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July 10, 2018

**Via E-mail Only ([trace@scottpatrickhomes.com](mailto:trace@scottpatrickhomes.com))**

Trace Salley  
Scott Patrick Homes  
Superior Land Investments  
8300 Carmel Ave NE Suite 401  
Albuquerque, NM 87122

**Re: Repair of Temporary Pond**

Dear Mr. Salley:

Our firm represents The Estates at Desert Ridge Trails Homeowners Association (the "Association"). The Association requested that I contact you in response to your e-mail dated June 20, 2018 in which you ask the Association to perform repairs on land owned by Superior Land Investments. Based on your representations in your e-mail, Superior Land Investments, and Mesa Verde Development Corp. are both a part of Scott Patrick Homes.

The Association disagrees that the repairs requested by the City of Albuquerque fall within the scope of the covenants. In addition, the Association believes that the original provision, which purports to give the Association maintenance responsibility of a parcel of land adjacent to the Association in the Declaration of Covenants, Conditions, and Restrictions for Desert Ridge Trails North Subdivision (the "Declaration") is a breach of the fiduciary duty that the Declarant, Mesa Verde Development Corporation, owed to the Association at the time of formation. Moreover, the Declaration provision is likely unenforceable as unconscionable. Accordingly, the Association will not be performing the work you requested.

#### **I. Outside the Scope of the Covenants**

In your e-mail you provided a portion of the Declaration, namely Article I, Section 1, Part (f). The provision reads, in part, "[T]he maintenance of...the Temporary Storm Water Retention Pond...shall be the responsibility of the Association." The City is asking for repairs and restoration of the Pond, not regular maintenance.

The Agreement and Covenant between Mesa Verde Development Corp. (defined as the “User” in the agreement) and the City states, “The User will be solely responsible for constructing, maintaining, repairing and, if required, removing the Improvement.”

Courts have stated that in interpreting restrictive covenants, “[W]e construe the language strictly in favor of the free enjoyment of the property and against restrictions, but not so strictly as to create an illogical, unnatural, or strained construction.”<sup>1</sup> In addition, “we will not read restrictions into covenants by implication.”<sup>2</sup> The provision in the Declaration is not clear that the Association has any responsibility besides regular maintenance. Therefore, the court will not imply additional requirements.

The provision of the Declaration limits the Association’s responsibility to maintenance. The request from the City is for repair and restoration of portions of the Pond. Accordingly, it is Superior Land Investments’ responsibility, as successors in interest of Mesa Verde Development Corp., to make the repairs and restoration.

## II. Violation of Declarant’s Fiduciary Duty

Regardless of how the provision in the Declaration may be interpreted, adding the provision in the Declaration, while retaining ownership of the land, is a violation of the Declarant’s fiduciary duty to the Association.

The Courts often cite to and follow the Restatement (Third) of Property (Servitudes).<sup>3</sup> Section 6.20 of the Restatement (Third) of Property (Servitudes) addresses the duties of a developer to an association. Comment a. of Section 6.20 provides helpful insight into the duty of a developer. Comment a. reads in part:

[T]he developer also creates the association, ordinarily a not-for-profit corporation, and then controls the association through election or appointment of the directors and officers. Corporate promoters, directors, and officers have fiduciary duties to the corporation and to the stockholders or members. **The developer’s relationship to the association is a fiduciary relationship during the period that the developer controls the association.** (emphasis added)

To the extent that the Declaration imposes responsibility on the Association to maintain or perform any work on the Pond, the developer breached its duty to the Association in retaining ownership of the land but attempting to put the responsibility of maintenance on the Association.

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<sup>1</sup> *Baker v. Bennie J. Aday & Dixie J. Aday Revocable Trust*, 1999 NMCA 123, 128 N.M. 250, 991 P.2d 994 (internal quotation marks and citation omitted).

