DISTRICT COURT, PARK COUNTY, COLORADO 300 Fourth Street Fairplay, Colorado 80440 **Plaintiffs:** ELK FALLS PROPERTY OWNERS ASSOCIATION, a Colorado nonprofit corporation, KATHRYN WELLS, THE PAUL J. VASTOLA AND SUZANNE G. NELSON LIVING TRUST, U/A, ROBERT W. PHELPS, and KEVIN O'CONNELL v. **Defendants:** VERA B. DUNWODY, DRAYTON D. DUNWODY, and FARM CREDIT OF SOUTHERN COLORADO, ACA, an agricultural credit association **Plaintiffs in Intervention:** PETER J. BRAUN and RENAE J. BRAUN	Case Number: 2010cv65 Div: B
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RESPONSE TO DEFENDANTS' VERIFIED MOTION TO JOIN INDISPENSABLE PARTIES AND DEFENDANTS' SUPPLEMENTAL MOTION TO JOIN PERSONS NEEDED FOR A JUST ADJUDICATION UNDER C.R.C.P. 105

Plaintiffs, through their attorneys Montgomery Little & Soran, P.C., in response to Defendants' Verified Motion to Join Indispensable Parties ("Verified Motion") and Defendants' Supplemental Motion to Join Persons Needed for a Just Adjudication under C.R.C.P. 105 ("Supplemental Motion"), submit that the Court should deny Defendants' Verified Motion and Supplemental Motion because: (1) under the Colorado Common Interest Ownership Act ("CCIOA"), the Elk Falls Property Owners' Association (the "Association") can adequately

represent the interests of all Elk Falls Subdivision Owners ("Owners"), (2) the remaining 141 Owners not named as parties ("141 Owners") are not indispensable parties, and (3) it is unduly burdensome to require that the Association join the 141 Owners. In support of this Motion, Plaintiffs state as follows:

Response to Facts in Verified Motion

Defendants make numerous inaccurate allegations in their Verified Motion. The allegations contained in Paragraph Nos. 1 through 14 of Defendants' Verified Motion are also irrelevant for the relief requested. To that end, Plaintiffs respond as follows:

1. **Allegations contained in Paragraph No. 1**: Denied.

2. **Allegations contained in Paragraph No. 2**: Plaintiffs admit that a few cabins existed in Elk Falls Block 1 in 1959. The remaining allegations are denied.

3. **Allegations contained in Paragraph Nos. 3 through 8**: Plaintiffs are without information to admit or deny these allegations and, therefore, they are denied. Plaintiffs request that Defendants disclose any documents supporting these claims.

4. **Allegations contained in Paragraph No. 9**: Denied.

5. **Allegations contained in Paragraph No. 10**: Denied. Each named Plaintiff can establish a prescriptive right to use the Disputed Roads. See: *Lively v. Wick*, 122 Colo. 156, 164, 221 P.2d 374, 377 (Colo. 1950) (finding that the principle of tacking is applicable in prescriptive easement cases).

6. **Allegations contained in Paragraph No. 11**: Denied. Assuming the Disputed Roads are not public roads, each Owner, including Plaintiffs, has an implied and/or express easement to use the Disputed Roads.

7. **Allegations contained in Paragraph No. 12**: Plaintiffs admit that South Elk Creek Road is the only access for certain Block 3 residents. Plaintiffs also admit that without the Disputed Roads the other Owners have inconvenient access to their homes. Plaintiffs deny the remaining allegations and affirmatively state: By virtue of the Dunwodys physically impeding access to Block 3, Block 3 residents' access was restricted. To wit: the sawhorse the Dunwodys placed in the middle of Elk Creek Road near the "West Gate" ("sawhorse") precluded convenient access for Elk Falls subdivision Block 3 residents to use South Elk Creek Road and Juniper and Jensen Roads to access their homes, and the pole barrier the Dunwodys placed across Elk Creek Road (" pole barrier") precluded convenient access for Elk Falls subdivision Block 3 residents to use South Elk Creek Road and Juniper and Jensen Roads to access their homes.

By virtue of the Dunwodys' actions, access for Block 1 and Block 2 residents was also made more difficult. To wit: the sawhorse, pole barrier, and the large boulders the Dunwodys placed on the Disputed Roads precluded Block 1 residents from conveniently using Juniper and Jensen Roads to access their homes, and prevented some Block 2 residents from conveniently using their safe and preferred route to access their homes. The Dunwodys also placed "No Trespassing" signs, and threatened trespass charges if the Owners used the Disputed Roads. These signs and threats precluded all Owners from freely using the Disputed Roads.

