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### Memorandum

To: New Mexico Legal Center, P.C.  
From: Rachel L. Winston<sup>1</sup> (Partner, Walcott, Henry & Winston, P.C.)  
Date: January 10, 2019  
Case: *Rhines, et al. v. Reynolds, et al.*, D-820-CV-2015-00328  
Re: A Subdivision Developer's Duty to the Homeowners Association.

#### I. INTRODUCTION

On October 10, 2015, Plaintiffs filed a Verified Complaint against Defendants alleging breach of fiduciary duty, unfair trade practices, negligent misrepresentation and fraud in connection with the development of a subdivision located in Taos, New Mexico. Defendants' summary judgment motions have been denied<sup>2</sup> as to Count I, paragraphs 15 (E), (F), (G), (H), and (M) of the Verified Complaint alleging Developer breached its fiduciary duty to Homeowners in five ways:

15(E) – Defendants were to have paid for the road improvements and repairs through the completion of the subdivision. However, in 2014, the Defendants required the members of GWC to pay for \$16,000 in road repairs after flooding took out many of the substandard culverts. Had Defendants constructed the road according to the regulations, Plaintiffs are informed and believe and thereon allege that these repairs would not have been necessary. In any case, Defendants were responsible for the repairs and not GWC of which Plaintiffs are a member.<sup>3,4</sup>

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<sup>1</sup> See Curriculum Vitae of Rachel L. Winston, attached hereto as Exhibit A.

<sup>2</sup> See Order on Defendants' Third Motion for Summary Judgment (August 8, 2018).

<sup>3</sup> Plaintiffs' Verified Complaint for Damages for Breach of Fiduciary Duty, Unfair Trade Practices, Negligent Misrepresentation and Fraud, ¶ 15(E) (October 10, 2015).

<sup>4</sup> Order on Defendants' Motion for Summary Judgment and Plaintiffs' Motion to Strike, ¶ 5(d) and ¶ 5(j) (July 25, 2017) ("The Court accepts as disputed whether the homeowner's association has the authority to assess homeowners for the taxes on common lands and upkeep of roads.").

15(F) – Signage that currently exists has been paid for by GWC dues and this is the proper responsibility of the Defendants as well as guard rails and signage at the ‘land dam’ area.<sup>5,6</sup>

15(G) – The Defendants have stacked the Board of Directors of GWC with their own employees and/or agents and/or co-conspirators. Thus, the Board of Directors and the Defendants are one and the same.<sup>7,8,9</sup>

15(H) – The Defendants had the Board of Directors authorize the GWC to pay Defendants’ insurance and property taxes for property Defendants still own.<sup>10,11,12,13</sup>

15(M) – On June 30, 2015, Defendant Reynolds sent an email to Plaintiff Balassone stating that Members can only bring up one issue per board meeting. This was sent before the Board even voted on it. This demonstrates the fact that GWC has no independent board of directors and this edict was issued in retaliation for Plaintiffs’ complaints, as set forth herein, which the Defendants and the GWC Board of Directors continue to ignore.<sup>14,15,16</sup>

In response to a letter dated July 25, 2017 from the Hon. Jeff McElroy to all parties in this case urging “a satisfactory and economical resolution of this dispute”,<sup>17</sup> I have been engaged by Plaintiffs’ counsel to prepare this legal memorandum in order to identify the duty owed by Defendants Michael

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<sup>5</sup> See *supra* note 3, at ¶ 15(F).

<sup>6</sup> See *supra* note 4, at ¶ 5(j).

<sup>7</sup> See *supra* note 3, at ¶ 15(G).

<sup>8</sup> See *supra* note 4, at ¶ 5(j) (“To the extent that [Defendants] assert that the Association is governed by the Board, Exhibit 19 places that in dispute. To the extent that [Defendants] assert that the Board has been established and is operating in accordance with the New Mexico HOA Act...that is in dispute.”).

<sup>9</sup> *Id.* at ¶ 8 (holding that the reasonable inference that the Defendants did not breach a fiduciary duty to the Plaintiffs because their status as an experimental sustainable community excuses their nonperformance is in dispute).

<sup>10</sup> See *supra* note 3, at ¶ 15(H).

<sup>11</sup> See *supra* note 4, at ¶ 5(j) (“The court accepts as disputed whether the homeowner’s association has the authority to assess homeowners for the taxes on common land and upkeep of roads.”).

<sup>12</sup> *Id.* at ¶ 5(q) (“To the extent [Defendant] asserts that the common land has been constructively conveyed to the homeowners association, the Court finds that fact to be in dispute.”).

<sup>13</sup> *Id.* at ¶ 5(w) (holding that the delay in completing the development has been caused by Taos County’s financial problems is a disputed fact).

<sup>14</sup> See *supra* note 3, at ¶ 15(M).

<sup>15</sup> See *supra* note 4, at ¶ 5(j).

<sup>16</sup> *Id.* at ¶ 5(t) (holding that Plaintiff’s Exhibits 16 and 17, containing Gillian Fryer’s statements concerning HOA’s business practices, create an issue of fact in dispute).

<sup>17</sup> Jeff F McElroy, LETTER RE: RHINES, ET AL. V. REYNOLDS, ET AL., D-820-CV-2015-00328 (July 25, 2017).

E. Reynolds, Sustainable Solutions Worldwide, Earthship Bioteecture, and Does 1 through 10, inclusive (collectively: "Defendants") to Plaintiffs Jody Rhines, Marcus Romano, and Michael Balassone (collectively: "Plaintiffs"), and to answer the following five disputed questions:<sup>18,19</sup>

- (1) whether the Greater World Land Users Association, an unincorporated New Mexico homeowners association (hereinafter: "Association" or "HOA") board of directors has been duly constituted and has the proper authority to act on behalf of the homeowners;<sup>20</sup>
- (2) whether the Defendants "stacked a sham board of directors with its own employees, agents, or co-conspirators";<sup>21</sup>
- (3) whether the common lands and roads have been properly turned over to the ownership and control of the HOA;<sup>22</sup>
- (4) whether Defendants breached a duty to the Plaintiffs by directing the board of directors to require homeowners to pay dues; and
- (5) whether it was a breach of duty for Defendants to require Plaintiffs to pay dues for insurance and property taxes that were the obligation of Developer.<sup>23</sup>

In preparing this Memorandum, I have read the substantive pleadings, reviewed each of the exhibits filed with the Court in this case,<sup>24</sup> and documents filed in the real property records of Taos

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<sup>18</sup> *Id.* at ¶ 25.

<sup>19</sup> Defendants have filed a Motion to Reconsider Judgment concerning these six issues of disputed fact. *See* Defendants' Motion to Reconsider Judgment (August 30, 2018).

<sup>20</sup> *See supra* note 17.

<sup>21</sup> *See supra* note 4, at ¶ 25.

<sup>22</sup> *See supra* note 17.

<sup>23</sup> *See supra* note 4, at ¶ 25.

