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MEMORANDUM ON ENFORCEABILITY OF FINE POLICY FOR PARKING VIOLATIONS

DATE: February 14, 2018

CLIENT: REMINGTON RANCH COMMUNITY ASSOCIATION, INC.

QUESTION 1: Is the HOA's Board of Directors authorized to adopt a fine policy without the approval of the HOA's members?

QUESTION 2: Do the HOA's Articles of Incorporation, its By-laws, the Declaration, CHAPTER 22 of the TEXAS BUSINESS ORGANIZATIONS CODE, or the TEXAS PROPERTY CODE authorize or prohibit the HOA's Board of Directors from adopting a fine policy?

QUESTION 3: Is the fine policy adopted by the HOA's Board of Directors enforceable as drafted?

QUESTION 4: Is the HOA's fine policy, as drafted, enforceable against the HOA's members for violations of the HOA's existing parking rules/regulations provided in the HOA's dedicatory instruments?

CONCLUSION: Yes, the Board of Directors is authorized to issue and collect fines from members who violate the parking rules and regulations. However, the Fine Policy, as drafted, is potentially, if not likely, to be unenforceable in a court of law due to the range of discretion afforded to the Board of Directors in its administrative decision-making. The Fine Policy should be revised to provide clear and easily-understood instructions to the Board of Directors that will result in uniform enforcement against all members of the HOA.

The basis for this conclusion is outlined in detail below.

I. **BY-LAWS**

The relevant section of REMINGTON RANCH's By-Laws, Article III, Section 10, states:

All of the powers, authority, and duties of the Association existing under the Texas Non-Profit Corporation Act, the Texas Property Code, the Declaration and these ByLaws shall be exclusively

exercised by the Board, its agents, contractors or employees, subject only to approval by Members when such is specifically required by law, the Declaration or these ByLaws.

To paraphrase, REMINGTON RANCH's Board of Directors are authorized to take any action on behalf of the HOA that does not require the HOA's members' approval (and does not violate the HOA's By-Laws, the Declaration, and the TEXAS PROPERTY CODE).

REMINGTON RANCH's By-Laws do not include any express prohibition on the Board of Director's authority to adopt a fine policy. Unless the TEXAS PROPERTY CODE, REMINGTON RANCH's Declaration, as amended, or the application section of the TEXAS BUSINESS ORGANIZATIONS CODE regarding non-profit corporations expressly prohibit the Board of Directors from proposing and adopting a fine policy without the HOA's members' approval, the HOA's By-Laws appear to allow the Board of Directors to adopt a fine policy.

II.

TEXAS BUSINESS ORGANIZATIONS CODE

SECTION 22.102 of the TEXAS BUSINESS ORGANIZATIONS CODE states:

- (a) The initial bylaws of a corporation shall be adopted by the corporation's board of directors or, if the management of the corporation is vested in the corporation's members, by the members.
- (b) The bylaws may contain provisions for the regulation and management of the affairs of the corporation that are consistent with law and the certificate of formation.
- (c) The board of directors may amend or repeal the bylaws, or adopt new bylaws, unless:
 - (1) this chapter or the corporation's certificate of formation wholly or partly reserves the power exclusively to the corporation's members;
 - (2) the management of the corporation is vested in the corporation's members; or
 - (3) in amending, repealing, or adopting a bylaw, the members expressly provide that the board of directors may not amend or repeal the bylaw.

SECTION 22.201 of the TEXAS BUSINESS ORGANIZATIONS CODE states:

Except as provided by Section 22.022, the affairs of a corporation are managed by a board of directors. The board of directors may be designated by any name appropriate to the customs, usages, or tenets of the corporation.

According to SECTION 22.102 of the TEXAS BUSINESS ORGANIZATIONS CODE, REMINGTON RANCH'S Board of Directors are authorized to amend its By-Laws, unless prohibited by the TEXAS PROPERTY CODE or REMINGTON RANCH'S Declaration.

