

Southern Highlands Community Association
Board of Directors
11411 Southern Highlands Pkwy., Suite 100
Las Vegas, NV 89141

September 18, 2017

Subject: Master Acknowledgment Regarding Public Access in Southern Highlands Parks (Parks Access document)

Dear SHCA Board:

As a home owner in the Southern Highland Community Association (SHCA), it has come to my attention a document titled Master Acknowledgment Regarding Public Access in Southern Highlands Parks (Parks Access document) constructed by the declarant and coordinated through the County, is on the September 21, 2017 agenda for approval by the Board of Directors. **SHCA has no present obligation to execute the Public Access document and should act to reject approval to execute the document for the following reasons:**

1. The deeded transfer of the park properties identified in the Park Access document to SHCA is not enforceable and void. Additionally, the title transfers fail to comport Southern Highlands Development Corporations' (Developer) required conditions for said transfers to SHCA as set forth in the Southern Highlands Development Agreement (SHDA) and SHCA CC&Rs. They were completed without Board resolution, making original title actions voidable.

- A. Recorded Quitclaim Deeds on the park properties, purport to convey an ownership interest and establish collectively performance obligation of the Association, set out in the singular and collective deeds. The deeds create a performance obligation by the Association, thus per NRS 116.087, create a security interest¹. Statute provides the SCHA Board may "...acquire, hold, encumber, and convey...any right, title, or interest to real estate...but: (1) subjected to a security interest only pursuant to NRS 116.3112"². NRS 116.3112 requires "at least a majority of the votes in the association...must agree...". As no SHCA owner vote was accomplished, the parks transfer, "...is not enforceable against the association..."³ and the deed, purporting a conveyance of a security interest, not pursuant to NRS 116.3112 par 5 "is void"⁴.

¹ NRS 116.087- "'Security interest" defined. "Security interest" means an interest in real estate or personal property, created by contract or conveyance, which secures payment or performance of an obligation."

² See (NRS 116.3102 (h))

³ Per NRS 116.3112 par 4.- "The association, on behalf of the units' owners, may contract to convey an interest in a common-interest community pursuant to subsection 1, but the contract is not enforceable against the association until approved pursuant to subsections 1, 2 and 3. Thereafter, the association has all powers necessary and appropriate to effect the conveyance or encumbrance, including the power to execute deeds or other instruments."

⁴NRS 116.3112 par 5 - "Unless made pursuant to this section, any purported conveyance, encumbrance, judicial sale or other voluntary transfer of common elements or of any other part of a cooperative is void." (emphasis added).

- B. Park acceptance, park property conveyances and deed transfers to SHCA were not accomplished in accordance with the conditions established in the SHDA and similar conditions set out in the SHCA CC&Rs⁵.
 - C. No easements related to SHDA conditions are recorded against the properties nor have any actions been taken by SHCA that would otherwise obligate the Association under terms of the SHDA.
 - D. Title transfer acceptance of the Identified park properties, performed by Rick Rexuis, SHCA Board President and an employee of the Developer, was done so without a resolution by the SCHABOD nor were his actions later affirmed by same making his actions voidable.
2. Execution of the Park Access document would effectively establish a Board resolution acknowledging acceptance of conveyed park property to the Association which, as provided in #1D, has not been previously established. Any such action, as set out in 1A, would be unenforceable without an owner majority approval vote.
3. The Park Access document establishes a security interest and encumbrance of the park properties. If executed it would not be enforceable and void without an owner majority vote approving the action⁶.

Paragraph C. purports Park Properties were provided "...to the Association for programming and management and thereafter conveyed.... pursuant to (the recorded deeds)". Paragraph 2. of the Parks Access document establishes park properties "... will continue to be operated and programmed in accordance with the provisions of Paragraph 1. (conditions generally set forth in the SHDA and applicable Deeds)". This provision would obligate SHCA to maintain the parks at its sole expenses establishing a security interest (see footnote #2) and establish an encumbrance. As previously noted, NRS 116.3102 while providing SHCA the power to convey a security interest in and encumber common areas, NRS 116.3112 par 4. establishes any such action, as does the Park Access document "...is not enforceable against the association until approved pursuant to (a majority vote of owners)" and per NRS 116.3112 par 5. "is void".

4. Conditions set forth in the Master Acknowledgment Regarding Public Access in Southern Highlands Parks before the Board are seriously flawed. If executed the document would falsely affirm, establish a number of unacceptable conditions, and inappropriately obligate SHCA to park operating maintenance expenses.