<sup>24</sup> I have relied on the following community documents in preparing this Memorandum: (i) "The Greater World Communities of Taos, New Mexico Treatise; Articles of Association for the Greater World Land User's Association; By-laws of Reach Land User's Association; and Land Users Code for the Greater World Communities of Taos, NM (**April 1994 Ed.**)", filed on **April 26, 1994**, in Book M-167, pages 82-98, as Doc. No. 174126, in the real property records of Taos County, New Mexico; (ii) "The Greater World Communities of Taos, New Mexico Treatise; By-laws of Reach Land User's Association; Land Users Code for The Greater World Communities of Taos, NM (**May 1994 Ed.**); and Articles of Association for the Greater World Land User's Association", filed on **June 13, 1994**, as Doc. No. 175375; (iii) "Land Users Code for the Greater World Community of Taos, NM (**Dec. 2001 Ed.**); Clarification of G.W. Obligations (**Dec. 2001 Ed.**); Articles of Association for the Greater World Subdivision (**Dec. 2001 Ed.**); By-Laws of Greater World Subdivision (**Dec. 7, 2001 Ed.**)", filed on **March 25, 2002**, in Book M-317, pages 199-205; (iv) "Land Users Code for the Greater World Community of Taos, NM (**Dec. 2001 Ed.**); Clarification of G.W. Obligations (**Dec. 2001 Ed.**); Articles of Association for

County, including: the Greater World Community Subdivision (“Subdivision”) and HOA community documents;<sup>25</sup> the Taos County Disclosure Statement for Greater World Subdivision Phases 3 and 4;<sup>26</sup> phasing plats;<sup>27</sup> Subdivision deeds and lot surveys filed in the real property records of Taos County, New Mexico;<sup>28</sup> the decisions of the Board of County Commissioners of Taos County concerning phasing approval for the Subdivision from 2001 to 2004;<sup>29</sup> HOA meeting minutes published between

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the Greater World Subdivision (**Dec. 2001 Ed.**); By-Laws of Greater World Subdivision (**Dec. 7, 2001 Ed.**), filed on **March 25, 2002**, in Book M-317, pages 199-205; (**v**) “Land Users Code for the Greater World Community Subdivision” (**Aug. 2003 Ed.**), Articles of Association for the Greater World Subdivision (**Aug. 2003 Ed.**); By-Laws of Greater World Subdivision (**Aug. 2003 Ed.**), filed on **August 25, 2003**, in Book M-397, pages 797-809; (**vi**) “Land User’s Code Amendments for the Greater World Community Subdivision” (**March 2005**) filed on **August 23, 2005**, in Book 508, pages 300-301; (**vii**) “Land User’s Code for the Greater World Community Subdivision (**Aug. 2003 Ed.**); Articles of Association for the Greater World Subdivision (**Aug. 2003 Ed.**); By-Laws of Greater World Subdivision (**Aug. 2003 Ed.**); and Addendum to the Greater World Documents”, filed on **March 12, 2010**, in Book 711, pages 443-452; (**viii**) “Notice of Homeowner’s Association”, filed on **June 7, 2015**, at Book 877, page 966.

<sup>25</sup> See 47-16-2 (G) NMSA 1978 of the Homeowner Association Act (“HOA Act”) defining ‘community documents’ as “all documents governing the use of the lots and the creation and operation of the association, including the declaration, bylaws, articles of incorporation and rules of the association”).

<sup>26</sup> See **Exhibit E** (*Taos County Disclosure Statement for the Greater World Subdivision*) to Defendants’ Response to Plaintiffs’ Application for a Preliminary Injunction (June 10, 2016).

<sup>27</sup> See (**i**) Greater World Community Phase I Land Division Survey, filed on **July 9, 2012**, in Cab. F, page 6-A (“**Phase I Survey**”); (**ii**) Great World Phase II, Tract 44 Land Division Survey, filed on **Nov. 27, 2017**, in Cab. F, page 10-B (“**Phase II, Tract 44 Survey**”); (**iii**) Greater World Community Adjusted Tract 43 of Phase II Lot Line Adjustment Survey, filed on **August 28, 2015**, in Cab. F, page 41-B (“**Phase II, Tract 43 Survey**”); (**iv**) Greater World Community Phase III EVE Lot Line Adjustment Land Division Survey, filed on **May 10, 2016**, in Cab. F, page 51-B (“**Phase III, EVE Adjustment Survey**”); (**v**) Tract 44, Phase II, Greater World Subdivision Land Division Survey, filed on **Sept. 22, 2016**, in Cab. F, page 57-B (“**Phase II, Tract 44 Survey**”); (**vi**) Tract 49, Phase II Greater World Community Land Division Survey, filed on **Sept. 4, 2018**, in Cab. F, page 87-A (“**Phase II, Tract 49 Survey**”); (**vii**) “**Phase I Plat**”, “**Phase II Plat**”, “**Phase III Plat**” and “**Phase IV Plat**” attached as **Exhibit G** to Defendants’ Response to Plaintiffs’ Application for a Preliminary Injunction (June 10, 2016).

<sup>28</sup> See (**i**) Warranty Deed from M. Reynolds to Karen Payne, filed on **April 15, 1999**, in Book A-252, page 967 (“**1999 Payne Deed**”); (**ii**) Greater World Community Phase III, Lots 16 & 17 Land Division Survey, filed on July 2, 2013, in Cab F, page 14-B (“**Phase III, Lots 16 & 17 Survey**”); (**iii**) Greater World Community Phase III, Lots 18 & 18 Land Division Survey, filed on June 4, 2015, in Cab F, page 38-A (“**Phase III, Lots 18 & 19 Survey**”); (**iv**) Greater World Subdivision Phase III, Lot 16 Lot Line Adjustment Survey, filed on Dec. 8, 2015, in Cab. F, page 46-B (“**Phase III, Lot 16 Adjustment survey**”); (**v**) Lots 3, 6 and 7, Phase IV, Greater World Subdivision Land Division Survey, filed on Aug. 8, 2016, in Cab. F, page 55-B (“**Phase IV, Lots 3, 6 & 7 Survey**”); (**vi**) Greater World Community Phase III, Lot 13 Boundary Survey, filed on June 11, 2018, in Cab. F, page 82-B (“**Phase III, Lot 13 Survey**”).

<sup>29</sup> See (**i**) “Taos County Commissioners, In the Matter of the Preliminary Plat Approval for the Greater World Community Phase II: Decision of Commission” (Aug. 23, 2001), filed on Aug. 23, 2001, in Book M-289, page 642 (“**8/23/01 Phase II Decision**”); (**ii**) “Taos County Commissioners, In the Matter of the Final Plat Approval for the Greater World Community Phase II: Decision of Commission” (Jan. 10, 2002), filed on Jan. 14, 2002, in Book M-306, page 957 (“**1/10/02 Phase II Decision**”); (**iii**) “Variance Requests for Michael Reynolds’ Greater World Subdivision Phase 2” (Aug. 1, 2001), filed on

2005 and 2018 (referenced hereinafter by date); emails to and from the HOA Board of Directors which were included as exhibits in this case; excerpts from Defendants' website advertising lots for sale within the Subdivision which were included as exhibits in this case; Centinel Bank of Taos loan documents which were included as exhibits in this case; and Plaintiffs' and Defendants' Affidavits filed with the Court.

Finally, I have conducted a review of statutes, case law and treatises concerning a subdivision developer's duty to a homeowners association with respect to the five questions at issue in this case.

## **II. SUMMARY OF FINDINGS AND RECOMMENDATIONS**

A subdivision developer "has a duty to create an association to manage the common property and enforce the servitudes" governing the project.<sup>30</sup> A developer and its nominees serving on a homeowners association board of directors owe "the degree of care and loyalty required of a fiduciary" of the lot owners."<sup>31</sup>

A developer owes to persons who have already purchased lots in the subdivision "a wider range of duties than does the developer/promoter who deals only with prospective purchasers."<sup>32</sup>

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Nov. 24, 2003, in Book M414, page 350 ("**8/1/01 Phase II Variance Requests**"); (iv) "Taos County Commissioners, In the Matter of the Preliminary Plat Approval for the Greater World Community Subdivision Phase III & Phase IV: Decision of Commission" (Dec. 8, 2003), filed on Dec. 12, 2003, in Book M-417, page 170 ("**12/8/03 Phase III&IV Decision**"); (v) "Phase 3: County of Taos Subdivision Application", filed on March 30, 2004 in Book M-432, page 335 ("**3/30/04 Phase III Application**"); (vi) "Phase 4: County of Taos Subdivision Application", filed on March 30, 2004 in Book M-432, page 370 ("**3/30/04 Phase 4 Application**"); (vii) "Taos County Planning Commission, In the Matter of the Application for Special Use Permit Commercial Use, for Michael Reynolds, Agent Representing the Angel's Nest Institute SUP-016-2004: Decision of Planning Commission", (Sept. 14, 2004), filed on Sept. 30, 2004, in Book M-459, page 979 ("**09/14/04 Special Use Permit Decision**") ; (viii) Taos County Commissioners, In the Matter of the Final Plat Approval for the Greater World Community Subdivision Phase III and Phase IV" (March 15, 2004), filed on May 19, 2004, in Book M-439, page 356 ("**5/19/04 Phase III&IV Decision**").

