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MEMORANDUM

TO: John Furlong, President – Rustling Oaks Estates Property Owners Association, Inc.
CC: Deborah Hendrix, Director
FROM: Chris Nichols
RE: ~~Review of Plats, Declarations, By-Laws and other relevant documents of the Rustling Oaks Estates Property Owners Association, Inc. and recommendations regarding same.~~
DATE: January 3, 2012

The following memorandum represents my observations and conclusions resulting from my review of the documents and materials provided to me on or about November 18, 2011, from Deborah Hendrix. The scope of this review is specifically limited to those documents and does not include any outside documents or materials. The purpose of this memorandum is to give the members and the Board of Directors of the Rustling Oaks Estates Property Owners Association, Inc. a summary of issues that have, in my opinion, legal significance and should be addressed by the Board of Directors.

HOA/POA Law – General Discussion:

Texas Property Code Section 209.002(7) defines a "property owners' association" as an incorporated or unincorporated association that is designated as the representative of the owners of property in a residential subdivision. The association has a membership primarily consisting of the owners of the property covered by a dedicatory instrument for the residential subdivision, and the association manages or regulates the residential subdivision for the benefit of the property owners in the residential subdivision. *Id.* The terms "property owner association" (POA) and "home owner association" (HOA) are commonly used interchangeably when in truth there is no legal distinction that can be made between them solely by their name. In fact, Texas Property Code Section 204.004(a) states that a "Property Owners' Association" may be referred to as a "homeowners association," "community association," "civic association," "civic club," "association," "committee," or other similar term. *Id.* In most cases, the entity (regardless of its name) simply represents a community association that usually has the following characteristics:

1. It is a not-for-profit business entity formally created with the filing of a Certificate of Formation (or formerly known as Articles of Incorporation) with the Texas Secretary of State;
2. It is governed by a collection of written "covenants" which may include deed restrictions, declarations, by-laws, and/or rules of the association, and
3. It is subject to all applicable resolutions passed by the present or past Board of Directors.

Community associations may take many forms in that they can arise out of a condominium regime, a subdivision consisting of single-family homes, townhomes, or a combination thereof. From a

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legal standpoint, the association's origin determines what body of law applies. For example, associations that arise out of a condominium regime are controlled by either Ch. 81 or Ch. 82 of the Texas Property Code, depending on when the declaration governing the condominium regime was initially filed of record. For the Rustling Oaks Estates Property Owners' Association (hereinafter the "Association,") membership arises from Article Eleven of the Articles of Incorporation which states that "[t]he members of the corporation shall mean the membership of the corporation and shall be composed of such persons owning property in the real estate development known as Rustling Oaks Estates..." The Texas statutes outlined in Chapters 202, 207, 209, and 211 of the Texas Property Code are applicable to the Association, the extent to which is outlined in further detail in the memo below.

The Plats for the Rustling Oaks Estates Subdivision:

Platting and Development History. Kathryn Whatley Loper, Cindy Loper Emmons and Russell Whatley Loper (hereinafter "Developer"), being the then owners of the real property now known as the Rustling Oaks Estates subdivision, filed the Phase I plat of Rustling Oaks Estates for record in Navarro County on or about February 6, 1987. The Developer subsequently filed the Phase II plat in Navarro County on November 1, 1990; the Phase III plat on September 9, 1996; a replat of Phase I Lots 8, 9, 10, and 11 in Block D on February 1, 2000; and finally the Phase IV plat on August 15, 2001. A summary of the filed plats is attached hereto as Exhibit "A."¹ Since Kathryn Whatley Loper, Cindy Loper Emmons and Russell Whatley Loper were the initial developers of the subdivision, they are more commonly referred to as the "Declarant."

On the initial plats identified above, the Developer made various dedications that impact the streets and easements within the various phases of the subdivision. However, there are two (2) specific problems with the Developer's street and easement dedications on the plats:

• **PROBLEM NO. 1 - Divided Responsibility for Streets and Easements.**

The Developer's various street and easement dedications are inconsistent because:

- (1) the streets for Phases I, II and IV are dedicated to the "public" while the streets for Phases II and III are dedicated as "private;"
- (2) the replat of Section (Phase) I, Block D, Lots 8, 9, 10, and 11 to what is assumedly now Block D, Lot 8A designated streets as private (which is inconsistent with the previous dedication of Phase I streets as "public;" and
- (3) there is a specific dedication of easements in Phases I and IV to the "public" while the Phase III easements are dedicated as "private" and there is no specific dedication of easements in Phase II at all.

