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Executive Board  
Somerset Estates Homeowners Association

By email

Dear Sirs and Madams:

The ruling in Boulder District Court case no. 2017 CV 30168 on May 31, 2017 which declared invalid the supposed merger of the original Cottonwood Hills Estates Homeowners Association (“Cottonwood Hills,” renamed in 1990 as Somerset Homeowners Association “SHOA”) and Hillside Estates Homeowners Association (“Hillside Estates”) into one association to be known as Somerset Homeowners Association has thrown into turmoil the governance of the neighborhoods. One of the issues that I have been asked to address is to determine the actual ownership of the several outlots within the boundaries of the Somerset Estates neighborhood. To do that I have reviewed the documents recorded in the official real property records maintained by the Clerk and Recorder as well as other records showing the history of the subdivisions. Most of the spaces called outlots on the plats of Somerset Estates are merely easements and roadways, but Outlots A, C, and D, in particular, are designated for open space or for parks (Outlot A is designated as Boulder County open space, and the other two are designated for private open space).

A more complete explanation appears below, but as a short answer to the question of who owns the outlots, Outlots B and C are owned by Somerset Estates Homeowners Association (“SEHOA”) because those outlots were deeded to Somerset Estates Homeowners Association (in March, 1994). A portion of Outlot D is owned by Somerset Swim & Tennis Club because that property was deeded to it (in August, 1995). Only Outlots B, C, and part of D were deeded out by the developer. The outlots designated to be conveyed to Boulder County are not the subject of this letter (though Outlot H was deeded to it in July 1992). Title to all the other outlots and parts of outlots was never transferred by the developers of Somerset Estates subdivision (Martin T. Hart, Dwight E. Wederquist, and E. Jean Wederquist as to the original Hillside Estates and Longview Associates as to all of Somerset Estates including the original Hillside Estates as successor to what became phase I of Somerset Estates) by deed or otherwise, and that almost certainly means that Longview Associates still owns them. Since Longview Associates was required by the subdivision agreement to transfer ownership of the outlots to the applicable association, it is a fixable problem, but it will not fix itself.

I have been informed that SHOA claims to own the outlots within the Somerset Estates neighborhood. Given the court’s ruling that there never was a merger of the two associations, that

cannot be correct. SHOA's power and authority arises from and depends entirely upon the power granted to it by its developer, Colorado Adera Incorporated, in the declaration of covenants for Cottonwood Hills. The property which SHOA has the legal power and authority to own is limited to the property in the Cottonwood Hills neighborhood described in Article II, Section 1 of the declaration (and to some extent in Article I). Property located in the Somerset Estates neighborhood is not included within the legal description of the property over which SHOA can have control. There is language in Article IV of the Cottonwood Hills declaration that says that the Declarant could convey additional common property to what is now SHOA, but the Declarant for Cottonwood Hills was Colorado Adera Incorporated, not Longview Associates. Longview Associates was a separate partnership that was the developer of Blocks 2-5 of Somerset Estates. Colorado Adera Incorporated never owned any property in Somerset Estates, and did not and could not have conveyed property in Somerset Estates to SHOA. The declaration contains no provision for any other persons or entities to convey additional common property to SHOA, and Longview Associates did not do so in any case. Thus, SHOA cannot legally own property in the Somerset Estates neighborhood.

In general, property in a subdivision may be conveyed in two ways: a deed by the developer, or by a dedication by the developer in the plat of the subdivision. The Boulder District Court has determined that Somerset Estates is a common interest community created under the Colorado Common Interest Ownership Act ("CCIOA"). A declaration of covenants is the defining indicator of the existence of a common interest community under CCIOA. The recording of a declaration is what creates a common interest community (38-33.3-201, C.R.S.). The map or plat of the subdivision is considered to be a part of the declaration (38-33.3-209, C.R.S.). In the case of the Somerset Estates subdivision, the declaration provides that the outlots will not be conveyed to the association, and thus will not become common properties, until they have been actually deeded to the association by Longview Associates and the deed or deeds have been recorded (Art I, Sec. 1[b]). As noted above, Outlots B and C were deeded to SEHOA, and part of Outlot D was deeded to the swim club, but the other outlots were never deeded to anyone.