<sup>30</sup> Restatement (Third) of Property: Servitudes § 6.19, *Developer's Duty to Create an Association and Turn Over Control* (2000).

<sup>31</sup> See § 47-16-7 NMSA 1978.

<sup>32</sup> See Robert G. Natelson, *LAW OF PROPERTY OWNERS ASSOCIATIONS*, § 10.6.3 (1989).

These duties include: good faith (honesty in fact), obedience (compliance with applicable law and the rules of the servitude scheme), diligence (care), and loyalty (fiduciary).<sup>33</sup>

Having reviewed the fact record in its entirety, it is my legal opinion that Defendants have breached their duties to the Plaintiffs by: (1) neglecting to incorporate the HOA after the expiration of its legal existence as an unincorporated association under New Mexico law; (2) failing to survey and transfer title to the Common Area for nearly a quarter of a century after establishing the Greater World Land User's Association; (3) charging member dues for road maintenance, insurance and property taxes on land held by the Defendants while using portions of those lands as collateral for non-HOA loans; (4) ignoring statutory administrative duties and disclosure obligations in connection with the operation of the HOA; (5) filing and refileing erroneous and contradictory community documents in the Taos County real property records without adhering to the procedures outlined in those same documents; and (6) failing to construct advertised subdivision improvements in a reasonable timeframe.

With respect to the five disputed questions identified by the Court, it is my legal opinion that:

- (1) the Greater World Land Users Association ("HOA") does not legally exist under New Mexico law and therefore its board of directors lacks the proper authority to act on behalf of the homeowners;
- (2) the Defendants maintain *de facto* control of the board of directors of the HOA;
- (3) the common lands and roads have not been properly turned over to the ownership and control of the HOA;
- (4) the Defendants breached their duty to the Plaintiffs by directing the HOA board to require homeowners to pay dues for budget items which were Defendants' financial obligation...
- (5) including dues for insurance and property taxes on land owned by the Defendants.

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<sup>33</sup> See Robert G. Natelson, LAW OF PROPERTY OWNERS ASSOCIATIONS, § 10.7 (1989).

A satisfactory and economical resolution of this dispute would require Defendants to fulfill their statutory and common law duties to the Plaintiffs and the HOA by: (1) incorporating the Greater World Land Users Association under the Nonprofit Corporation Act, Chapter 53, Article 8 NMSA 1978; (2) adopting amended and restated community documents consistent with the provisions of the Nonprofit Corporation Act and the HOA Act; (3) transitioning full control of the HOA board of directors to the owners, including access to bank accounts, financial records, legal records and maintenance records; (4) surveying and transferring title to the Common Areas from Defendant Michael Reynolds to the HOA; (5) fully funding the HOA's reserves for capital repairs and replacements; (6) refunding dues to owners for budget items which were Defendants' financial obligation, including insurance and property taxes paid by the HOA for land still owned by Defendant Michael Reynolds; (7) constructing the Common Area amenities advertised by the Defendants including roads, drainage structures, water treatment facilities, a sports park and community building;<sup>34</sup> and (8) reimbursing Plaintiffs' attorney's fees incurred in bringing this cause of action pursuant to § 47-16-14 NMSA 1978.<sup>35</sup>

### **III. FACTS**

#### **A. The Project.**

Defendants filed articles for the Greater World Land User's Association in the Taos County

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<sup>34</sup> See *Chesus v. Watts*, 967 S.W.2d 97 (Mo.Ct.App.1998) (developer liable for breach of contract and fraud for failure to provide common areas, facilities, and amenities promised to purchasers who relied on sales brochure, oral representations of developer, and appearance of model used in sales presentations; developer owed duty to association to turn over common areas that were not substandard and in good repair); see also *Knight v. City of Albuquerque*, 110 N.M. 265, 794 P.2d 739 (Ct.App.1990) (developer's retention of right to change use of golf course or other open spaces shown on plat would not be given effect where developer used the golf course as a selling tool; permitting the developer to induce purchases by pointing to present or planned existence of a park or golf course while retaining the power to alter the use would be patently unfair and violative of public policy).

<sup>35</sup> The attorney's fees exemption under § 47-16-15 NMSA 1978 applies to associations created before July 1, 2013. However, the Greater World Land User's Association ceased to exist as a legal unincorporated association in 2014, pursuant to § 53-10-7 NMSA 1978. Subsequent to the termination of its legal existence in 2014.

Clerk's records on April 26, 1994, along with bylaws and a Land Users Code.<sup>36</sup> The Subdivision consists of four phases.<sup>37</sup> Each phase is limited to a pre-approved number of lots, consisting of defined rectangular and undefined circular lots. Phase One may contain up to 24 lots; Phase Two may contain up to 56 lots; Phase Three may contain up to 27 lots; and Phase Four may contain up to 23 lots.<sup>38</sup> "None of the four phases is complete."<sup>39</sup> Defendants received Taos County Board of Commissioners approval for the final phases (Phase Three and Phase Four) on May 17, 2004.<sup>40</sup>

The Subdivision consists of "approximately 633 acres,"<sup>41</sup> 357 of which are to be dedicated for common use of the members ("Common Areas").<sup>42</sup> The Common Areas have not been surveyed and are designated "by acreage, not location."<sup>43</sup> Title to the land within which the Common Areas are to be designated is held by the Defendants.<sup>44</sup>

There are 130 "lots" permitted within in the project, the majority of which are circular lots. According to the Defendants, the Subdivision "is at 55% build out."<sup>45</sup> Based on this percentage, 71 lots within the project have homes constructed on them and 59 lots remain unimproved. Fifty-five of the lots have been sold.<sup>46</sup> Based on these numbers, Defendants own at least 16 of the homes within the Subdivision or 22% of the residences and 57% of the total lots.

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<sup>36</sup> See *supra* note 24.

<sup>37</sup> See *supra* note 29.

<sup>38</sup> *Id.*

<sup>39</sup> See Defendants' Response to Plaintiffs' Application for a Preliminary Injunction (June 10, 2016).

<sup>40</sup> See *supra* note 29.

<sup>41</sup> See *Affidavit of Michael Reynolds*, filed with the court on August 30, 2018.

<sup>42</sup> *Id.*

<sup>43</sup> See Defendants' Response to Plaintiffs' Application for a Preliminary Injunction (June 10, 2016).

<sup>44</sup> See *supra* note 27.

<sup>45</sup> See *Affidavit of Michael Reynolds*, filed with the court on October 26, 2016.

<sup>46</sup> See Defendants' Response to Plaintiffs' Application for a Preliminary Injunction (June 10, 2016).



Twenty-five of the remaining unimproved circular lots have not been surveyed and are of undefined size.<sup>47</sup> These circular lots exist somewhere within the land designated for the proposed Common Areas.<sup>48</sup> There is no way to distinguish between the Common Areas and the un-surveyed lots because the surveys<sup>49</sup> and maps<sup>50</sup> of record do not identify the location of the "Common Areas" within the Subdivision.

In 2011, Defendant Michael Reynolds obtained a line of credit loan with Centinel Bank using the un-surveyed Common Areas and the un-surveyed lots within the Subdivision as collateral.<sup>51</sup> While Centinel Bank states that its "collateral does not include any real estate identified or known as 'common land' within 'Greater World Subdivision,'"<sup>52</sup> this appears to be a distinction without a difference. In fact, none of the Subdivision surveys identify the location of the 357 acres of 'common land' or Common Areas. Nevertheless, the line of credit mortgage appears to have collateralized the remaining un-surveyed land within the Subdivision which, by definition, includes the Common Areas.

On August 8, 2018, a mortgage modification for the 2011 loan was filed in the Taos County records once again using the un-surveyed land within the Subdivision as collateral.<sup>53</sup>

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<sup>47</sup> See **Exhibit F** to Defendants' Response to Plaintiffs' Application for a Preliminary Injunction (June 10, 2016), an undated subdivision map showing approximate locations of remaining un-surveyed lots, "community greenhouse," and "sports park area," with no reference to Common Areas.