The inconsistencies identified above create a "divided" subdivision in terms of which streets and easements are public versus which ones are private. Furthermore, there is also a discrepancy within Phase I itself in that some streets are dedicated as "public" (see Block A, Lots 1-25, Block B, Lots 1-25, Block C, Lots 1-11, Block D, Lots 1-7; 12-23; Block E, Lots 1-11) and some are dedicated as private (see Block D, Lots 8-11, replatted as Lot 8A). As a result, the responsibility for the streets and easements is divided between the "public" and private property owners. Further complicating this division of responsibilities is the fact that every Declaration for each phase states that part of the assessment collected by the Association shall be used, at least in part, for the improvement and maintenance of roads.

¹ Exhibit "A" reflects information previously provided by Deborah Hendrix with additional information added.

- **PROBLEM NO. 2 - Entrance gate/road.**

In the context of the streets and roads, there is also a problem with the entrance gate and road for the ingress and egress of all property owners of the Rustling Oaks Estates subdivision. In a letter dated September 5, 1996, Kathryn Loper on behalf of the Developer / Declarant (Rustling Oaks Inc.) stated that the "entrance gate and the entrance road to Phase I will be dedicated by deed for the ingress and egress of all property owners of Rustling Oaks Estates in perpetuity." However, the actual Warranty Deed dated April 9, 1997, does not convey the entrance gate or the road. Accordingly, the entrance gate and the road are still owned by the Rustling Oaks Inc., which is the Developer / Declarant.

- **PROBLEM NO. 3 - Common Areas.**

In the same letter dated September 5, 1996, that promised the conveyance of the entrance gate and road, the Developer / Declarant also promised to "identify, by survey, the common area surrounding the Club House building, swimming pool and tennis court." Based on my review, ownership of the common area facilities was never transferred by deed to the Association. Accordingly, the Developer / Declarant still owns these facilities (unless they have been deeded to the Association by another deed) and the Developer / Declarant is still responsible for the maintenance of these facilities. To the extent there has been any issue with the Developer / Declarant restricting access to these facilities, any such restriction must now comply with Texas Property Code Section 209.006 discussed in further detail later in the memo.

- **PROBLEM NO. 4 – Who is the "public?"**

For every dedication, there must be an acceptance of that dedication. In this case, the Developer dedicated the streets in Phases I, II, and IV, and the easements in Phases I and IV to the "public." However, there is nothing on any of the plats that indicates who or what entity accepted the public dedication. Without an acceptance of the Developer's public dedication by another governing body (be it a city, a county, or even the property owners' association), then what has actually occurred is that the Developer made the dedication to no entity which means no entity is responsible for the dedicated "public" roads or easements. Since the Rustling Oaks Estates subdivision is not located in the city of Streetman, then it is unlikely that Streetman would have ever accepted any public dedication of streets or easements in the subdivision. Since the Rustling Oaks Estates subdivision is located in Navarro County, it is possible that the county could have accepted the Developer's public dedication of the streets and/or easements.² Whether or not the county accepted any public dedication of the streets or easements could be confirmed by reviewing (1) the minutes from the Navarro County P & Z Commission's approval of the various plats, and (2) the minutes from the Navarro County Commissioner's Court's approval of the various plats. The Commissioner's Court's approval of the various filed plats is in the attached Exhibit "A."³ Otherwise, in order for the subdivision's roads to become county roads, the roads must be formally accepted by the County Commissioner's Court, a fact that is already reflected in the "Notes for the File" prepared by Deborah Hendrix and dated May 25, 2011.

► **RECOMMENDATIONS:**

- (1) Confirm which streets are "public" and have been accepted by the County;
- (2) Determine which "private" streets remain in the subdivision and who owns them;

² See March 8, 1999, letter to then Commissioner William Baldwin confirming "that the roads in Phases I and II of Rustling Oaks are Public Roads and, are to be maintained and controlled by Navarro County." This fact should be confirmed by the minutes from the Commissioner's Court meetings whereby the county formally accepted the publication dedication of the roads in Phase I and II.