Another way that outlots, streets, and the like are sometimes conveyed is by dedication in the plat. However, there was no such dedication of the outlots in any of the plats of Somerset Estates. Given the requirement in the declaration that transfer of ownership of the outlots in Somerset Estates could only be accomplished by deed, any attempted dedication in the plat would probably have been ineffective anyway. Nevertheless, because there is some language in the plats which may indicate the developer's intent to transfer ownership of the outlots, and in some cases to a Somerset homeowners association, additional discussion is warranted. There are references here and there among the various plats which an arguer could grasp onto to try to assert some sort of interest by SHOA, but they are weak reeds, and don't hold up to scrutiny. The references in the plats for Somerset Estates regarding the developer's intention to convey outlots are not dedications. There are express dedications of the streets and easements shown on the plats, but not of the outlots. As to the outlots, they are instead referenced only under the heading of "General Notes." A Notes section is not the proper place for dedications to appear in a plat, nor do such references appear to be intended to be dedications. Some of the paragraphs in the Notes which reference the outlots say that they "shall be" dedicated. The verb phrase "shall be" indicates that the conveyance was to happen prospectively in the future, and is thus consistent with the language of the declaration saying

that the outlots will be conveyed only by deeds. Some of the paragraphs referencing the outlots omit any verb phrase. They do not say that the outlots referenced in those paragraphs “shall be” dedicated, but nor do they say that the outlots “are” or “are hereby” dedicated either. There is no verb or verb phrase at all. Most likely, the verb phrase “shall be” was inadvertently omitted from those paragraphs in the nature of typographical errors. That interpretation is consistent with the declaration, with the other paragraphs saying that the transfers of the outlots are to be prospective, and with the fact that the language about the outlots appears under the General Notes sections of the plats rather than in the in the dedication sections.

The subdivision and development agreements for Hillside Estates and Somerset Estates, and amendments thereto, provide in the 1989 amendment that Outlots C and D are to be deeded to SEHOA, and provide in the 1992 amendment that the areas designated as “private open space” on the 1992 plat (Outlots C and D) are to be deeded to a private association or associations of homeowners for parks, open space, and recreational areas “by the homeowners in the [Somerset Estates] Subdivision.” Only the homeowners in the Somerset Estates subdivision are referenced. The subdivision agreement permits amenities, including structures and recreational facilities, to be constructed on the private open space by Longview Associates or by the associations. In that context, “structures and recreational facilities” would include the pool, and the associations referred to would necessarily be SEHOA and the swim club.

The amended plat whereby Hillside Estates (being now Block 1 of Somerset Estates) became part of Somerset Estates was recorded in September, 1989, prior to the recording of the attempted merger of the Cottonwood Hills HOA and Hillside HOA (in June, 1992), and prior to the time the Cottonwood Hills HOA changed its name to SHOA (in May, 1990), and none of the outlots in Block 1 was deeded to SHOA after 1989. Thus, there is no argument that the outlots in Block 1 of Somerset Estates are or could be owned by SHOA. In the plats of Blocks 2, 3, 4, and 5 of Somerset Estates, the only association referenced is “Somerset Homeowner’s Association”. That is not quite the correct name of SHOA, and may have been a generic reference to the association for the Somerset Estates neighborhood rather than a reference to SHOA specifically, or it may have been a reference to a merged association which did not actually exist. Longview Associates was not careful or precise in its language from document to document. In any event, when Outlots B and C were actually deeded by Longview Associates in 1994, they were deeded to SEHOA (at the time an unincorporated association), not to SHOA. The subdivision agreements for Somerset Estates provide that the outlots are to be owned by SEHOA. The replat of Block 4 says, in the General Notes section, that signage, landscape, and drainage easements “are” dedicated to Somerset Homeowners Association, but contains no reference to outlots, and, again, is not an actual dedication. The replat of Block 5 also contains no reference to outlots. No language in any section of any of the plats of Somerset Estates is a dedication of any outlot to SHOA.

