October 17, 2018

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Board of Directors
Pinon Ranch Homeowners Association, Inc.
c/o Frank Hibbitts
PO Box 50373
Colorado Springs, CO 80949

Re: Pinon Ranch Homeowners Association, Inc. / Limited Expense Communities and the Maximum Assessment Cap Increase
Our File No. 1034.0002

Dear Members of the Board:

Altitude Community Law P.C. has been retained to provide an opinion regarding limited expense communities, recent legislation that increased the maximum assessment cap, and how this applies to the Association. This letter is in response to that inquiry. For ease, we have included the Association's various questions and included our answers below each individual inquiry.

To what extent does C.R.S. § 38-33.3-116 apply to the Association? Do we have to comply with Section 116 or not?

Section 2.3 of the Declaration provides that "Pinon Ranch Subdivision constitutes a 'common interest community' in the nature of a 'planned community' as these terms are defined in the Colorado Common Interest Ownership Act … However, as provided in Section 116 of the Act … Pinion Ranch Subdivision is subject only to Sections 38-33.3-105, 38-33.3-106 and 38-33.3-107 of the Act, and not any other provisions of the Act, by virtue of the limitation on Assessments contained in Section 5.4(d) of this Declaration." C.R.S. § 38-33.3-116 provides, in part, "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 use fees and any insurance premiums paid by the association, may not exceed four hundred dollars … it is only subject to sections 38-33.3-105 to 38-33.3-107." While we understand the Declaration references a $300 cap, the statute was amended to increase this amount to $400. Because the Declaration references Section 116, this section applies to the Association along with the $400 assessment cap maximum, as adjusted by inflation.

Is the Association noncompliant with State law by keeping the cap on dues at $300? Section 5.4(d) of the Association's Covenants establishes the maximum annual rate of dues at $300 per year, plus insurance. It does not reference State statute. The revised C.R.S. § 38.33.3-116 changes the definition of our type of community to one whose annual dues do not exceed $400.

The Association does not have an obligation to raise dues to $400 as adjusted. Section 5.4(b) provides "the maximum annual Assessment against each Lot may, at the Board's option, be increased for each fiscal year by the greater of: (i) the percentage increase, if any, in the Consumer Price Index … or (ii) 10 percent." If the Association wishes to raise dues, it must comply with the requirements in Section 5.4(b) and (d). Because Section 116 applies to the Association, the $300 limitation in Section 5.4(d) is automatically increased to $400 by the Colorado Common Interest Ownership Act. Thus, the maximum yearly assessment amount is $400. However, this does not mean the Association is required to increase to this amount, or that the Association is required to increase its assessments at all.

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Is it possible for the Board to increase the maximum cap on annual dues without changing the Covenants? When I read section 5.4(d) of our Covenants, it seems clear that the maximum cap on dues is $300 plus the cost of insurance and that to exceed that cap we would need to change the Covenants. Our manager implied at the most recent Board meeting that because the revised State law allows for higher dues, we could simply disregard the limit stated in our Covenants and increase the annual dues as needed.

The Association does not need to amend its Declaration to utilize the $400 cap on maximum assessments. Because the Association is governed by Section 116 of the Colorado Common Interest Ownership Act, the Declaration may not contradict this Section. However, as stated above, just because there is now a $400 yearly maximum assessment cap, it does not mean that the Association must increase to this amount.

Is it possible for the Board to change the Association's Covenants without a vote of 2/3 of the owners?

Pursuant to Section 11.3 of the Declaration, the same may not be amended without a vote of 67% of the total number of Lots in the Community. There is no other mechanism under Colorado law which would allow the Board of Directors to amend the type of Declaration provisions outlined herein. However, the statute allows for the increased assessments without a vote.

If we change the cap in dues to match State law, does State law also determine the limit in the annual increase in dues? Our Covenants outline in section 5.2(b) that the Board may increase dues annually by either 10% or the cost of living index for the Denver Metro area until such time as the $300 cap is reached. The revised section C.R.S. § 38.33.3-116 establishes the annual maximum at $400 in 1998 dollars, with subsequent cost of living increases. It doesn't outline a method for increasing the dues up to that maximum. It is my understanding that our manager would like to cap dues at $400 in 1998 dollars, which is more than $600 today, and retain the ability to implement 10% annual increases until we reach the approximately $600 maximum, then transition to cost of living increases after that. Is this possible?

State law does not control or limit the amount of the Association's annual increase, if any. As outlined above, the Association must comply with Section 5.4(b) when determining whether or not to increase the annual assessments and by how much. In addition, the maximum annual dues, per Section 116 is $400, as adjusted by inflation per Section 116(3). Therefore, the Association may continue to raise assessments per the Declaration until such maximum assessments equal $400 as adjusted by inflation.

If the Board were to pursue this increase in annual assessments, what would be your recommendation for the actual language in the Covenants? A simple reference to state statute? Could we create our own language?

Again, the Association must comply with the Declaration with respect to increases. Just because the Association's maximum cap on dues is $400 as adjusted for inflation, the Association will not be able to increase assessments over what is outlined in the Declaration. Further, the Declaration does not need to be amended with respect to the revised Section 116. The revised Section 116 will apply irrespective of whether or not the Declaration is amended.

Our manager rightly points out that our Covenants conflict with some revised sections of 38.33.3-105 - 107, which our Covenants and section 38.33.3-116 declare we must defer to. Do we have to change the Covenants? Exhibit C of the Bylaws allows the Board to adopt "policies, procedures, and rules" to be used to "interpret, supplement, and enforce" the governing documents. They cannot conflict with the governing documents. Could we adopt a rule effectively nullifying our unconstitutional political signage covenants and the others covered in 38.33.3-105 - 107?

The Association does not need to amend the Declaration if it is in conflict with sections of the Colorado Common Interest Ownership Act. These sections will supersede the Declaration. However, if the Association is so inclined, it may adopt a rule advising the Community of the issue and that the Colorado Common Interest Ownership Act applies and governs.

We hope this letter 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,

Maris Davies
Altitude Community Law P.C.
MSD/amc
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