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A Professional Corporation

KELLY G. BLACK
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♦Certified Specialist
Injury and Wrongful Death Litigation

MICHAEL R. PRUITT
SCOTT L. POTTER
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JAMES L. TANNER
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BRADLEY D. WEECH
DAVID L. WEED
RICHARD A. WHITE
JEFFREY G. WILLIAMS

*Also Licensed in Texas
†Also Licensed in Utah

April 10, 2008

VIA FACSIMILE AND U.S. MAIL

Melanie McKeddie
Cheifetz Iannitelli Marcolini PC
1850 N. Central Ave. 19th Floor
Phoenix, AZ 85004

RECEIVED

APR 11 2008

**CHEIFETZ IANNITELLI
MARCOLINI, P.C.**

Re: Proposed Bylaw Amendments

Dear Ms. McKeddie:

This letter is Apache Wells Homeowners Association, Inc.'s ("Association") official response to the Bylaw amendments proposed by the Save Apache Wells group ("SAW"). Specifically, it is my understanding that SAW proposes amending a number of provisions in the Bylaws, including:

- **Article V, Section 4, Paragraph E**
- **Article V, Section 5, Paragraph A(4)**
- **Article V, Section 5, Paragraph A(5)**
- **Article V, Section 5, Paragraph B(2)**
- **Article X, Section 2, Paragraph C, General Assessment (1)**
- **Article X, Section 2, Paragraph C, General Assessment (3)**
- **Article X, Section 2, Paragraph D Special Assessment (1)**
- **Article X, Section 3, Reserve Funds**
- **Article XIII, Section 1, Amendment Proposals (C)**

As you know, pursuant to Article XIII, Amendments, members of the association may submit proposed amendments to the Bylaws to the Board for consideration. Under this provision, the proposed amendments must meet three preliminary form requirements in order to be considered by the Board as to whether or not to submit the proposed Bylaws to the general membership for adoption. The proposed amendments which were submitted by SAW appear to conform to the preliminary form requirements of Article XIII, Section 1, Paragraphs (A) and (B)

480.464.1111
Toll Free 800.243.1160
Fax 480.464.5692

40 North Center Street, Suite 200 • Mesa, Arizona 85201
Offices in Mesa, Payson, Casa Grande & Sun City

E-Mail: firm@jacksonwhitelaw.com
www.jacksonwhitelaw.com
www.arizonaseniorlaw.com

and therefore, have been considered in full by the Board. Nevertheless and notwithstanding compliance in form, proposed amendments may be rejected for submission to the general membership for vote at the Board's discretion.

As you know, unlike the Declaration of Covenant Conditions and Restrictions ("CC&Rs") which governs the contractual relationship between the Association and its Members, the Bylaws govern the corporate mechanics of the Association. Under common law corporate principles, the Board is vested with the power of governing the Association. In addition, under A.R.S. § 10-3801 (B), "All corporate powers shall be exercised by or under the authority of and the affairs of the corporation shall be managed under the direction of its board of directors, subject to any limitation set forth in the articles of incorporation." Further, under Article V, Section 1, Paragraph A of the Bylaws "The business of the Association shall be managed by a Board of Directors."

Each of SAW's proposed Bylaw amendments have been considered by the Board. The process for consideration and submission to the general membership is governed by Article XIII of the Bylaws and A.R.S. § 10-11003, pursuant to A.R.S. § 10-11021. While Article XIII contains the requirements for adoption of a proposed Bylaw, A.R.S. § 10-11003 provides for the Board's discretion in deciding whether or not to submit the proposed amendment to the general membership for vote. Specifically, A.R.S. § 10-11003 (A)(3) states: "The board of directors may condition its submission of the proposed amendment on any basis." With that as the groundwork, the Board makes the following responses to SAW's proposed Bylaw amendments.

SAW's proposed Article V, Section 4, Paragraph E will not be submitted to the general membership for vote. This proposed amendment violates the Bylaws and A.R.S. § 10-3801 by placing discretionary power of the Association's affairs in a group other than the Board. The proposed amendment provides, "Any action of this Committee will have full authority to approve or disapprove any Board of Director decisions." Although A.R.S. § 10-3825 gives a Board power to appoint committees, this does not give the Board power to make itself subservient to any committee, thereby abdicating its duties to the Association and Membership. If this proposed Bylaw were to be adopted, the Committee would be given power to govern the Association higher than that of the Board, contrary to A.R.S. § 10-3801.