<sup>48</sup> *Id.* ("Plots can be neither smaller than .75 acres, nor larger than 3acres."); see also *supra* note 29(iii) ("We request circle surveys as per Tab II-5 and all lots to be surveyed as the individual parcels are sold. The purpose for this is so that the initial surveying costs can be less (for circles) and spread out as development happens; and so that the surveying for adjoining lots may be adjusted according to the size of the home").

<sup>49</sup> See *supra* note 27.

<sup>50</sup> See *supra* note 42.

<sup>51</sup> See **Exhibit 29** introduced by Plaintiffs' counsel during the April 11, 2016 hearing, Centinel Bank Line of Credit Mortgage, Loan No. 9698496, recorded on July 28, 2011, in Book 754, page 143; see also Centinel Bank Modification of Mortgage, Loan No. 9698496, recorded on August 9, 2018, in Book 988, page 45.

<sup>52</sup> See **Exhibit C** to Defendants' Response to Plaintiffs' Application for a Preliminary Injunction (June 10, 2016), Letter from Angel Reyes, President, Centinel Bank dated June 8, 2016.

<sup>53</sup> See *supra* note 46.

Common Area amenities advertised by the Defendants include roads, drainage structures, water treatment facilities, and a sports park and community building “which will be located in Phase One” and constructed “[d]uring the development of Phase Four.”<sup>54</sup> Phase IV was approved in 2004.<sup>55</sup> The sports park and community building have yet to be constructed.

**B. Community Documents.**

On **April 26, 1994**, Defendants filed Articles of Association for the Greater World Land User's Association, By-Laws, a Treatise, a property description, and a Land Users Code (labeled “April 1994 Edition”) in the real property records of Taos County.<sup>56</sup> The April 1994 Land Users Code identifies the HOA as “a non-profit unincorporated association.”<sup>57</sup>

The April 1994 Articles provide that Defendant Michael Reynolds “is to act in the capacity of director” for the first seven years.<sup>58</sup> However, the By-Laws filed with the April 1994 Articles provide that the affairs of the HOA “shall be managed by a single director, Michael Reynolds...for the first five years following the filing of this association.”<sup>59</sup>

The April 1994 Articles provide that after the seventh year, Michael Reynolds “shall appoint five (5) directors with terms of 5 years, 4 years, 3 years, 2 years, and 1 year, respectively; and at every year thereafter, the members of the Association shall elect one (1) director for a term of five (5) years as their terms shall expire.”<sup>60</sup> However, the April 1994 By-Laws provide that at the fifth annual

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<sup>54</sup> See *supra* note 26, at ¶ 34.

<sup>55</sup> See *supra* note 29.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 97.

<sup>58</sup> See *supra* note 24 (emphasis added).

<sup>59</sup> *Id.* (emphasis added).

<sup>60</sup> *Id.* (emphasis added).

meeting, “the members shall elect Four (4) directors for a term of Five (5) years, and at every annual meeting thereafter, the members shall elect a director for a term of One (1) year.”<sup>61</sup>

Regardless of this discrepancy in mandatory appointment provisions in the recorded By-Laws, Defendant Michael Reynolds admits that he did not appoint any owner Board members until 2005, eleven years after the HOA was established.<sup>62</sup>

The April 1994 By-Laws and Articles contain no amendment procedures. The unsigned April 1994 Land Users Code states that it [the Code] “will evolve as per the conditions we encounter during the first five to seven years” and requires members “to validate their Agreement to the Land Users Code updates by signing addendum’s [sic] as they are issued.”<sup>63</sup> A member’s failure to sign “can result in membership nullification.”<sup>64</sup> Neither the April 1994 Treatise nor the Land Users Code contain a signature or an acknowledgment.

Defendants re-recorded Articles, By-Laws, a property description, a Treatise, and a Land Users Code (labeled “May 1994 Edition”) on **June 13, 1994**.<sup>65</sup> The June 1994 community documents include no notice of amendments to the April 1994 community documents. The June 1994 By-Laws and Articles contain no amendment procedures. Like the April 1994 Land Users Code, the June 1994 Land Users Code contains a mandatory member signature requirement for all amendments.<sup>66</sup>

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<sup>61</sup> *Id.* (emphasis added).

<sup>62</sup> *See Affidavit of Michael Reynolds*, filed with the court on August 30, 2018.

<sup>63</sup> *See supra* note 24.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> The April 1994 Edition of the Land User’s Code and the June 1994 Edition of the Land User’s Code contain the following amendment requirement:

Members, upon signing their membership acceptance form document that they agree to and accept these restrictions and definitions...This Land User’s Code will evolve as per the conditions we encounter in the first five to seven years. Members will be required to validate their Agreement to the Land User’s Code updates by signing addendum’s [sic] as they are issued. Refusal to sign a Land User’s Code Update can result in membership nullification...

However, the June 1994 Land Users Code, like the April 1994 Land Users Code, contains no signatures whatsoever.

Defendants re-recorded Articles, By-Laws, property description, and Land User's Code (labeled "December, 2001 Edition") on **March 25, 2002**.<sup>67</sup> These March 2002 community documents include no notice of amendments to the April 1994 or the June 1994 community documents. Nevertheless, the March 2002 Articles contain amended provisions concerning the transition of the HOA from developer to homeowner control, stating that when Michael Reynolds "deems the property...as at least 90% developed and after all debts created in the founding of the community are paid," Reynolds shall appoint five directors with terms of "five (5) years, four (4) years, three (3) years, two (2) years, and one (1) year respectively; and at every year thereafter, the members of the Association shall elect one (1) Director for a term of five (5) years as their terms shall expire."<sup>68</sup> The March 2002 By-Laws filed with the Articles contain a similar provision. Like the April 1994 and June 1994 By-Laws and Articles preceding it, the March 2002 By-Laws and Articles contain no amendment procedures.

The March 2002 Land Users Code, like the April 1994 and June 1994 Land Users Codes, contains a mandatory member signature requirement for all amendments; however, the March 2002 Code contains only Michael E. Reynolds' signature as the "Director/Initiator" and no certification that the requisite member approvals were obtained.

Defendants re-recorded Articles, By-Laws, property description, and Land User's Code (labeled "August 2003 Edition") on **August 25, 2003**.<sup>69</sup> These August 2003 community documents

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<sup>67</sup> See *supra* note 24.

<sup>68</sup> *Id.* (emphasis added).

<sup>69</sup> *Id.*

include no notice of amendments to the April 1994, June 1994 or March 2002 community documents. The August 2003 Articles and By-Laws contain no amendment procedures. The August 2003 Land User's Code, like the April 1994, June 1994 and March 2002 Land Users Codes, includes a mandatory member signature requirement for all amendments;<sup>70</sup> however, the August 2003 Code contains only Michael E. Reynolds' signature as the "Director/Initiator."

Defendants filed an amendment to the Land User's Code on **August 23, 2005** ("2005 Addendum").<sup>71</sup> The 2005 Addendum purports to amend the Land User's Code filed on August 25, 2003, and states that "[t]hese amendments are mandatory to all Greater World members whose deed is dated beyond 3/30/05 and optional for all members whose deed is dated before 3/30/05."<sup>72</sup> The 2005 Addendum changes existing lot restrictions related to fences, outdoor screening, pets, and "absentee landlords."<sup>73</sup> There are no recitations in the 2005 Addendum concerning notice to members or their consent to the amendment. The document contains only Michael E. Reynolds' signature as the "Director/Initiator."<sup>74</sup>

On **March 12, 2010**, Defendants re-recorded Articles, By-Laws, a property description, and a Land User's Code (labeled "August 2003 Edition", but including the text of the 2005 Amendment).<sup>75</sup>

In the same 2010 community document filing, Defendants also recorded a second amendment

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<sup>70</sup> The March 2002 Edition and the August 2003 Edition of the Land User's Code provide:

Members, upon signing their membership acceptance form, document that they agree to and accept these restrictions and definitions as presented in the Articles of Association, By-laws and Land User's Code. All documents will evolve as per the conditions we encounter in the first five to ten years. Members will be required to validate their agreement to the various document up-dates by signing addendum's [sic] as they are issued. Refusal to sign a document update can result in that member not being allowed to vote on community issues.