- A. Language in Paragraph 2. is flawed and misleading. It purports to be "memorializing the original intent of the Developer and the Association with respect to the conveyance and subsequent management and operation of each Park..."
 - 1) The original conveyance, management, and operations intent of the Developer was to provide all park properties to the County, not SHCA. The Developer sent formal notice dated April 27, 2005 to the County informing the County of its "intent to dedicate" the subject park properties to the County "in accordance with paragraph 6.02(a) of the (SHDA)". Furthermore, the County recognized the Developer's conveyance request and

⁵ Established in section 6.02(b) of the original SHDA, unaltered by subsequent amendments. The section provides for transfer of an "HOA Park" by the Developer only pursuant to "...Homeowner's Association acknowledges in writing (a) that it is obligated to perform any unfulfilled terms and conditions of this Section 6, and (b) that it accepts Owner's maintenance obligation for such park or paseo." No such written acknowledgment was executed.

⁶ **An owner majority vote approving the original transfer action to SHCA by the BOD would also be required.**

began budget efforts for the maintenance of the parks⁷. The County anticipated funding to operate the parks upon final conveyance acceptance, pending inspections and among other things, park compliance with County standards, the SHDA, and RCT conditions. Park conveyance to the County was never completed⁸.

2) There is no evidence SHCA has ever properly resolve or otherwise establish an original intent as purported.

B. Paragraph A of the Park Access document states that the Developer "improved (the parks) pursuant to the requirements set forth in the Development Agreement ...(as amended, the "Development Agreement"), and further, the County approved the Park Properties as constructed and designed". The claim parks are compliant with the SHDA is being raised without documentation to prove the claim⁹ while documentation of County approval "as constructed and designed" cannot be provided for confirmation¹⁰.

⁷ Evident by a series of emails, obtained via FOIA, I can provide upon request.

⁸ Following discussions and at least one "informal" meeting between the Developer and County, the County would stop its budget efforts in the fall of 2005. Shortly after the County would approve proposed changes to the SHDA related to park conveyance and standards while granting a significantly expansion to the Developer's total project scope, among other items. The Developer would transfer the parks to the HOA following Amendment 2 with now potentially revised compliance standards, therein providing the County an ability to avoid funding park maintenance.

⁹ Section 6.01 of the original SHDA provided "Owner shall design, construct, maintain and dedicate to County (or on HOA parks provide a public access easement) public neighborhood parks and a paseo in compliance with the Master Parks and Public Facilities Plan attached as Exhibit "I"". Note, the **SHDA required County approval of park designs and the Master Plan controlling before and after construction completion**, defined neighborhood parks as greater than 5 acers. Neighborhood park would include Goett, Stonewater, Inzalaco, and Somerset Hill Parks. The SHDA would be amended (A2) in November 2005. All park properties associated with the Park Access document were completed prior to A2 with the aforementioned void title transfer actions to SHCA taken after A2, in and around 2008. First, A2 would delete section 6.01 of the original SHDA, inserting Section 6.01(b) Park Standards, wherein all parks of the Parks Access document (this is identified in amended language "Of Parks not yet constructed and to be dedicated...") would inexplicably, attempt to preclude parks already completed from previously established standards and County's previously approved final design. A2 would establish a revised Section 6.01 Park Standards and Location providing "owner shall design and construct public neighborhood parks and a paseo in compliance with the Master Parks and Public Plan attached as Exhibit "I-2" (not "I" as provided prior to A2).

Confirmation of construction compliance as referenced in paragraph A, necessitates an examination of the approved park designs, approved cost overruns, and post construction inspections for the park properties, all required under the original SHDA and the Park Master Plan in Exhibit "I" and "I-2". However, the County responded to my FOIA, submittal to inspection said documents, inexplicably informing me the above requested and **required documents have not been located** (per ADA Miller letter dated June 2 19,2017, subject Southern Highlands Development Agreement).

¹⁰ Similarly, to footnote #9, FOIA requests for County document wherein showing parks were approved as "constructed and designed" but as noted in FN #10 cannot be found. Documentation reflecting Clark County Commission actions, recognizing the park properties were "completed", are available. However, "approval" and/or affirmation parks completed were in compliance with all SHDA conditions requires examination of documents not available.

Additionally, it should be noted, the SHDA as amended with A2, provided for the Developer (no longer the County) to "...create and establish uniform design guidelines for all (Parks)" then merely "deliver to County" the design guidelines even "when amended", with no reference to County approval. A2 was effective after all park properties were completed. A2 purports to delete any County design approval requirement. See footnote #10 for additional context around the above A2 approval.