Moreover, since the supposed merger of the two associations has been declared to be not valid, the value of any reference to Somerset Homeowners Association outside of the boundaries of the Cottonwood Hills subdivision must be questioned, if not disregarded. If Longview Associates ever intended to put any property in Somerset Estates under the control of Somerset Homeowners Association, it could only have been the merged association that it intended but failed to create, and not the SHOA that is the association for Cottonwood Hills. With no conveyances to SHOA by deed

or by dedication, it is farfetched to argue that SHOA owns any interest in any outlots in the Somerset Estates neighborhood. In the absence of a merger, there is no logical basis for arguing that Longview Associates intended that the outlots in one neighborhood were to be managed by the association for a different neighborhood that Longview Associates had not developed. And as discussed above, in the absence of a merger, the defined scope of authority of SHOA is limited to the property in Cottonwood Hills described in the declaration of Cottonwood Hills, and that does not include any property in Somerset Estates.

Longview Associates left both SHOA and SEHOA with a mess. It didn't follow its own rules (that it created in its declaration) for conveying the outlots in Somerset Estates by deed (except for outlots B, C, and H, and part of outlot D). And it did not dedicate the outlots either. The expressions of the intent of Longview Associates, to the extent its intent can be gleaned from the language of the plats, and subdivision agreements, and its own actions, are not consistent. Most of the outlots were never conveyed by the developer at all. I discovered in my research that SHOA has long been aware of exactly that problem, even while it believed it was the merged association for both neighborhoods. At least as recently as June, 2006, SHOA approved a resolution to engage an attorney to draft the documents necessary to transfer title to the outlots from the developer to the association and to try to get those signed by the then surviving partner of Longview Associates (see the minutes of the 6-28-06 meeting of SHOA). However, no conveyance of the outlots was thereafter made.

There are now no surviving partners of Longview Associates. Nevertheless, the problem we are faced with is fixable by a simple action to quiet title to the outlots in Somerset Estates by declaring that they are in fact owned by SEHOA as was required by the subdivision agreement. Because both partners are deceased, and probably even if they survived, it is unlikely that the action would be opposed. The conveyance of the outlots to the association for Somerset Estates is mandated by the subdivision agreements and plats, and the court can complete the process that the developer failed to finish by entering a decree.

Such a quiet title decree would benefit both SEHOA and SHOA. SHOA has no real interest in the outlots in Somerset Estates, except as a potential lever to encourage a merger. And it has no legal authority to own the outlots in Somerset Estates absent a merger. The key to whether a merger will occur is if the members of both associations think a combined association suits their needs better than two separate associations. The amount of the assessments, and the care of the common properties, and the amounts to be set aside for reserves are the real issues impacting merger, not the ownership of the outlots. If the two associations remain separate, a quiet title decree will align the common properties, and the responsibility for caring for them, between the associations in accordance with the boundaries of the neighborhoods. If SEHOA and SHOA should hereafter merge, the surviving association will assume control of the outlots anyway. The transfer of ownership of the outlots out of Longview Associates is necessary regardless of whether there is a merger of the associations.