<sup>71</sup> See *supra* note 24.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

to the Land User's Code titled "Addendum to the Greater World Documents" ("2010 Addendum"). The 2010 Addendum includes sections titled "Clarification of Covenants/Land User's Code", "Clarification of Covenants/By-Laws" and "Remedy for Breach of Covenants" ("2010 Addendum").<sup>76</sup> Like the 2005 Addendum, the 2010 Addendum includes no recitation of amendment procedures nor any indication that homeowners were notified or their consent obtained in advance of its recording. The 2010 Addendum contains no signatures other than Michael E. Reynolds as the "Director/Initiator."<sup>77</sup>

Finally, on **June 17, 2015**, Defendants filed a Notice of Homeowner's Association, pursuant to § 47-16-4 of the Homeowner Association Act.<sup>78</sup>

In total, Defendants recorded five sets of Articles, By-Laws, and Land Users Codes, and two Addendums, since the inception of the HOA.

### **C. The Homeowners Association.**

Article IV, Section C of the April 1994 Articles provide that the HOA is to "[h]ave and to exercise all powers, rights and privileges which an association organized under the unincorporated association law of the State of New Mexico by law may now or hereafter have or exercise, except as otherwise provided herein."<sup>79</sup>

The powers assigned to the HOA board of directors in the April 1994 By-Laws include the power to:

- a. Adopt and publish rules and regulations governing the use of the lodging sites in all aspects inclusive of regulation of design and construction of buildings, and inclusive

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

- of dimension, materials, design, systems, provisions of water, sewage and trash disposal, and of the entire tract of real property, parking, access and tree removal and the personal conduct of the members and their guests on roadways and easements;
- b. Fix, levy, collect and enforce payment of the assessments of the members for payment of funds relative to insurance and property taxes...;
  - c. Remove a member;
  - d. Procure and maintain adequate liability and hazard insurance on property owned by the Association;
  - e. Cause the members solid waste to be collected;
  - f. Cause the roadways and easements to be maintained;
  - g. Cause all bills of the Association to be paid from assessment funds; and
  - h. Issue Membership Certificates.<sup>80</sup>

All five sets of recorded By-Laws assign one (1) membership per lot and one (1) vote per membership on Association matters. Each defines quorum as the presence, in person or by proxy, of members holding two-thirds ( $2/3^{\text{rds}}$ ) of the votes in the HOA.<sup>81</sup> However, the only member consent thresholds listed the five sets of By-Laws concern removal of a co-director and compensation of a co-director.<sup>82</sup>

The 2010 “Addendum to the Greater World Documents,” under “Clarification of Covenants/By-Laws” states: “All members will be required to pay annual dues. This means that each member will be required to contribute to the maintenance of Earthship Way and their own street if applicable as well as taxes and insurance on the common land...”<sup>83</sup>

The March 2002 Land User's Code and subsequent editions include the following “clarification” of the role of the HOA:

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<sup>80</sup> *Id.* (emphasis added).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (emphasis added).

#### CLARIFICATION OF G.W. OBLIGATIONS

...Greater World is therefore neither a maintenance agency nor a care taker of the land or people. The people through a Board of Directors care for the land and facilities. Greater World is simply an association formed so that many people can use the land in an organized fashion to pursue a more mentally, physically, spiritually and ecologically healthy way of life on this planet Earth under the direction of the Greater World Land Users Code...This project is simply a trial run for things to come. It is not a typical subdivision. It is a demonstration project and potential members should consider this before they purchase a home or lot in this community.<sup>84</sup>

#### IV. NEW MEXICO LAW

Unincorporated subdivision associations in New Mexico are subject to the provisions of the Unincorporated Associations statute [Chapter 53, Article 10 NMSA 1978] (“UA Act”) and the Homeowner Association Act [Chapter 47, Article 16 NMSA 1978] (“HOA Act”).

##### A. Unincorporated Associations.

The UA Act provides:

Whenever two or more persons shall desire to form an association for the promotion of their mutual pleasure or recreation...or an association not for the individual profit of the members thereof, and without incorporating the same as a corporation, or maintaining title of its property in trust...[t]he said persons or members desiring to form such an association...may file in the office of the county clerk...a statement containing the name of such association, its objects and purposes, the names and residences of the persons forming such association, together with a copy of its articles of association and any rules and/or regulations governing the transactions of its objects and purposes and prescribing the terms by which its members may maintain or cease their membership therein.<sup>85</sup>

The filing of a statement, including articles of association, rules and regulations, and member names and residences is mandatory, not permissive.<sup>86</sup> An association formed under the UA Act “may exist for

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<sup>84</sup> *Id.*

<sup>85</sup> § 53-10-1 NMSA 1978.

<sup>86</sup> See *Blue Canyon Well Ass'n v. Jevne*, 410 P.3d 251 (N.M. App., 2017).



such period of time not exceeding twenty years.”<sup>87</sup> Legally-existing unincorporated associations may hold, acquire, mortgage or sell real property in the name of such association.<sup>88</sup> An association recognized under the UA Act may also: (i) sue or be sued in the name of the association, “with any money judgment collection against the association limited to its joint or common property;”<sup>89</sup> and (ii) adopt rules and regulations “as the majority of its members from time to time may determine,”<sup>90</sup> including dues amounts, dues payment schedules, and rules concerning default in payment of dues or violations of any rules and regulations.<sup>91</sup> Validly-adopted rules and regulations of an unincorporated association under the UA Act are treated as “a contract between the member affected thereby and the balance of the members composing such association.”<sup>92</sup>

Unless recognized by statute, however, unincorporated associations “have no legal existence and ordinarily are legally incapable in their associate name of taking and holding either real or personal property,” nor do they possess the legal capacity to sue or to obtain judgment.<sup>93</sup>

## **B. Homeowner Association Act.**

The HOA Act governs the operation of homeowners associations (“HOAs”) in the state of New Mexico.<sup>94,95</sup> Under the HOA Act, an association must be “organized in accordance with the laws of the

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<sup>87</sup> § 53-10-7 NMSA 1978.

<sup>88</sup> See § 53-10-2 NMSA 1978.

<sup>89</sup> See § 53-10-6 NMSA 1978.

<sup>90</sup> See § 53-10-4 NMSA 1978.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Flanagan v. Benvie*, 1954-NMSC-74. See also, *State ex rel. Overton v. N.M. Tax Comm’n*, 1969-NMSC-140 (finding that a common law unincorporated association formed to advocate for tax equity was not a legal entity); *Blue Canyon Well Ass’n*, *supra* ¶ 19 (holding that an unincorporated association not lawfully formed under the UA Act has no legal capacity to sue or to obtain judgment).

<sup>94</sup> Chapter 47, Article 16 NMSA 1978.

<sup>95</sup> Adopted during the 2013 New Mexico legislative session, the HOA Act contains a number of consumer protection and disclosure provisions that are virtually identical to those found in the Condominium Act [Chapter 47, Articles 7A-7D

state and be identified in a recorded declaration.”<sup>96</sup> The statute defines a homeowners association as “an incorporated or unincorporated entity upon which maintenance and operational responsibilities are imposed and to which authority is granted in the declaration.”<sup>97</sup>

A “declaration” is defined as “an instrument, however denominated,” including subsequent amendments or supplements, that:<sup>98</sup>

- (1) imposes on the association maintenance or operational responsibilities for common areas, easements or portions of rights of way; and
- (2) creates the authority in the association to impose on lots or on the owners or occupants of such lots, or on any other entity, any mandatory payment of money in connection with the provision of maintenance or services for the benefit of some or all of the lots, the owners or occupants of the lots or the common areas.

