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MEMORANDUM

TO: Planning Commission, City of Solvang
FROM: Chelsea E. O'Sullivan, Assistant City Attorney
DATE: April 22, 2021
SUBJECT: Skytt Mesa—Formation of a Homeowners Association

I. Introduction

At the April 6, 2021 Planning Commission meeting, Staff provided information on the City's enforcement role in the Skytt Mesa neighborhood and highlighted a variety of issues on which the City has received requests and complaints from Skytt Mesa residents. These include accessory structures/sheds, recreational vehicles, front yard landscaping, side yard landscaping, fencing changes, architectural/painting changes and accessory dwelling units.

As Staff explained at the meeting, the Skytt Mesa neighborhood is subject to Conditions of Approval; Covenants, Conditions, and Restrictions (CC&Rs); and a Design Manual. Currently under these governing documents, the City and the property owners each have the right but not the obligation to enforce the CC&Rs and the Design Manual. Since completion of the Skytt Mesa development, residents have increasingly looked to the City to enforce the provisions of the CC&Rs and the Design Manual. Addressing these complaints requires staff time and City resources above and beyond what is required for enforcement of the zoning ordinance. The governing documents also call for a landscape maintenance district to maintain certain landscaped areas in open spaces and along the streets. In contrast to the Skytt Mesa arrangement, developers of subdivisions often form a homeowners association (HOA) during the development phase to enforce the CC&Rs and maintain open space areas after completion of the project.

After hearing Staff's presentation at the April 6, 2021 meeting, the Planning Commission requested that Staff provide additional information on how the residents of Skytt Mesa could form an HOA to allow for enforcement of the CC&Rs without undue burden on City staff and resources.

As explained in the following memorandum, while it is possible for the residents of Skytt Mesa to form an HOA, doing so would require coordination among a large majority of homeowners and approval by the City.

II. Background on Homeowners Associations and Subdivisions

HOAs are typically formed by a developer prior to the sale of any of the properties in a subdivision and are reflected in the subdivisions CC&Rs. Because a developer owns all the affected lots at the time of subdivision, the developer can impose the CC&Rs on all the lots in the subdivision. This makes the establishment of an HOA much easier as there is only one voting property owner (the developer) when the HOA is formed. When a subdivision has common areas, it is known as a Common Interest Development (CID) and is governed by the Davis-Stirling Common Interest Development Act (DSA), Cal. Civ. Code §§ 4000 – 6150. The DSA requires an HOA be formed for CIDs. This HOA can be incorporated or unincorporated. Regardless of incorporation status, the DSA provides HOAs for CIDs the same powers as a nonprofit mutual benefit corporation under Section 7140 of the Corporations Code.

HOAs can be formed in subdivisions where there is no common area. The California Department of Real Estate explains in guidance about residential subdivisions that:

All projects having an HOA are not necessarily CIDs. . . . [A] developer may voluntarily establish an HOA in order to enhance the value of the homes within the subdivision, even though the HOA is not required by the DSA. For example, a developer may form an HOA as a means of providing long-term architectural controls or enforcing other community standards. HOAs may provide a more effective governance and enforcement mechanism than can be provided by local governments or than can be provided by CC&Rs without an association.

Esquivel & Alwayay, California Department of Real Estate, *A Guide to Understanding Residential Subdivisions in California* 33 (2014). But HOAs for regular subdivisions without common areas are not governed by the DSA. Cal. Civil Code § 4201 (“Nothing in this act may be construed to apply to a real property development that does not contain common area.”).¹ We have not identified any statute or regulations governing HOAs in non-common interest subdivisions.

¹ Courts have found that open space governed by covenants to keep the space undeveloped and public streets in a subdivision did not qualify as “common area,” as that term is defined under the DSA, and thus the associated subdivision was not subject to the DSA. *Committee to Save Beverly Highlands Home Ass’n v. Beverly Highlands*

Although HOAs are typically formed by developers, it is possible for homeowners to come together and form an HOA. We have not identified any provisions prohibiting the owners in a regular subdivision from creating a homeowners association after development of a subdivision is complete. At a minimum any residents seeking to create an HOA would need to follow the relevant provisions of the Corporations Code to properly form a corporation, such as a nonprofit mutual benefit corporation, or association under California law. Such activities would include filing articles of incorporation or articles of association with the State. The residents would also need to agree on a variety of issues regarding how the HOA would be governed, including by-laws, assessment of fees and election of the board of directors.

III. Skytt Mesa Governing Documentation

The governing documentation for the Skytt Mesa development currently provides the City and homeowners both with the right but not the obligation to enforce the CC&Rs. Specifically, the City required, as a condition of approval, that the City have the right but not the obligation to enforce the CC&Rs.

Before the homeowners can form an HOA, the homeowners will need to amend the current governing documents to allow for an HOA to enforce the CC&Rs (and potentially remove the City's enforcement rights).

The CC&Rs specify particular procedures for their amendment. The CC&Rs "may be amended by the written assent of the Owners of not less than sixty-seven percent (67%) of the Lots in the Project." An amendment is "effective when it is set forth in writing, executed by the requisite number of owners, each before a notary public, and recorded in the Office of the County Recorder."

Amendments "which would revoke or amend any provision implementing a condition of approval or other requirement imposed by the City in connection with the development of the Project" also require prior written consent of the City in order to be effective. The Conditions of Approval specifically require that the CC&Rs provide the City the right but not the obligation to enforce the CC&Rs. Thus a change to the enforcement provisions of the CC&Rs to provide for the creation of, and enforcement by, an HOA and to remove the City's enforcement powers would require the City's pre-approval. Additionally, the Conditions of Approval required the creation of the landscape maintenance district. Thus any amendments to remove that district or have the HOA assume the district's responsibilities would also require prior City approval.

Homes Ass'n, 92 Cal. App. 4th 1247 (2001); *Tract 19051 Homeowners Ass'n v. Kemp*, No. B235015, 2013 WL 1993677, at *6 (Cal. Ct. App. May 15, 2013), *rev'd on other grounds*, 60 Cal. 4th 1135, 343 P.3d 883 (2015).

The CC&Rs also provide that once recorded an “amendment shall be effective and binding up on all Owners, regardless of whether such Owner consented to such amendment.” Based on this provision, unless also amended, any HOA created would be mandatory and apply to all owners in the subdivision. A mandatory HOA is more effective as an enforcement body.

IV. Conclusion

In summary, based on requirements in the Skytt Mesa governing documents, the homeowners of Skytt Mesa would need to engage in a considerable amount of coordination to create an HOA. A large majority of residents (67%) would need to agree to create an HOA and agree on how that HOA is to be formed and governed. The homeowners would also be required to obtain the City’s written consent to amendments of the governing documents.

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