³ Exhibit "A" reflects information previously provided by Deborah Hendrix with additional information added.

- (3) Determine (a) whether to seek dedication of private streets to the public, and (b) whether the County will accept the public dedication of those streets.
- (4) Seek a conveyance of the entrance gate and road from Rustling Oaks Inc., (Developer / Declarant) to the Association IF the Association wants to be responsible for maintaining the entrance gate and road. Otherwise, Rustling Oaks Inc. is responsible for the maintenance and repair of these facilities.
- (5) Seek a survey and conveyance of the common areas and facilities from Rustling Oaks Inc. (Developer / Declarant) to the Association IF the Association wants to be responsible for maintaining the common areas and facilities. Otherwise, Rustling Oaks Inc. is responsible for the maintenance and repair of these facilities.

The "Declaration" for Phases I thru IV of the Rustling Oaks Estates Subdivision:

There are four (4) separate documents entitled "Declaration of Covenants, Conditions and Restrictions" (hereinafter collectively referred to as "Declarations") that currently exist for each phase of the subdivision. None of the Declarations are completely identical to one another and none of the Declarations resemble what I believe is a more common Declaration for a property owners' association. Based on my experience, a more common Declaration is one that outlines the basic rules and guidelines of the association, and usually includes, but is not necessarily limited to the following:

1. Identification of the various common elements;
2. Maintenance responsibilities for owners and the association for common elements;
3. Easements and common element boundaries;
4. Membership in the association and voting;
5. Association administration, management and record keeping;
6. Meetings;
7. Directors, including number, terms, election and indemnity;
8. Assessments;
9. Insurance; and
10. Use restrictions.

Instead, the Declarations are really nothing more than deed restrictions (also referred to as restrictive covenants) that are applicable to each respective phase of the subdivision. In the case of the Rustling Oak Estates Subdivision, it is the By-Laws that outline the general powers, duties and responsibilities of the subdivision's Association. However, the By-Laws are not filed as a public record in Navarro County, which is addressed further in By-Law review later in this memo.

The ACC. Construction within each phase of the subdivision is regulated by an Architectural Control Committee. However, it is not absolutely clear whether the Developer intended there be one single Architectural Control Committee for the entire subdivision, or whether each phase is to have its own Architectural Control Committee. Indeed, the only indication of any intent by the original Developer that there be one single Architectural Control Committee is the language within Phase I and Phase II's respective "Declaration" that states an Architectural Control Committee shall be composed of owners of lots *in subdivision* duly selected by democratic process by all such lot owners. However when the subdivision expanded to include a Phase III, that phase's Declaration refers to an already established Architectural Control Committee composed of three (3) members appointed by the property owners' association, not by the vague "democratic process" referenced in the Phase I and Phase II Declaration. With the addition of Phase IV to the subdivision, that phase's Declaration further confuses the issue with the language that "there shall be established an Architectural Control Committee compose of three (3) members appointed by Kathryn Whatley Loper." The Phase IV Declaration does not refer to an Architectural Control Committee already in existence, but rather one that is to be formed in the future, and

composed of members appointed by Kathryn Loper, not the property owners' association as required by the Phase III Declaration.

- **PROBLEM NO. 5 – Enforcement of the ACC.**

Like the By-Laws, the ACC "Policy and Course of Principle Actions" are not filed as a public record in Navarro County, and as a result are not currently enforceable.

- ▶ **RECOMMENDATIONS:**

- (1) File the ACC Policy and Course of Principle Actions as they exist in the Navarro County Real Property Records to make them valid; then
- (2) Review the existing ACC Policy and Course of Principle Actions to ensure they suit the current needs and desires of the Association; and
- (3) Make any revisions according to the proper legal process for amending the ACC documents and file a revised "Policy and Course of Principle Actions" in the Navarro County Real Property Records.

- **PROBLEM NO. 6 – Enforcement of the Declarations.**

Notwithstanding the issue of the inconsistencies between each phase's Declarations, any person owning a lot in the subdivision has what is called a "common law" right to initiate legal proceedings against another property owner that is allegedly violating the Declarations. Each phase's Declaration provides that:

"[i]f any person or persons shall violate or attempt to violate any of the restrictions and covenants herein, it shall be lawful for any person or persons owning any lot in said subdivision to prosecute proceedings at law or in equity against the person violating or attempting to violate any such restrictions and covenants, either to prevent him or them from doing so or to correct such violation or to recover damages or other relief from such violations...."