The HOA Act provides that an association’s membership “shall consist exclusively of all lot owners in the development.”<sup>99</sup> Under the Act, Bylaws are defined as “the code of rules adopted for the regulation or management of the affairs of the association, irrespective of the name by which such rules are designated” and its articles of incorporation are defined as “the articles of incorporation, and all amendments thereto, of an association on record in the office of the county clerk in the county or counties in which the association is located.”<sup>100</sup> In order to transition control of an Association, the HOA Act requires the developer, after giving written notice to the association, to record an instrument voluntarily terminating all rights to declarant control. No such instrument has been recorded.

The HOA Act imposes a number of statutory duties on an HOA’s board of directors, including:

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NMSA 1978], a statute prepared by the National Conference of Commissioners on Uniform State Laws and adopted in modified by the New Mexico Legislature in 1982. *See* W. Breetz, Jr., “Dealing with the Condo Concept, An Outline: Uniform Condominium Act,” National Conference of Commissioners on Uniform State Laws, Chicago (no date).

<sup>96</sup> *See* § 47-16-3 NMSA 1978.

<sup>97</sup> *See* § 47-16-2(M) NMSA 1978.

<sup>98</sup> *See* § 47-16-2(I) NMSA 1978.

<sup>99</sup> *See* § 47-16-3 NMSA 1978.

<sup>100</sup> *See* § 47-16-2(A) and (D) NMSA 1978.

- (a) to exercise any powers conferred to the HOA in the community documents;<sup>101</sup>
- (b) to file a “Notice of Homeowner Association” in the real property records containing: the name and address of the HOA; the name and address of any management company responsible for preparing a disclosure documents on behalf of the HOA; and the recording data for the subdivision plat and the declaration governing the lots within the development (“Notice of HOA”). Failure to record a Notice of HOA suspends the right of an HOA to charge assessments, levy fines for late payment of an assessment and enforce liens for nonpayment of assessments;<sup>102</sup>
- (c) to make available all “financial and other records” of the association for examination by a lot owner within ten (10) business days of the owner’s request. The association cannot charge a fee for making the records available for review, but may charge a “reasonable fee” for copies.<sup>103</sup> Under this section, “financial and other records” is a defined term which includes the following documents:
- the declaration of the association;
  - the name, address, and telephone number of the association’s designated agent;
  - the bylaws of the association;
  - the names of all association members;
  - minutes of all meetings of lot owners and the board for the previous five (5) years other than executive sessions, and records of actions taken by a committee in place of the board or on behalf of the association for the previous five (5) years;
  - the association operating budget for the current fiscal year;
  - a list of current assessments (regular and special);
  - financial statements and accounts (including amounts held in reserve);
  - the most recent financial audit or review, if any;
  - all current contracts entered into by the association; and
  - the current insurance policies, including company name, policy limits, deductibles, additional insureds, expiration dates for property, general liability and association director and officer professional liability and fidelity policies;<sup>104</sup>

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<sup>101</sup> See § 47-16-6 NMSA 1978.

<sup>102</sup> See § 47-16-4 NMSA 1978.

<sup>103</sup> See §47-16-5 NMSA 1978.

<sup>104</sup> See § 47-16-5 NMSA 1978.

- (d) to possess a lien on a lot for any assessment levied against that lot or for fines imposed against that lot's owner from the time the assessment or fine becomes due;<sup>105</sup>
- (e) to furnish, upon written request by a lot owner, a recordable statement setting forth the amount of unpaid assessments against the lot owner's lot. The statement shall be furnished within ten business days after receipt of the request and is binding on the association and the board;<sup>106</sup>
- (f) to adopt a budget annually and, within thirty calendar days after said adoption, to provide a summary of the budget to all the lot owners;<sup>107</sup>
- (g) to provide for the election or appointment of a board of directors consisting of at least three members;<sup>108</sup>
- (h) upon a majority vote of all lot owners, to provide for (and to make available to lot owners) a financial audit, review or compilation of the association's records;<sup>109</sup>
- (i) to furnish a disclosure certificate to lot owners offering their lots for sale, including:<sup>110</sup>
  - a statement disclosing the existence and terms of any right of first refusal or other restraint on the free alienability of the lot;
  - a statement setting forth the amount of the monthly common expense assessment and any unpaid common expense or special assessment currently due and payable from the selling lot owner;
  - a statement of any other fees payable by lot owners;
  - a statement of any capital expenditures anticipated by the association and approved by the board for the current fiscal year and the two next succeeding fiscal years;
  - a statement of the amount of any reserves for capital expenditures and of any portions of those reserves designated by the association for any approved projects;

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<sup>105</sup> See § 47-16-6 NMSA 1978.

<sup>106</sup> *Id.*

<sup>107</sup> See § 47-16-7 NMSA 1978.

<sup>108</sup> See § 47-16-8 NMSA 1978.

<sup>109</sup> See § 47-16-10 NMSA 1978.

<sup>110</sup> See § 47-16-11 NMSA 1978.

- the most recent regularly prepared balance sheet and income and expense statement, if any, of the association;
- the current operating budget of the association;
- a statement of any unsatisfied judgments or pending suits against the association and the status of any pending suits material to the association of which the association has actual knowledge;
- a statement describing any insurance coverage provided for the benefit of lot owners and the board of the association;
- a statement of the remaining term of any leasehold estate affecting the association and the provisions governing any extension or renewal thereof;
- the contact person and contact information for the association.

The HOA Act requires the period of declarant control of the association to terminate no later than the earlier of:

- (1) sixty days after conveyance of seventy-five percent of the lots that are part of the development and any additional lots that may be added to the development to lot owners other than a declarant;
- (2) two years after all declarants have ceased to offer lots for sale in the ordinary course of business;
- (3) two years after a development right to add new lots was last exercised; or
- (4) the day that the declarant or the declarant's designee, after giving written notice to the association, records an instrument voluntarily terminating all rights to declarant control.<sup>111</sup>

Defendants received Taos County Board of Commissioners plat approval for the final Subdivision phases, Phase Three and Phase Four, containing 50 lots, on May 17, 2004.<sup>112</sup>

## V. ANALYSIS

### A. **The Duty Owed by a Subdivision Developer.**

A subdivision developer “has a duty to create an association to manage the common property

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<sup>111</sup> § 47-16-8 NMSA 1978 (emphasis added).

<sup>112</sup> See *supra* note 29.

and enforce the servitudes” governing the project.<sup>113</sup> A developer and its nominees serving on a homeowners association board of directors owe “the degree of care and loyalty required of a fiduciary” of the lot owners.”<sup>114</sup>

In the case of a developer whose sales campaign has lasted a reasonable length of time and who continues to maintain control of the HOA by virtue of possessing of a significant number of unsold lots:

...it is fair to say that his status has essentially changed character. Not only have his own interests become more identified with those of the other [lot] owners, but those other [lot] owners develop legitimate expectations of him as the semi-permanent provider of management services. These facts justify imposition of a duty of loyalty upon the [developer]. In other words, the [developer] should have the fiduciary duties generally associated with corporate control.<sup>115</sup>

This duty of undivided loyalty<sup>116</sup> owed by a developer and its nominees toward the association and its members pertains to all aspects of the administration of the HOA, including: maintaining HOA records in the manner required by statute and the community documents; adopting annual operating budgets; collecting assessments; funding reserves for capital repairs and replacements; filing annual tax returns; insuring and maintaining the common areas; negotiating maintenance and repair contracts on behalf of the association; enforcing the servitudes governing the project; transferring the common areas to the HOA; and transitioning control of the HOA to the homeowners.<sup>117,118</sup>

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<sup>113</sup> Restatement (Third) of Property: Servitudes § 6.19, *Developer's Duty to Create an Association and Turn Over Control* (2000).

<sup>114</sup> See § 47-16-7 NMSA 1978.

<sup>115</sup> See Robert G. Natelson, *LAW OF PROPERTY OWNERS ASSOCIATIONS*, § 10.6.3 (1989).

<sup>116</sup> See Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L.REV. 539, 555 (1949).

<sup>117</sup> See *supra* note 30, at § 6.20.