<sup>2</sup> *Id.*

<sup>3</sup> See *Generally: Nettles v. Ticonderoga Owners’ Ass’n. Inc.*, 2013 NMCA 030, 306 P.3d 441, *Allen v. Timberlake Ranch Landowners Assn.*, 2005 NMCA 115, 138 N.M. 318, 119 P.3d 743, *Estates at Desert Ridge Trails v. Vasquez*, 2013 NMCA 051, 300 P.3d 736.

First, the developer owes a responsibility to the City to be “solely responsible for constructing, maintaining, repairing and, if required, removing the Improvement,” under the Covenant and Agreement with the City. The developer attempted, although ineffectively, to pawn off the maintenance responsibility to the Association.

Second, the Association is not the only beneficiary of the Pond. Water from the Association drains into the Pond through a large pipe on the South side of the Pond. The area that the City has requested to be repaired and restored is on the East side of the Pond. No water from the Association drains into the Pond from that direction. The erosion is not caused by water from the Association, nor does the Association benefit from that portion of the Pond. This too is evidence that the developer attempted to transfer its own responsibilities to the Association, even though there is no reason why the Association should be required to maintain portions of a drainage Pond for which it does not receive any benefit.

Third, it appears that the developer retained title to the property in hopes that eventually the Temporary Retention Pond would no longer be required, and the developer could develop or sell the land. Article VI, Section 34 of the Declaration provides that, when the Temporary Retention Pond is no longer required, the “Declarant or the owner thereof shall be entitled to the unencumbered title thereto and use thereof.” The developer, acting in its own self-interest, retained title to the property but attempted to transfer the maintenance responsibility of the property to the Association. It appears that the developer hoped to retain title to, but not pay for maintenance of, its own land, until it could sell the property and make a profit.

Fourth, the “Temporary” Retention Pond was established over 15 years ago. The Association is not able to develop other drainage facilities so that the city will no longer require the Temporary Retention Pond. The developer is in a position to create alternate drainage facilities. However, even though the Pond is referred to as “Temporary,” it appears that the developer is content with holding on to the parcel of land with no intent or motivation to have the easements released and with wanting to require the Association to take care of it indefinitely.

By taking such actions, the developer breached its fiduciary duty to the Association.

### **III. Provision Procedurally and Substantively Unconscionable**

Not only was the provision a breach of the developer’s fiduciary duty, the provision also is likely to be held unconscionable and, therefore, unenforceable.

The Courts will likely apply contractual concepts of unconscionability to determine the enforceability of this restrictive covenant. To the extent the provision in the Declaration gives the Association maintenance responsibility of the Pond, the provision is both substantively and procedurally unconscionable and, therefore, unenforceable.

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“In New Mexico, a contract provision that unreasonably benefits one party over another is substantively unconscionable.”<sup>4</sup> In addition, “A contract or provision therein is procedurally unconscionable where there is such gross inequality in bargaining power between the parties that one party’s choice is effectively non-existent.”<sup>5</sup> A provision may be held unenforceable if either procedural or substantive unconscionability is shown.<sup>6</sup>

The provision in the Declaration is substantively unconscionable because it unreasonably benefits the Declarant by requiring maintenance of an entire Temporary Retention Pond for which the Association only receives a small benefit. Moreover, although referred to as Temporary, the provision requires the Association to maintain the Pond for so long as the Declarant fails to take any action to have the easement released by the City. All the while, the Declarant retains ownership of the parcel and receives the benefit of its appreciated value.

The provision in the Declaration is procedurally unconscionable because the Declarant has all the bargaining power in creating the Declaration. At the time of the creation of the Declaration, the Association is yet unformed and therefore has no choice or power to determine the terms of the Declaration or its obligations.

## Conclusion

In summary, based on the above analysis, the Association will not be performing the work you have requested. Please do not hesitate to contact me with any questions or to discuss this matter further.

Sincerely,



Lynn M. Krupnik

cc: Association  
James Hughes, City of Albuquerque (jhughes@cabq.gov)

Enclosure (Agreement and Covenant)

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<sup>4</sup> *Stransberg v. Laurel Healthcare Providers, LLC*, 2012 NMCA 006, 269 P.3d 914

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*