In the context of my earlier conclusion above that the Declarations are really nothing more than deed restrictions, the right of a property owner to enforce the Declarations against another property owner is contractual in nature since deed restrictions are viewed as a contractual obligation between property owners in a subdivision. Furthermore, the power given to any one property owner to enforce the Declarations against another property owner is problematic in that a property owner in one phase could technically enforce the Declarations against a property owner in another phase. Moreover, the greater problem is that the Declarations, as they currently read, require individual property owners to each enforce the Declarations against other property owners *at their own expense*. Failure to enforce the Declarations (or deed restrictions) could render the Declarations unenforceable under certain legal theories such as waiver, abandonment, laches (i.e., sitting on one's legal rights), ratification, one or more changed conditions in the subdivision, or simply because it would be unfair to enforce the Declarations after a long, ongoing period of non-enforcement.

Finally, nothing in the Declarations specifically designate the property owners' association or the Architectural Control Committee as a representative for the property owners of the subdivision for the purpose of enforcing the Declarations. In fact, Article 7, Section 7.1.2 of By-Laws of the property owners' association provides that the Association's Board of Directors shall have the power to

"exercise for the Association all powers, duties and authority vest in or delegated to this Association and not reserved to the membership by other provisions of these By-Laws, the Articles of Incorporation, or the Declaration." (emphasis added)

Arguably, the Declarations reserve the power to enforce the Declarations to the individual property owners, not the Association or the Architectural Control Committee. However, reservation of power is inconsistent with Texas Property Code Section 202.004(b) which states that "A property owners' association or other representative designated by an owner of real property may initiate, defend, or intervene in litigation or an administrative proceeding affecting the enforcement of a restriction covenant or the protection, preservation, or operation of the property covered by the dedicatory instrument." That being said, consider this – in the event you had a property owner in the subdivision that was violating his/her phase's Declaration, you could have the following enforcement scenarios:

- (1) an individual property owner suing another property owner to enforce the Declaration;
- (2) the property owners' association (which notably has no power under the Declarations or By-Laws to levy special assessments for the expenses that would be associated with the enforcement of the Declarations) suing another property owner; or
- (3) a group of property owners that form a separate entity for the specific purpose of enforcing the Declarations against the violating property owner(s).

Also, in the context of enforcement proceedings, the Texas Property Code does provide for a civil penalty that may be recovered in the amount of \$200 per day for a continuing and ongoing violation. However, only a property owners' association can take advantage of the civil penalty provision because the penalty proceeds must go to an organization that would use the proceeds for the benefit the entire subdivision. Individuals or groups of individuals cannot legally be awarded civil penalty damages in an enforcement action.

► **RECOMMENDATIONS:**

- (1) Determine who or what entity is going to enforce the Declarations; then
- (2) Consider combining the Declarations for the four Phases into one master Declaration; then
- (3) Amend the Declarations to (a) properly reflect who or what entity will enforce the new Declaration (in addition to any other amendments that the Association members may deem necessary), and (b) provide for an assessment mechanism that can financially support enforcement actions against property owners.

• **PROBLEM NO. 7 – The End of Developer / Declarant Control**

There is nothing in the Declarations, By-Laws, ACC documents, or any other governing document that actually triggers what is customarily referred to as the end of the "declarant control period." The only language that exists that identifies a time when Developer / Declarant control will cease is in Section 2.X. of the Declarations when the subdivision will be turned over to the Homeowners Association, by "a majority vote of owners of lots in subdivision duly covenanted for that purpose."

► **RECOMMENDATIONS:**

- (1) Determine if there has been a vote of all property owners in the subdivision to terminate Developer / Declarant control and turn the subdivision over to the Homeowners Association; then

- (2) Decide if the Association wants to proceed with assuming control over the subdivision and proceed with a vote if one has not already occurred. You should note that if Rustling Oaks Inc. still owns a majority of lots in the subdivision, then obtaining a majority vote in favor of the Association assuming control over the subdivision could be problematic.

The By-Laws for the Rustling Oaks Estates Property Owners Association, Inc.:

In general, the By-Laws do an adequate job of laying out the basic powers, duties and responsibilities of the Association. However, there are a number of areas where the By-Laws do not comply with the recent changes in the law, which is outlined below:

PROBLEM NO. 8 – Enforcement and Legal Compliance of the By-Laws.