- C. I dispute claims in the Master Acknowledgment Regarding Public Access in Southern Highlands Parks purporting to establish the "original intent" of both parties related to park public access. Paragraph 2. and Paragraph E. provides "...original intent of the Developer and the Association... included and has always included, a non-exclusive public access easement ...". Paragraph E., further states a "...desire to re-acknowledge the original intent of the Developer and the Association regarding public access".
- 1) The Developer has never properly recorded a public access easement on the park properties, despite SHDA requirements, this despite the County's release, of RCT credits issued under the SHDA and IAW NRS, subject to said easement recording.¹¹
 - 2) Despite having been made aware of a 2011 audit by the County identifying a lack of any properly recorded public access easements required under the SHDA, none were recorded
 - 3) Despite the Developer's material representing in 2015, in executing A3 to the SHDA, the "Owner has recorded approved Public Access Easement(s) ...". None were ever properly recorded.¹²
 - 4) No action of any kind, affirming the Association's "original intent" has ever been properly executed by SHCA. The Association thus cannot "re-acknowledge".
- D. It is unclear what the language in the Park Access document providing "valuable consideration, the receipt and sufficiency of what are mutually acknowledge..." means. Documentation of said consideration is not provided.
- E. I consider a number of provisions and guarantees, contained in every park property Quitclaim Deed¹³ unacceptable. They include but are not limited to:
- 1) "...the quality of planting and equipment would be maintained at an acceptable level, in Declarant's sole discretion...",
 - 2) "...maintain the grounds, landscaping, annual flowers, hardscape, play apparatus, and other organic and inorganic material and features within the park at the same or superior level...an acceptable level, in the Declarant's sole discretion",

This section of the Park Access document may be referencing A3 to the SHDA was inexplicably approved in 2015. A3 to the SHDA would once again delete section 6.01, this time replaced with an affirmation (lacking any supporting documentation) that all park properties identified in the document were completed "... in compliance with Master Park and Public Facilities Plan ... (which was updated in the Third Amendment to this Development Agreement)." No approval or other documentation supporting the affirmation parks were compliant with the Master Plan at completion or alternatively demonstrating compliance post-construction, with the Master Plan current at completion and/or in 2015, has not been made available. See 1C.3) for at least one confirmed false affirmation contained in A3.

¹¹ See NRS 278.4983 Residential Construction tax. RCT must be imposed pursuant to this section. The section requires compliance with the County ordinance enacted adopting a recreation park master plan.

¹² This was confirmed by ADA Warhola in a letter dated October 13, 2016. An easement was approved by the Clark County Commission for Stonewater. It was located by this author having been recorded in error against the wrong parcel number. It should be additionally noted, Stonewater (parcel # 191-06-615-001) was designated in the Association CC&Rs as a common area with formal title transfer occurring in 2003 as a common area. SHCA approval was not required.

¹³ Some minor wording changes at present among the park Quitclaim deeds recorded while the restrictions and conditions are effectively the same.

- 3) "...the name will not be changed..."
- 4) Upon violations of the above guarantees and other terms the "Declarant shall have the right and authority but not the obligation, at the sole cost and expense of the Association to obtain a permanent injunction...",
- 5) "...Declarant shall have the right and authority but not the obligation, at the sole cost and expense of the Association, to replace, repair, or maintain the feature or material.".
- 6) "...may not convey said land to any other entity, included but not limited to the Clark County Park and Recreation Department without the express written consent of Declarant."
- 7) "If any of the foregoing guarantees are violated, ownership of the parcel shall immediately revert back to the Declarant."

The above noted deed conditions continue beyond declarant control and the term of the SHDA. They more rightly describe a lease than a conveyance of real property and its associated rights bundle. **They obligate the Association to onerous conditions.** If properly accepted, they would permanently restrict and subordinate the authority of SHCA- terms and condition the Board, as a fiduciary of the owners and in exercising good Business Judgement, find are not in the best interest of the association.

Agreements and actions described above along with years of continuing omissions by the SHCA Board has resulted in SCHA inappropriately funding maintenance of park properties, costing owners in the community an estimated ten million dollars (\$10M); an obligation otherwise resting with the Developer.

Last year a document similar to the Park Access document constructed by the Developer and coordinated with the County. It too intended to obtain SHCA execution of an agreement related to the park properties. It was by myself and others, eventually rejected by the Board. The disposition and maintenance of the park properties is and should remain a contract condition between the Developer and County.


In summary, the SHCA Board has no present obligation to execute the Public Access document. SCHA's acceptance of the park properties identified in the Park Access document are void. The document, if executed, lacking a majority owner vote in approval, would not be enforceable and void. In addition, numerous conditions set out in the Public Access document are seriously flawed, suspect and (as yet) unsubstantiated. The Public Access document contains conditions the Board, as a fiduciary of the owners, should find unacceptable.

A deferral of action can be accomplished without additional expense. Acting to approve, without addressing issues identified here, will result in significant and permanent additional and unnecessary cost to the community.

The above should provide you great pause. I strongly recommend you obtain an independent legal review of the document and consider the issues raised in this letter. Finding merit singularly or collectively in any issue noted above, demands you reject the Public Access document. Being unsure as to the facts, circumstances, and ramifications of the issues noted, demands you withhold any vote on the document and oppose an affirmative action by any Director to execute the Parks Access document.

If the Public Access document is executed, I and other owners will pursue all legal remedies available us.

Respectfully,



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Cc:

Office of the District Attorney

- Steven B Wolfson, District Attorney

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