III. **TEXAS PROPERTY CODE**

SECTION 202.004(a) of the TEXAS PROPERTY CODE states:

- (a) An exercise of discretionary authority by a property owners' association or other representative designated by an owner of real property concerning a restrictive covenant is presumed reasonable unless the court determines by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious, or discriminatory.

SECTION 202.004(a) of the TEXAS PROPERTY CODE is significant because it creates the presumption that REMINGTON RANCH'S Board of Directors' exercise of discretionary authority is reasonable. This provision will be construed with specific attention to the language of REMINGTON RANCH'S Fine Policy at the conclusion of this Memorandum.

SECTION 204.009(b) of the TEXAS PROPERTY CODE states:

The property owners' association has the powers and shall promote the purposes enumerated in the articles of incorporation and bylaws. These powers and purposes necessarily modify the express provisions of the restrictions to include the referenced powers and purposes.

SECTION 204.009(b) of the TEXAS PROPERTY CODE authorizes REMINGTON RANCH'S Board of Director's to modify its governing documents in accordance with its own By-Laws and the Declaration.

SECTION 204.010(a)(1), (11), (12), and (19) of the TEXAS PROPERTY CODE states:

- (a) Unless otherwise provided by the restrictions or the association's articles of incorporation or bylaws, the property owners' association, acting through its board of directors or trustees, may:
 - (1) adopt and amend by-laws;
 - ...
 - (11) if notice and an opportunity to be heard are given, collect reimbursement of actual attorney's fees and other reasonable costs incurred by the property owners' association relating to violations of the subdivision's restrictions or the property owners'

association's restrictions or the property owners' association's bylaws and rules;

...

- (12) charge costs to an owner's assessment account and collect the costs in any manner provided in the restrictions for the collection of assessments;

...

- (19) exercise other powers conferred by the restrictions, its articles of incorporation, or its bylaws.

SECTION 204.010 of the TEXAS PROPERTY CODE expressly authorizes Remington Ranch's Board of Directors to adopt or amend its By-laws. It also authorizes the Board of Directors to collect reimbursement of "actual attorney's fees" and "other reasonable costs incurred by [REMINGTON RANCH] relating to violations of [REMINGTON RANCH's] restrictions, By-Laws, and Rules.

SECTION 204.010(11) of the TEXAS PROPERTY CODE could potentially be construed as authorizing REMINGTON RANCH'S Fine Policy so long as the fines are reasonably related to reasonable costs "incurred." It is more likely that SECTION 204.010(11) of the TEXAS PROPERTY CODE does not have any effect or relation to REMINGTON RANCH'S Fine Policy.

SECTION 204.010(12) expressly authorizes REMINGTON RANCH'S Board of Directors to charge "costs" to a member of REMINGTON RANCH'S assessment account. Again, the "costs" that can be assessed to a member's assessment account appears to be tied to a "cost" incurred, which would exclude fines.

SECTION 204.010(19) is a "catch-all" provision that authorizes REMINGTON RANCH'S Board of Directors to exercise any powers that are conferred in its By-laws, Articles of Incorporation, and/or the Declaration. In this case, REMINGTON RANCH'S Declaration authorizes the Board of Directors to implement a "Fine Policy."

SECTION 209.002 of the TEXAS PROPERTY CODE provides the following definitions:

- (1) "Assessment" means a regular assessment, special assessment, or other amount a property owner is required to pay a property owners' association under the dedicatory instrument or by law.

A liberal construction of the definition of "assessment" as provided by SECTION 209.002(1) of the TEXAS PROPERTY CODE would include a "fine," which would fall under the "other amount a property owner is required to pay" language.

SECTION 202.001(1) of the TEXAS PROPERTY CODE states:

"Dedicatory instrument" means each document governing the establishment, maintenance, or operation of a residential

subdivision, planned unit development, condominium or townhome regime, or any similar instrument subjecting real property to:

- (A) restrictive covenants, bylaws, or similar instruments governing the administration or operation of a property owners' association;
- (B) properly adopted rules and regulations of the property owners' association; or
- (C) all lawful amendments to the covenants, bylaws, instruments, rules, or regulations.