4a. Enforcement Issues:

- i. The Association's By-Laws are not valid and enforceable because they are not currently filed as a public record with Navarro County. See Tex. Prop. Code Sec. 202.006. (Beginning January 1, 2012, all documents governing an association must be filed in the county where the association is located or they will have no legal effect.)

4b. Legal Compliance Issues:

- i. What is the "Neighborhood Directory" and why is the registered office of the Corporation (i.e., the Association) published in this directory? The registered agent for the Corporation (Association) should be updated and on file with the Texas Secretary of State.
- ii. **Article 2, Section 2.10 – "Good Standing"; Section 2.11 – "Voting Majority."** The definition "good standing" and the language "eligible voters" contained in the definition of "voting majority" is problematic because you can no longer exclude an owner from voting for any reason under House Bill 2761 / Senate Bill 472. It is recommended that the definition "voting majority" be amended to remove the language "eligible voters" and be amended to reflect the language "voting interest." Also, the law has changed regarding the required percentage of votes needed to amend a declaration. As of September 1, 2011, you only need 67% of the total voting interest to amend a declaration. Accordingly, Section 2.11 as it relates to amending the Declaration of covenants is unenforceable and should be amended to read "[t]o amend the Declaration of covenants, it shall mean two-thirds (2/3) of the voting interest."
- iii. **Article 3, Section 3.2 – "Special Meeting."** "Special Meetings of the members may be called at any time by the President, by the Board of Directors, or upon written request of the members who are entitled to vote not less than one-tenth (1/10) of all the votes entitled to be cast at said meeting." Does this mean by a majority vote of the entire board? By just one Board member? Also, the language "members who are entitled to vote" is problematic since all owners now have a right to vote according to House Bill 2761 / Senate Bill 472. It is recommended that the language "members who are entitled to vote" be removed and replaced with the language "voting interest."

- iv. **Article 3, Section 3.3 – “Notice of Meeting.”** The language “shall be deemed delivered when deposited in the United States Mail addressed to the member at his address as set out above...” is problematic because Texas Property Code Section 209.0051(e)(2)(B) addressing “Open Board Meetings” now requires notice be sent “by e-mail to each owner who has registered an e-mail address with the association.”
- v. **Article 3, Section 3.4 – “Quorum.”** It is recommended that the language “voting interest” replace the language “members entitled to cast” since all owners now have a right to vote according to House Bill 2761 / Senate Bill 472.
- vi. **Article 4, Section 4.1 – “Number.”** It is recommended that the language “who must be members of the Association in good standing” be eliminated because Texas Property Code Section 209.00592 voids any instrument that restricts a property owner’s right to run for a position on the board of the Association *unless* the person running for or currently serving on the Board has been convicted of a felony or crime involving moral turpitude.
- vii. **Article 6, Section 6.1 – “Regular Meeting.”** Board meetings must now be open to the membership unless the topic qualifies as a subject that falls under the executive session rule. Topics that are subject to an executive session include matters relating to personnel, pending or threatened litigation, contract negotiations, enforcement actions, confidential communications with the Association’s attorney, matters involving the invasion of privacy of individual owners or matters that are to remain confidential by request of the affected parties and agreement of the Board. See Texas Property Code Section 209.0051(c). Also, the Board must meet the new notice requirements, including notice via e-mail to those owners who register an e-mail address with the Association.
- viii. **Article 6, Section 6.2 – “Special Meeting.”** Must meet the new notice requirements, including notice via e-mail to those owners who register an e-mail address.
- ix. **Article 7, Section 7.1, Subsection 7.1.1 – Suspension of Voting Rights and rights to use Recreational Facilities.** A property owner’s voting rights may not be suspended pursuant to Texas Property Code Section 209.0059(a). A property owner’s right to use a common area may be suspended only after complying with Texas Property Code Section 209.006 entitled “Notice Required Before Enforcement Action” which requires written notice to an owner by certified mail, return receipt requested, informing the owner of the basis for the suspension and giving the owner (1) a reasonable period to cure the default and avoid the suspension, (2) an opportunity to request a hearing on or before the 30th day after the date the owner receives the notice; and (3) informing the owner of any special rights to relief under federal law for owners serving on active military duty.
- x. **Article 7, Section 7.2, Subsection 7.2.1 – Association Records.** It is recommended that the language “voting interest” replace the language “members entitled to vote” since all owners now have a right to vote according to House Bill 2761 / Senate Bill 472. See also comment to Article 10 below regarding the Association’s “Books and Records.”

