predict the outcome; however, it is my opinion that the safest way to proceed with collecting deposits for architectural projects would be to amend the DORs to expressly grant the Board and ACC the right to collect deposits and address how the deposits are to be handled if the project is not completed in accordance with ACC procedures.

Finally, please note that pursuant to A.R.S. Section 33-1817(B)(2),

For new construction of the main residential structure on a lot or for rebuilds of the main residential structure on a lot and only in a planned community that has enacted design guidelines, architectural guidelines or other similar rules, however denominated, and if the association documents permit the association to charge the member a security deposit and the association requires the member to pay a security deposit to secure completion of the member's construction project or compliance with approved plans, all of the following apply:

(a) The deposit shall be placed in a trust account with the following instructions:

(i) The cost of the trust account shall be shared equally between the association and the member.

(ii) If the construction project is abandoned, the board of directors may determine the appropriate use of any deposit monies.

(iii) Any interest earned on the refundable security deposit shall become part of the security deposit.

(b) The association or the design review committee must hold a final design approval meeting for the purpose of issuing approval of the plans, and the member or member's agent must have the opportunity to attend the meeting. If the plans are approved, the association's design review representative shall provide written acknowledgement that the approved plans, including any approved amendments, are in compliance with all rules and guidelines in effect at the time of the approval and that the refund of the deposit requires that construction be completed in accordance with those approved plans.

(c) The association must provide for at least two on-site formal reviews during construction for the purpose of determining compliance with the approved plans. The member or member's agent shall be provided the opportunity to attend both formal reviews. Within five business days after the formal reviews, the association shall cause a

written report to be provided to the member or member's agent specifying any deficiencies, violations or unapproved variations from the approved plans, as amended, that have come to the attention of the association.

(d) Within thirty business days after the second formal review, the association shall provide to the member a copy of the written report specifying any deficiencies, violations or unapproved variations from the approved plans, as amended, that have come to the attention of the association. If the written report does not specify any deficiencies, violations or unapproved variations from the approved plans, as amended, that have come to the attention of the association, the association shall promptly release the deposit monies to the member. If the report identifies any deficiencies, violations or unapproved variations from the approved plans, as amended, the association may hold the deposit for one hundred eighty days or until receipt of a subsequent report of construction compliance, whichever is less. If a report of construction compliance is received before the one hundred eightieth day, the association shall promptly release the deposit monies to the member. If a compliance report is not received within one hundred eighty days, the association shall release the deposit monies promptly from the trust account to the association.

(e) Neither the approval of the plans nor the approval of the actual construction by the association or the design review committee shall constitute a representation or warranty that the plans or construction comply with applicable governmental requirements or applicable engineering, design or safety standards. The association in its discretion may release all or any part of the deposit to the member before receiving a compliance report. Release of the deposit to the member does not constitute a representation or warranty from the association that the construction complies with the approved plans.

As such, in the event that the Board ultimately decides to collect a security deposit in connection with new construction or a rebuild of the main residential structure, please be sure that the deposit and trust account instructions strictly comply with subsection (a) above and that the review process strictly complies with subsections (b), (c) and (d) above.

Please let me know if you have any further questions. Thank you for the opportunity to represent the Association.

Sincerely,
Beth Mulcahy, Esq.



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