REMINGTON RANCH's Fine Policy is included in the TEXAS PROPERTY CODE's definition of "dedicatory instrument" under Subsections (A) and/or (B) as REMINGTON RANCH's properly adopted rules and regulations.

SECTION 202.006 of the TEXAS PROPERTY CODE states:

- (a) A property owners' association shall file all dedicatory instruments in the real property records of each county in which the property to which the dedicatory instruments relate is located.
- (b) A dedicatory instrument has no effect until the instrument is filed in accordance with this section.

SECTION 202.006 adds an additional requirement that Remington Ranch's Fine Policy must be recorded in the Official Public Records of Real Property of Harris County, Texas to be enforceable.

SECTION 209.006 of the TEXAS PROPERTY CODE states:

- (a) **Before a property owners' association may** suspend an owner's right to use a common area, file a suit against an owner other than a suit to collect a regular or special assessment or foreclose under an association's lien, charge an owner for property damage, or **levy a fine for a violation of the restrictions or bylaws or rules of the association, the association or its agent must give written notice to the owner by certified mail.**
- (b) **The notice must:**
 - (1) **describe the violation or property damage that is the basis for the suspension action, charge, or fine and state any amount due the association from the owner;**
 - (2) **except as provided by Subsection (d), inform the owner that the owner:**
 - (A) **is entitled to a reasonable period to cure the violation and avoid the fine or suspension if the violation is of a curable nature and does not pose a threat to public health or safety;**

- (B) **may request a hearing under Section 209.007 on or before the 30th day after the date the notice was mailed to the owner; and**
 - (C) **may have special rights or relief related to the enforcement action under federal law, including the Servicemembers Civil Relief Act (50 U.S.C. App. Section 501 et seq.), if the owner is serving on active military duty;**
- (3) **specify the date by which the owner must cure the violation if the violation is of a curable nature and does not pose a threat to public health or safety; and**
- (4) **be sent by verified mail to the owner at the owner's last known address as shown on the association records.**
- (c) **The date specified in the notice under Subsection (b)(3) must provide a reasonable period to cure the violation if the violation is of a curable nature and does not pose a threat to public health or safety.**
- (d) **Subsections (a) and (b) do not apply to a violation for which the owner has been previously given notice under this section and the opportunity to exercise any rights available under this section in the preceding six months.**
- (e) **If the owner cures the violation before the expiration of the period for cure described by Subsection (c), a fine may not be assessed for the violation.**
- (f) For purposes of this section, a violation is considered a threat to public health or safety if the violation could materially affect the physical health or safety of an ordinary resident.
- (g) For purposes of this section, a violation is considered incurable if the violation has occurred but is not a continuous action or a condition capable of being remedied by affirmative action. For purposes of this subsection, the nonrepetition of a one-time violation or other violation that is not ongoing is not considered an adequate remedy.
- (h) The following are examples of acts considered incurable for purposes of this section:
 - (1) shooting fireworks;
 - (2) an act constituting a threat to health or safety;
 - (3) a noise violation that is not ongoing;
 - (4) property damage, including the removal or alteration of landscape; and
 - (5) holding a garage sale or other event prohibited by a dedicatory instrument.
- (i) **The following are examples of acts considered curable for purposes of this section:**
 - (1) **a parking violation;**
 - (2) a maintenance violation;

- (3) the failure to construct improvements or modifications in accordance with approved plans and specifications; and
- (4) an ongoing noise violation such as a barking dog.

The fact that SECTION 209.006(a) states that “before a property owners’ association ... may levy a fine ...” is conclusive proof that REMINGTON RANCH is authorized to adopt a fine policy, which must still comply with the Subsections (b) through (e). Since SECTION 209.006(i)(1) expressly states that a “parking violation” is conclusively defined as “act considered curable,” REMINGTON RANCH must comply with all of the notice and opportunity to cure provisions.