- xi. **Article 7, Section 7.2, Subsection 7.2.3(f) – Liens for Unpaid Assessments.** A notice of lien is a legal document which must now be drafted by an attorney according to Texas Property Code Sec. 209.0094. Also, the Association's ability to foreclose a lien against any owner's property has been modified as follows:
- a. Texas Property Code Section 209.0092 – an association may not foreclose an association's assessment lien unless the association first obtains a court order pursuant to an application for expedited foreclosure under the rules adopted by the Texas Supreme Court.
 - b. Texas Property Code Section 209.0093 – the property owners may revoke the right of the Association to foreclose by a 67% vote of the voting interest. It takes only 10% of the voting interest to call for a vote on the revocation of foreclosure power.
- xii. **Article 10 – Books and Records.** Texas Property Code Section 209.005(m) requires that Associations consisting of over 14 lots must adopt and file of public record a "Document Retention Policy" for the Association. In that same vein, the Association must also adopt a Record Production Policy and establish a schedule of costs associated with obtaining records from the Association. Until such time that a schedule of costs is adopted, the Association may not charge to produce records.
- xiii. **Article 13 – Amendments.** It is recommended that the language "voting interest" replace the language "members in good standing" since all owners now have a right to vote according to House Bill 2761 / Senate Bill 472. Also, Texas Property Code Section 209.0041 specifically prohibits adopting or amending a by-law that conflicts with the declaration.
- xiv. **Payment Plan Policy.** Under the new laws, Associations must advise owners of the availability of payment plans for paying delinquent assessments and must approve and file as a matter of public record a uniform Payment Plan Policy which must apply owner's payments in a particular manner. Associations must apply payments toward delinquent assessments in the following order:
- a. Delinquent assessments;
 - b. Current assessments;
 - c. Attorney's fees and expenses for which the Association has a lien;
 - d. Attorney's fee and expenses for which the Association has no lien;
 - e. Fines; and
 - f. Other amounts owed to the Association (late fee, interest, collection fees).

4c. **Miscellaneous Issues:**

- i. **Article 2, Section 2.3 - "Common Area."** What property, which is defined as "all real property owned by the Association" is *actually owned* by the Association? For example, on the Phase III plat, the POA never signed the plat claiming the land therein designated as "the green belt and park area of Rustling

Oaks Sec. 1." The only other "common area" that can be traced back to a formal dedication or conveyance is the common area made the subject of the Warranty Deed dated April 9, 1997, that conveyed the "Greenbelt and Park areas of Rustling Oaks Estates Phase 1 and 2" which the Association's Board of Directors shall maintain according to Article 7, Section 7.2, subsection 7.2.8.

- ii. **Article 2, Section 2.9 – "Member."** The term "member" is currently defined as "those persons entitled to membership as provided in the Declaration." However, none of the Declarations for any phase in the subdivision define membership or state whether membership in the Association is voluntary or mandatory. The definition of a member in the By-Laws as a person "entitled" to membership could suggest that membership is voluntary. This would conflict with the Articles of Incorporation which indicates membership is mandatory, in which case the Article of Incorporation control according to Article 13, Section 13.2.

► **RECOMMENDATIONS:**

- (1) File the existing By-Laws in the Navarro County Real Property Records to ensure that they are enforceable as written; then
- (2) Perform a survey of the By-Laws to make recommendations for revisions to the By-Laws; then, which should include the adopting of all policies (i.e., Document Retention, Record Production, Payment Plan Policies) now required under the law; then
- (3) Hold the required meeting and vote to approve the proposed amendments to the By-Laws and policies; and
- (4) File the newly amended and adopted By-Laws in the Navarro County Real Property Records to ensure that they are enforceable.

Conclusion:

This concludes my review and recommendations for the documents and materials associated with the Rustling Oak Estates Property Owners Association, Inc. Once you and your organization have had an opportunity to review the information I have provided, please do not hesitate to contact me with any questions or concerns.