<sup>118</sup> See *Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co., Inc.*, 114 Cal.App.3d 783, 800 (1981) (a developer's failure “to exercise supervision which permits mismanagement or nonmanagement [of the association] is an independent ground for breach of fiduciary duty” during the period of developer control of the HOA).

In addition to a (fiduciary) duty of undivided loyalty, a subdivision developer owes the following duties to the association and its members during the period of developer control:

- (1) to use reasonable care and prudence in managing and maintaining the common property;
- (2) to establish a sound financial basis for the association by imposing and collecting assessments and establishing reserves for the maintenance and replacement of common property;
- (3) to disclose the amount by which the developer is providing or subsidizing services that the association is or will be obligated to provide;
- (4) to maintain records and to account for the financial affairs of the association from its inception;
- (5) to comply with and enforce the terms of the governing documents, including design controls, land-use restrictions, and the payment of assessments;
- (6) to disclose all material facts and circumstances affecting the condition of the property that the association is responsible for maintaining; and
- (7) to disclose all material facts and circumstances affecting the financial condition of the association, including the interest of the developer and the developer's affiliates in any contract, lease, or other agreement entered into by the association.<sup>119</sup>

After a period “reasonably necessary to protect the developer’s interest in completing and marketing the project, the developer has a duty to transfer the common property to the association...and to turn over control of the association to members other than the developer.”<sup>120</sup>

Transition of control of an HOA from a developer to the members “is a process—a series of events,” not merely the appointment or election of homeowners to the HOA’s board of directors.<sup>121</sup> Common property that must be transferred as part of the developer transition of control includes all

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<sup>119</sup> Restatement (Third) of Property: Servitudes § 6.20, *Developer's Duty to Create an Association and Turn Over Control* (2000).

<sup>120</sup> See *supra* note 30

<sup>121</sup> See Wayne S. Hyatt & Susan F. French, *COMMUNITY ASSOCIATION LAW*, 622 (2 ed. 2008).

real and personal property intended for the community. The developer must also transfer the following documents and account information to the HOA: all governing documents of the community, as amended; insurance policies; bank accounts; contracts; legal records; financial records; tax returns; maintenance and facilities records; and correspondence and historical records of the Association.<sup>122</sup>

**B. Questions.**

1. Whether the Greater World Land Users Association, an unincorporated New Mexico homeowners association (hereinafter: "Association" or "HOA") board of directors has been duly constituted and has the proper authority to act on behalf of the homeowners.

On April 26, 1994, Defendants filed Articles of Association for the Greater World Land User's Association, By-Laws, a Treatise, a property description, and a Land Users Code (labeled "April 1994 Edition") in the real property records of Taos County. The April 1994 Land Users Code identifies the HOA as "a non-profit unincorporated association" and the documents filed on that date meet the requirements for establishing an unincorporated association under the Unincorporated Association Act.<sup>123</sup>

At all times since 1994, the community documents filed in the real property records of Taos County have identified the HOA by the same name: the Greater World Land User's Association.<sup>124</sup> Each filing subsequent to the establishment of the HOA in April 1994 has therefore functioned as an amendment to the original governing documents for the HOA.

An association formed under the Unincorporated Associations Act "may exist for such period of time not exceeding twenty years."<sup>125</sup> By statute, the Greater World Land User's Association's legal

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<sup>122</sup> Restatement (Third) of Property: Servitudes § 6.19, *Developer's Duty to Create an Association and Turn Over Control* (2000).

<sup>123</sup> See § 53-10-1 NMSA 1978.

<sup>124</sup> See *supra* note 24.

<sup>125</sup> See § 53-10-7 NMSA 1978.



existence terminated in April 2014, twenty years after the original filing requirements were met under the Unincorporated Associations Act. Unless recognized by statute, unincorporated associations “have no legal existence and ordinarily are legally incapable in their associate name of taking and holding either real or personal property,” nor do they possess the legal capacity to sue or to obtain judgment.<sup>126</sup>

At any time during the past quarter century, the Defendants could have incorporated the HOA as a domestic nonprofit association. By failing to do so, the Defendants allowed Greater World Land User's Association's legal existence to lapse. As a result of this lapse, one of the central purposes of the HOA—to hold title to the common property within a Subdivision for the benefit of the owners—is defeated; an HOA with no legal existence cannot take or hold property in its name, nor does its board of directors possess legal authority to act on behalf of the homeowners, including the capacity to sue or to obtain judgment on behalf of the HOA.

Conclusion: the Greater World Land Users Association has not been duly constituted and its board of directors lacks the proper authority to act on behalf of the homeowners.

Recommendation: Defendants should incorporate the Greater World Land Users Association under the Nonprofit Corporation Act, Chapter 53, Article 8 NMSA 1978.

2. Whether the Defendants “stacked a sham board of directors with its own employees, agents, or co-conspirators.”

The five sets of Articles, By-Laws, and Land Users Codes, and two Addendums recorded by Michael Reynolds since the inception of the HOA contain contradictory provisions concerning the time period for mandatory transition of the HOA from developer to owner control.

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<sup>126</sup> *Flanagan v. Benvie*, 1954-NMSC-74. See also, *State ex rel. Overton v. N.M. Tax Comm'n*, 1969-NMSC-140 (finding that a common law unincorporated association formed to advocate for tax equity was not a legal entity); *Blue Canyon Well Ass'n*, *supra* ¶ 19 (holding that an unincorporated association not lawfully formed under the UA Act has no legal capacity to sue or to obtain judgment).

Depending on the document, owner representation on the board of directors must occur: after seven years (April 1994 Articles); after five years (April 1994 By-Laws); or when Michael Reynolds “deems the property...at least 90% developed and after all debts created in the founding of the community are paid” (March 2002 Articles).

Notwithstanding these provisions, Defendant Michael Reynolds admits that he did not appoint any owner Board members until 2005, eleven years after the HOA was first established. At that time, Mr. Reynolds says he “appointed five community members to serve on the first Board of Directors in 2005 and assigned them each a one, two, three, four or five year term. One director’s seat would then be up for community-wide democratic election each year thereafter. By 2010, all Board members besides me had been elected.”<sup>127</sup>

The HOA Act requires a developer, after giving written notice to the association, to record an instrument voluntarily terminating all rights to declarant control. No such instrument was ever recorded.

On September 16, 2015, Defendant Michael Reynolds circulated to the board of directors a document titled “Conduct, Objectives and Directives of the Board of Directors of the Greater World Community/Subdivision” (“Reynolds Notice”).<sup>128</sup> The Reynolds Notice states: “This document will be read at the beginning of each board of directors meeting” and contains the following directives:

The Articles of Association specify that when the development is 90% developed the initiator will appoint a board of directors to carry on the activities of the community. In that the development has not reached this percentage point, the developer has established a “courtesy board of directors” for the purpose of giving the community a voice prior to the time that the community is 90% developed. This courtesy board of directors will function the same as the ultimate board of directors except for the fact

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<sup>127</sup> See *Affidavit of Michael Reynolds*, filed with the court on August 30, 2018.

<sup>128</sup> See **Exhibit 19** to Plaintiffs’ Response to Summary Judgment Motion (November 30, 2016).

that it will be subject to direction of the initiator until such time that the development is 90% developed.<sup>129</sup>

The Reynolds Notice makes clear that Michael Reynolds maintains *de facto* control of the board of directors. However, there is substantial corroborating evidence in support of this conclusion.