In accordance with Section 209.006, REMINGTON RANCH may fine a “parking violation” if the HOA or its agent (the property management company):

- (1) provide a written notice describing the parking violation to the property owner, which must be sent to the property owner’s last known address as shown in REMINGTON RANCH’s record by certified mail with return receipt requested, and informing the property owner:
 - (A) that he or she has a reasonable period of time to cure the violation and avoid a fine;
 - (B) that he or she may request a hearing before Remington Ranch’s Board of directors on or before the 30th day after the date the notice was sent by certified mail;
 - (C) that he or she may have special rights related to the enforcement action under federal law (related to active military service); and
 - (D) the specific date on which the property owner must cure the parking violation, which must be a reasonable period of time.

If the property owner cures the violation by the deadline to cure provided in the letter, REMINGTON RANCH cannot fine the property owner. However, REMINGTON RANCH can assess the property owner the “costs” reasonably and actually incurred by REMINGTON RANCH related to enforcing the “parking regulations.”

If the property owner violated REMINGTON RANCH’s parking policy in the previous six (6) months (and if REMINGTON RANCH fully complied with the written notice provision identified above), REMINGTON RANCH would be authorized to assess a fine to the property owner without notice. To be safe, it would probably be a good idea to send written notice in compliance with SECTION 209.006(a) – (c) even if the property owner violated the parking regulations in the previous six (6) months.

If REMINGTON RANCH assesses a fine to a property owner for a parking violation, REMINGTON RANCH must also comply with SECTION 209.003 of the TEXAS PROPERTY CODE with regard to handling payments from the property owner.

SECTION 209.0063(a) of the TEXAS PROPERTY CODE states:

- (a) Except as provided by Subsection (b), a payment received by a property owners' association from the owner shall be applied to the owner's debt in the following order of priority:
 - (1) any delinquent assessment;
 - (2) any current assessment;
 - (3) any attorney's fees or third party collection costs incurred by the association associated solely with assessments or any other charge that could provide the basis for foreclosure;
 - (4) any attorney's fees incurred by the association that are not subject to Subdivision (3);
 - (5) any fines assessed by the association; and**
 - (6) any other amount owed to the association.

Accordingly, fines assessed to the violating property owner's account essentially have the lowest priority. This provision is significant as it relates to REMINGTON RANCH's accounting methods and REMINGTON RANCH's ability to collect the fine from the violating property owner (as detailed below).

SECTION 209.009 of the TEXAS PROPERTY CODE states:

A property owners' association may not foreclose a property owners' association's assessment lien if the debt securing the lien consists solely of:

- (1) fines assessed by the association;
- (2) attorney's fees incurred by the association solely associated with fines assessed by the association; or
- (3) amounts added to the owner's account as an assessment under Section 209.005(i) or 209.0057(b-4).

SECTION 209.009 is significant because if the violating property owner pays all charges on his or her account with the exception of the fines, REMINGTON RANCH cannot file a suit seeking to foreclose its assessment lien. REMINGTON RANCH would have to decide whether to file suit seeking a judgment against the violating property owner for the unpaid fines without foreclosure as a remedy. Also, if the fines remain unpaid for a period exceeding the applicable 4-year statute of limitations for breach of contract actions, REMINGTON RANCH's will be barred from attempting to collect the fines.

IV.

THE DECLARATION

Article II, Section 2.1.C. of REMINGTON RANCH's Declaration of Covenants, Conditions, and Restrictions (the "Declaration"), in relevant part, states:

Except as provided in Article II, Section 2.1, D, below, no Owner, lessee, tenant, or occupant of a Lot, including all persons who reside

with such Owner, lessee, tenant or occupant on the Lot, shall park, keep or store any vehicle on any Lot which is visible from any street in the Subdivision or any neighboring Lot other than a passenger vehicle or pick-up truck and then only if parked on the driveway for a period not exceeding forty-eight (48) consecutive hours.

...