SAW's proposed Article V, Section 5, Powers and Duties, Paragraph A(4) and SAW's proposed Article V, Section 5, Powers and Duties, Paragraph A(5) must be read and taken in conjunction with each other. These proposed amendments will not be submitted to the general membership for vote. The stated purpose for these amendments is to "let the residential unit owners make a final decision on the hiring of a manager," and allow "both the Board of Directors and residential unit owners [to make] the decision." However, Pursuant to A.R.S. § 10-3801, the board, not the individual unit owners, are charged with the duty of managing the corporation. Inherent is the ability of the Board to determine which, if any, property manager it will hire.

SAW's proposed Article V, Section 5, Paragraph B(2) will not be submitted to the general membership for vote. Again, this proposed bylaw attempts to place the decision making power vested in the Board into the hands of the members, contrary to A.R.S. § 10-3801.

SAW's proposed Article X, Section 2, Paragraph C, General Assessment (1) will not be submitted to the general membership for vote. Section M of the CC&Rs states:

The owner of each residential unit not owned by the Company shall pay to the Company as compensation for the privileges herein granted and for the services furnished or secured by Company hereunder, such amount as may be assessed ratably against said owner by the Company each month, such amount so assessed shall be reasonable and shall be based on the cost of maintenance of said facilities and the furnishing of any and all services hereunder. (emphasis added).

The proposed amendment conflicts with Section M of the CC&Rs as it would limit assessment funds strictly to "monthly expenses to common areas," whereas Section M allows for assessments to include "the furnishing of any and all services" allowed under the CC&Rs. Additionally, under the current Bylaws, what is "reasonable" should be determined by the Board pursuant to Article V, Section 1 of the Bylaws. Finally, this amendment again attempts to place the Board's duties in the hands of the unit owners.

SAW's proposed Article X, Section 2, Paragraph C, General Assessment (3) will be submitted to the general membership for vote.

SAW's proposed Article X, Section 2, Paragraph D Special Assessment (1) will be submitted to the general membership for vote.

SAW's proposed Article X, Section 3, Reserve Funds will not be submitted to the general membership for a vote. The Association is a multi-million dollar a year operation that requires a large reserve. Limiting the reserve to \$300,000.00 not only severely limits the Association's ability to maintain the Association's responsibilities but would significantly increase its financial vulnerability. In addition, setting the reserve so low could be a violation of the Board's Duty of Care, which it owes to the Association to safeguard the assets of the Association. Lastly, setting such a low reserve limit would be irresponsible and almost certainly necessitate a special assessment of the general membership at some point in the future.

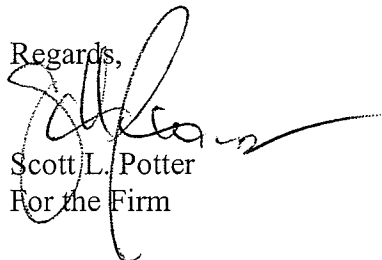
SAW's proposed Article XIII, Section 1, Amendment Proposals (C) will be submitted to the general membership for vote.

In addition to the above stated, under A.R.S. § 10-3801 (C):

The articles of incorporation may authorize one or more members, delegates or other persons to exercise some or all of the powers which would otherwise be exercised by a board. To the extent so authorized the authorized person or persons shall have the duties and responsibilities of the directors, and the directors shall be relieved to that extent from those duties and responsibilities.

However, under Section B, Paragraph 14 of the Articles of Consolidation for the Association these powers are entirely reserved in the Board. ("The corporation shall comply with A.R.S. Title 10, Chapter 5, and these Articles. The Board of Directors shall adopt and approve bylaws which shall govern and define the activities of the corporation, but which shall not be contrary to State law or these Articles.") Under this governing document, the Board is charged with adopting and approving bylaws to govern the Association and cannot adopt bylaws contrary to law. The Board has discretion under A.R.S. § 10-3801 to determine which bylaws to submit to the general membership for vote. Therefore, the Board will be submitting the proposed amendments to Article X, Section 2, Paragraph C, General Assessment (3); Article X, Section 2, Paragraph D Special Assessment (1) and Article XIII, Section 1, Amendment Proposals (C) to the general membership for vote, but have decided not to submit the other proposed amendments for the above stated reasons.

Regards,



Scott L. Potter
For the Firm

SLP/slp

cc: Client