On May 21, 2015, in response to an HOA Act financial records request by Plaintiff Jody Rhines, Nicole Leduc who is listed as “Clerk” in the May 6, 2015 Board Meeting Minutes, sent an email to Ms. Rhines notifying her that the Subdivision “does not have a formal HomeOwners Association [sic].”<sup>130</sup> Ms. Leduc also states: “In terms of financial records, the Director, Michael Reynolds has not stepped down, so there is no obligation to show you financial records.”<sup>131</sup>

The May 21, 2015 email also includes correspondence from board member Amy Duke who writes: “I don’t believe we are a formally recognized “Homeowners Association”...I didn’t keep financial records. I reported bills paid and income at the board meetings, but I didn’t keep a spreadsheet on it.”<sup>132</sup>

On June 12, 2015, Ms. Fryer sent Ms. Rhines an email stating that the HOA “only had an official treasurer when I requested it. We have no other officer than M[ichael] R[eynolds], who rarely attends monthly meetings....I am repeatedly stunned at how few standard business practices have been followed by Earthship Biotechure and I think they are winging it, conforming to legal requirements when they are forced to do so.”<sup>133</sup>

In *Beaver Lake Ass'n v. Beaver Lake Corp.*, 264 N.W.2d 871 (Neb.1978), the court held that property owners were entitled to elect the entire board of directors despite a bylaws provision allowing

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<sup>129</sup> *Id.*

<sup>130</sup> See **Exhibit 15** to Plaintiffs’ Response to Summary Judgment Motion (November 30, 2016).

<sup>131</sup> *Id.* (emphasis added).

<sup>132</sup> *Id.* (emphasis added).

<sup>133</sup> See **Exhibit 17** to Plaintiffs’ Response to Summary Judgment Motion (November 30, 2016) (emphasis added).

four of the seven to be appointed by developer. The court reasoned that control by property owners was necessary to permit association to carry out its quasi-municipal functions of operating water and sewage systems, providing security, and caring for common areas.

Conclusion: Based on the record, including Defendants' own statements, the Defendants clearly maintain *de facto* control of the HOA.

Recommendation: Transition full control of the HOA board of directors from the Defendants to the owners. In conjunction with this transition, Defendants must deliver HOA bank account access authorization, HOA bank records and all other financial records, as well as legal records, maintenance records, and historical records of the HOA. Defendants should also fully fund the HOA's reserves for capital repairs and replacements based on the remaining useful life the Common Area improvements to be determined by a qualified engineer.

3. Whether the common lands and roads have been properly turned over to the ownership and control of the HOA.

Nearly a quarter century after establishing the Greater World Land Users Association, the Common Areas remain un-surveyed and are indistinguishable from land intended to be sold as lots within the Subdivision. Title to the Common Areas remains in the name of Defendant Michael Reynolds and the land is currently serving as collateral for a Line of Credit extended to Mr. Reynolds by Centinel Bank.<sup>134</sup>

Conclusion: None of the common lands, including the roadways, within the Subdivision have been properly turned over to the ownership and control of the HOA.

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<sup>134</sup> See **Exhibit 29** introduced by Plaintiffs' counsel during the April 11, 2016 hearing, Centinel Bank Line of Credit Mortgage, Loan No. 9698496, recorded on July 28, 2011, in Book 754, page 143; *see also* Centinel Bank Modification of Mortgage, Loan No. 9698496, recorded on August 9, 2018, in Book 988, page 45.

Recommendation: Survey and transfer title to the Common Areas from Defendant Michael Reynolds to the HOA.

4-5. Whether Defendants breached a duty to the Plaintiffs by directing the board of directors to require homeowners to pay dues, including dues for insurance and property taxes that were the obligation of Developer.

To the extent provided for in the community documents, the HOA Act recognizes the authority of an HOA's board of directors to require homeowners to pay dues for the administration and operation of the Association, including maintenance, property tax and insurance on the common lands owned by the HOA.<sup>135</sup>

In the case of the Greater World Community Subdivision, however, there are no designated common lands—only a reference to 357 acres to be dedicated for common use of the members (“Common Areas”).<sup>136</sup>

On March 12, 2010, Defendants re-recorded Articles, By-Laws, a property description, and a Land User's Code for the Greater World Community Subdivision (labeled “August 2003 Edition”, but including the text of the 2005 Amendment) (“2010 Code”).

The 2010 Code states:

All roads will be provided by the Developer as per Transportation Plan, Tab VI. of subdivision application. These roads will meet Taos County specifications for subdivisions or variances approved by the Transportation Authority and will be maintained by the community after total build out and initial road installation by the Initiator.<sup>137</sup>

To date, none of the four Subdivision phases has achieved total build out, nor has title to any road or other Common Area acreage within the Subdivision been transferred to the Association. Instead, for

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<sup>135</sup> See § 47-16-2(I) NMSA 1978.

<sup>136</sup> See *Affidavit of Michael Reynolds*, filed with the court on August 30, 2018.

<sup>137</sup> See *supra* note 24.

the past twenty-five years, Defendants have retained title to all of the land within the Subdivision not otherwise platted as lots, including the 357 acres of un-surveyed Common Areas. Defendant Michael Reynolds has used this land and—as of August 9, 2018 continues to use this land—as collateral for a personal line of credit from Centinel Bank.<sup>138</sup>

Homeowners should not be required to pay dues for maintenance, insurance and taxes on land owned by the developer and collateralized for the purpose of obtaining personal loans benefitting the developer. In a June 11, 2015 email, board member Gillian Fryer shared this concern “about when and why road expenses were attributed to the HOA.”<sup>139</sup>

Conclusion: The Defendants breached their duties of good faith and loyalty to the Plaintiffs by directing the board of directors to require homeowners to pay dues for maintenance, repairs insurance and property taxes on land and improvements owned by the Defendants.

Recommendation: Refund the portion of homeowners' dues attributable to property tax and insurance paid by the HOA benefitting Defendant's land, as well as dues for maintenance and repairs of roadways and other improvements located on Defendants' land.

## V. CONCLUSION

Defendants have breached multiple duties owed by a long-term developer of a subdivision in control of the HOA to the homeowners, including the duty of good faith (honesty in fact), obedience (compliance with applicable law and the rules of the servitude scheme), diligence (care), and loyalty (fiduciary).<sup>140</sup> To ensure that these duties owed by Defendants are fulfilled, Defendants should be

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<sup>138</sup> See **Exhibit 29** introduced by Plaintiffs' counsel during the April 11, 2016 hearing, Centinel Bank Line of Credit Mortgage, Loan No. 9698496, recorded on July 28, 2011, in Book 754, page 143; *see also* Centinel Bank Modification of Mortgage, Loan No. 9698496, recorded on August 9, 2018, in Book 988, page 45.

<sup>139</sup> See **Exhibit 16** to Plaintiffs' Response to Summary Judgment Motion (November 30, 2016) (emphasis added).

<sup>140</sup> See Robert G. Natelson, *LAW OF PROPERTY OWNERS ASSOCIATIONS*, § 10.7 (1989).

ordered to: (1) incorporate the Greater World Land Users Association under the Nonprofit Corporation Act, Chapter 53, Article 8 NMSA 1978; (2) adopt amended and restated community documents consistent with the provisions of the Nonprofit Corporation Act and the HOA Act; (3) transition full control of the HOA to the owners as described herein; (4) survey and transfer title to the Common Areas, including roadways, from Defendant Michael Reynolds to the HOA; (5) fully fund the HOA's reserves for long-term capital repairs and replacements of Association property as determined by a qualified engineer; (6) refund dues for budget items which were Defendants' financial obligation, including maintenance, insurance and property taxes paid by the HOA for land still owned by Defendant Michael Reynolds; (7) construct the Common Area amenities advertised by the Defendants;<sup>141</sup> and (8) reimburse Plaintiffs' attorney's fees incurred in bringing this cause of action pursuant to § 47-16-14 NMSA 1978.<sup>142</sup>

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<sup>141</sup> See *Knight v. City of Albuquerque*, 110 N.M. 265, 794 P.2d 739 (Ct.App.1990) (developer's retention of right to change use of golf course or other open spaces shown on plat would not be given effect where developer used the golf course as a selling tool; permitting the developer to induce purchases by pointing to present or planned existence of a park or golf course while retaining the power to alter the use would be patently unfair and violative of public policy).

<sup>142</sup> The attorney's fees exemption under § 47-16-15 NMSA 1978 applies to associations created before July 1, 2013. However, the Greater World Land User's Association ceased to exist as a legal unincorporated association in 2014, pursuant to § 53-10-7 NMSA 1978.