No passenger vehicle or pick-up truck owned or used by the residents of a Lot shall be permitted to park overnight on any street. No guest of an Owner, lessee or occupant of a Lot shall be entitled to park any passenger vehicle or pick-up truck overnight on any street, or on the driveway of a Lot, for a period longer than forty-eight (48) consecutive hours. ...

Article II, Section 2.1.D. of the Declaration states:

No mobile home trailer, utility trailer, recreational vehicle, boat or the like shall be parked, kept or stored on any street or on the driveway of any Lot for more than twenty-four (24) hours in any fourteen (14) day period unless otherwise permitted in writing by the Board of Directors due to special circumstances (such as, by way of example and not in limitation, a recreational vehicle owned by a relative or guest that is visiting the Owner or occupant of a Lot) but then only at the location and for the duration specified by the Board.

Article IV, Section 4.1 of the Declaration, in relevant part, states:

The affairs of the Subdivision shall be administered by the Association. The Association shall have the right, power and obligation to provide for the management, maintenance, repair, replacement, administration, and operation of the Subdivision as provided for in the ByLaws and the Rules and Regulations. The business and affairs of the Association shall be managed by its Board of Directors. ...

Section 4.1 of the Declaration expressly authorizes REMINGTON RANCH's Board of Directors to manage REMINGTON RANCH's business and affairs.

Article IV, Section 4.7 of the Declaration, in relevant part, states:

The Association may exercise any right or privilege given to it expressly by the provisions of this Declaration or its Articles of Incorporation or Bylaws, or reasonably implied from or reasonably necessary to effectuate any such right or privilege. All rights and powers of the Association may be exercised by the Board of Directors without a vote of the membership except where any provision in this Declaration, the Articles of Incorporation, the

Bylaws or applicable law specifically requires a vote of the membership. ...

Section 4.7 of the Declaration authorizes the REMINGTON RANCH's Board of Directors to act on behalf of REMINGTON RANCH without a vote of its members, unless some other provision requires a vote of the members.

Article IV, Section 4.8 of the Declaration states:

The Board of Directors, the officers of the Association, and the Association shall have the duty to represent the interests of the Owners in a fair and just manner. Any act or thing done by any Director, officer, or committee member taken in furtherance of the purposes of the Association, and accomplished in conformity with the Declaration, Articles of Incorporation, Bylaws and the laws of the State of Texas, shall be reviewed under the standard of the Business Judgment Rules as established by the common law of Texas, and such act or thing shall not be a breach of duty on the part of the Director, officer, or committee member if taken or done within the exercise of their discretion and judgment. The Business Judgment Rule means that a court shall not substitute its judgment for that of the Director, officer, or committee member. A court shall not re-examine the decisions made by a Director, officer or committee member by determining the reasonable decision as long as the decision is made in good faith and in what the Director, officer, or committee member believed to be in the best interest of the Association.

Section 4.8 of the Declaration establishes the standard by which the Board of Directors actions will be reviewed, which is the "Business Judgment Rule."

Article IX, Section 9.6, of the Declaration states:

The provisions of this Declaration shall run with the Property and shall be binding upon and inure to the benefit of and be enforceable by the Declarations, the Association, each Owner of a Lot in the Subdivision, or any portion thereof, and their respective heirs, legal representatives, successors and assigns. If notice and an opportunity to appear before the Board of Directors are given as provided by law, the Association shall be entitled to impose reasonable fines for violations of this Declaration or any Rules and Regulations or Architectural Guidelines adopted by the Association or Architectural Review Committee pursuant to any authority conferred by either of them by this Declaration and to collect reimbursement of actual attorney's fees and other reasonable costs incurred by it relating to violations of this Declaration or any Rules

or Regulations or any Architectural Guidelines. Such fines, fees and costs may be added to the Owner's assessment account and collected in the manner provided in Article V of this Declaration.

Section 9.6 expressly authorizes REMINGTON RANCH's Board of Directors to fine any member for a violation of the Declaration or Rules and Regulations. It also authorizes REMINGTON RANCH to collect payment of the fines in accordance with Article V of the Declaration.