#### OTHER ISSUES

There are some side issues which may be raised in arguments concerning ownership of the outlots, which to me are really only red herrings. There seems to be some confusion created by the fact that certain of the outlots in Somerset Estates are noted by the Boulder County Assessor as being owned by SHOA. That should in no way be construed as a legal determination of ownership of the outlots. The Assessor is not empowered to determine who owns real property, it is only concerned with assessing taxes. Even the descriptions of properties utilized by the Assessor are not true legal descriptions. They are only abbreviated versions of the real legal descriptions, and intended only for the Assessor's own internal purposes. Of course, the Assessor tries to make sure that taxes are assessed to the actual owner, but it does not, and cannot legally, determine ownership. As a matter of fact, the Assessor's records show that taxes for outlots in Somerset Estates are actually assessed to the lots in Somerset Estates in spite of the Assessor's notation of Somerset Homeowners Association as the owner. Since the court decision which put the neighborhoods in this mess is not recorded, the Assessor is probably not aware of the decision or that there is not in fact a single merged association for both neighborhoods. The political body which is the County of Boulder (and of which the Assessor is a part) has no power to determine who owns real property either, and it does not purport to do so. The determination of ownership of real property is governed by the common law and state statutes. With minor exceptions, ownership of real property is shown by what is recorded in the public records of title kept by the Clerk and Recorder of each county. Where the ownership of real property is in question, it is the courts which determine ownership by reference to the common law and statutes, not the County. Where the record of title is flawed or incomplete, the Assessor's determination of who should be taxed (or noted as the owner on the tax rolls) may also be flawed or incomplete. To the extent that SHOA claims ownership of the outlots in Somerset Estates on the basis of the notation of ownership by the Boulder County Assessor, such a claim is specious.

It has apparently been suggested that the associations, and SHOA in particular, could sell common properties (outlots) in Somerset Estates as sites for building additional homes. Firstly, SHOA does not own them. Secondly, the subdivision and development agreements for Somerset Estates preclude that. The outlots set aside for private open space pursuant to the plats and subdivision agreements cannot be used for any purpose except those that they were set aside to serve, and expressly cannot be used to construct any additional residences (see, for example, paragraph 9 of the 1992 amendment to the subdivision and development agreement for Somerset Estates). The use of any of the outlots designated as open space is restricted to use as parks and open space and recreational amenities in perpetuity no matter who owns them. Even if the outlots could be sold, the market value of properties subject to such use restrictions and carrying the affirmative obligation to maintain them for the benefit of the homeowners in the subdivision would probably be a negative number. Setting aside open space in any subdivision has long been a requirement of subdivision and development agreements, and thus any common property so designated could never be redeveloped into additional building sites without the agreement of Boulder County to amend the subdivision agreements. That is never going to happen. There are no reasonably foreseeable circumstances in which any association which owns the outlots could sell any of them, and virtually no circumstances where the outlots involved could be used for any purpose other than those designated in the plats and subdivision agreements.

Lastly, it has apparently been suggested that the pool property could be forcibly taken back from the swim club. That is not true. The swim club owns the property on which the pool is located. The property was deeded to it by the developer. The conveyance was apparently provided for in the subdivision agreement, and, even though the deed conveyed only part of Outlot D to the swim club, the County has never opposed the deed to the swim club or argued that it was not in accordance with its regulations. On the contrary, since the conveyance to the swim club is consistent with the 1992 amendment to the subdivision agreement, there is reason to believe that the conveyance to the swim club was approved by the County. It was certainly not "illegal." An "illegal subdivision," as that term is sometimes used, is not actually illegal. What it means is that a property has been divided in a way that it not in compliance with subdivision regulations. In such event, the county may deny requests for issuing future building permits, for example, but it cannot undo the deed or change the legal ownership. In the case of the swim club, the deed to the Somerset Swim & Tennis Club appears to have been accomplished in accordance with the subdivision process, not independently of it. Neither SEHOA nor SHOA can compel the swim club to deed the pool property to either association, nor can either association or Boulder County declare the deed to the swim club to be invalid. Furthermore, even if it were possible for one of the associations to undo the deed to the swim club, the use of Outlot D would still be restricted to parks, open space, and recreational amenities.

Sincerely,

OSGOOD & OSGOOD, LLC

*/s/Scott R. Osgood*