Although Section 9.6 of the Declaration, in conjunction with Article V, do authorize Remington Ranch's Board of Directors to fine a member and assess the fine to the member's assessment account, the Board of Directors must ensure compliance with the priority of payments statute provided in SECTION 209.0063(a) of the TEXAS PROPERTY CODE.

V. FINE POLICY

The relevant portions of REMINGTON RANCH COMMUNITY ASSOCIATION, INC.'s ("REMINGTON RANCH" or the "HOA") Fine Policy, Sections 2 – 6, state:

2. Before any fine is imposed, the Association shall first provide the Owner the notice required by Section 209.006 of the Texas Property Code, or its successor statute. A courtesy notice may typically be sent prior to any notice required by applicable law, however, the board may send more or less notices and give more or less time to comply with the Dedicatory Instruments, depending on the severity of the violation and its impact on the community, as determined by the Board of Directors in its sole discretion.
3. If a violation continues from day to day without intervening activity by the Owner responsible for the violation, the fine shall be \$55.00 per month.
4. If the violation consists of a single occurrence or separate occurrences, the fine shall be \$55.00 per occurrence.
5. These fines are guidelines for standard fines only. The Board of Directors reserves the right to levy lesser or greater fines, provide additional warnings or fewer warnings before fines are made and provide more or less time for compliance, depending on the severity of the violation at issue, in the sole discretion of the Board.
6. If the violation continues without resolution, the Association shall have the right to undertake any action authorized by the Declaration and/or applicable law, including, but not limited to remedying the violation or initiating legal action, the costs of which actions shall be billed and/or assessed to the homeowner and collected and secured in the same manner as assessments.

VI.

CONCLUSION

REMINGTON RANCH's Board of Directors is authorized to assess a fine a member for violation of the Declaration and any Rules and Regulations, so long as the Declaration and the applicable Rules and Regulations are recorded in the Official Public Records of Real Property of Harris County, Texas. The Board of Directors' discretion to assess fines to a violating member's assessment account for violating any parking regulations does have limitations.

The standard of review for the Board of Directors' discretion is the "Business Judgment Rule." An additional component of any review of the Board of Directors' discretion is whether the exercise of discretion is arbitrary, discriminatory, or capricious.

The specific language of the Fine Policy requires additional scrutiny to ensure that the Board of Directors' discretion to issue fines is uniformly administered. In order to ensure the Board of Directors' discretion is not arbitrary, discriminatory, or capricious, the Fine Policy must be administered in a uniform manner (*i.e.*, treat all violating members the same).

With regard to the Fine Policy adopted by REMINGTON RANCH's Board of Directors, the language of the Fine Policy could be challenged by a violating member who was fined because of the significant amount of discretion provided to the Board of Directors when determining whether it will issue a fine against a violating member and the amount of the fine.

The Fine Policy could also be challenged by a violating member who was fined because the Fine Policy is arguably vague and ambiguous with regard to how the fines are administered. As an example, and without limitation, the language the following language in the Fine Policy is problematic: "the fines are guidelines for standard fines only." This essentially eliminates any requirement that the Fine Policy be administered in a uniform manner. The addition of the following language in the Fine Policy is very likely to render this particular Fine Policy to be unenforceable:

The Board of Directors reserves the right to levy lesser or greater fines, provide additional warnings or fewer warnings before fines are made and provide more or less time for compliance, depending on the severity of the violation at issue, in the sole discretion of the Board.

In conclusion, the Board of Directors does have the authority to fine a member for violating the parking rules and regulations; however, the Fine Policy adopted by REMINGTON RANCH's Board of Directors is potentially, if not likely, to be unenforceable due to the language of the Fine Policy as drafted. To ensure that the Fine Policy is enforceable, we recommend extensive revisions to the Fine Policy's language to clearly identify the how the fines will be uniformly administered and also significantly reducing the Board of Directors' discretion with regard to assessing fines against violating members.

Respectfully submitted,

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