8. **Allegations contained in Paragraph Nos. 13 and 14**: Plaintiffs admit there are a few residents that pay a nominal fee to the Dunwodys to use the Disputed Roads. Those parties are friends of the Dunwodys and are not supportive of the Association. Upon information and belief, Plaintiffs submit that these payments are made, in part, to solidify the Dunwodys' argument in this case. Plaintiffs also admit that a minority of the Owners do not want to pay the Association to

litigate this matter. Plaintiffs are unaware of any Owners that do not want access to the Disputed Roads. The remaining allegations are denied.

9. **Allegations contained in Paragraph No. 15**: Denied.

Response to Facts in Supplemental Motion

1. **Allegations contained in Paragraph No. 1**: Admit that C.R.C.P. 19(a) speaks for itself.

2. **Allegations contained in Paragraph Nos. 2 through 4**: These allegations reference Plaintiffs' Amended and Restated Complaint which speaks for itself.

Argument

1. The Association can adequately represent the interests of all Owners under CCIOA, C.R.S. § 38-33.3-302(1)(d) .

C.R.C.P. 19(a) requires joinder only if the absent parties with an interest cannot be adequately represented by the named parties. C.R.S. § 38-33.3-302(1)(d) provides standing to Colorado homeowner associations in litigation that affects a common interest community. C.R.S. § 38-33.3-302(1)(d) applies here.

Under C.R.S. § 38-33.3-302(1)(d), the Association has standing to sue Defendants and can adequately represent all Owners. The Association was established in 1965 as the Property Owners' Association for the Owners. It was formed to promote the integrity of the area, promote and protect property values in the area, and to repair all roads and ongoing maintenance. For over forty years, the Association has collected annual assessments from the Owners to pay for road maintenance and improvements. The Elk Falls Subdivision is a common interest community because the recorded covenants require that the Owners pay for real estate maintenance and improvement. See: C.R.S. § 38-33.3-103. Certain provisions of CCIOA apply to common interest

communities created before 1992. See: C.R.S. § 38-33.3-117. One such provision is C.R.S. § 38-33.3-302(1)(d). See: C.R.S. § 38-33.3-117(i). C.R.S. § 38-33.3-302(1)(d) gives the Association standing to institute in litigation in its own name on behalf of itself or two or more unit owners on matters affecting the Elk Falls Subdivision. Access to the Disputed Roads affects the Elk Falls subdivision because a majority of the Owners use the Disputed Roads. To that end, the Association can adequately represent all Owners. The Court does not need to join the 141 Owners.

Joining the 141 Owners would contradict the purpose of CCIOA - C.R.S. § 38-33.3-302(1)(d). Colorado passed CCIOA in 1991. CCIOA became effective in 1992. A major reason underlying CCIOA was eliminating class action lawsuits, and the inefficiency in joining hundreds of home owners in a lawsuit. Another reason was to provide home owner associations the flexibility to efficiently litigate on behalf of home owners. See: *Yacht Club III Homeowners Ass'n v. A.C. Excavating*, 94 P.3d 1177, 1180 (Colo. App. 2003) (finding that the purpose of CCIOA is to clarify that an association can sue or defend lawsuits on behalf of home owners, that CCIOA ends the difficult homeowner standing issue in Colorado, that CCIOA eliminates the necessity of class action law suits, and that CCIOA simplifies and makes more practical prompt action in association's and owners' common interests).

2. *The 141 Owners are not indispensable parties.*

C.R.C.P. 19(a) does not require that the Court join the 141 Owners. Under C.R.C.P. 19(a), a party is indispensable if the named parties cannot adequately represent his interests, or his absence impairs or impedes his ability to protect his interests, or his absence leaves the named parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations.

Whether a party is indispensable depends on the context of the particular litigation. *I.M.A., Inc., v. Rocky Mountain Airways, Inc.*, 713 P.2d 882, 891 (Colo. 1986). The test of indispensability

is whether the absent person's interest is such that no final judgment can be entered, without injuriously affecting the rights of the absent parties; that a final decree cannot be made without leaving the controversy is a situation where final determination may be inequitable. *Davis v. Maddox*, 169 Colo. 433, 438, 457 P.2d 394, 396-397 (Colo. 1969). Some factors to determine indispensability include: (1) the danger of inconsistent decisions, (2) the avoidance of a multiplicity of suits, and (3) the reluctance of a court to render a decision that will not finally settle the controversy before it. *Id*. A substantial interest in a case is not enough to invoke indispensability. *Thorne v. Board of County Commissioners of County of Fremont*, 638 P.2d 69, 73 (Colo. 1981). If the Court can do justice with the present parties without injuring absent persons, it will do so, and shape relief in a manner that preserves the rights of the absent persons. *Woodco v. Lindahl*, 152 Colo. 49, 55, 380 P.2d 234, 238 (Colo. 1963).

a. <u>The Association can adequately represent the Owners.</u>

The Association can adequately represent the Owners. C.R.S. § 38 33.3-302(1)(d) mandates as such, and there are no conflicting interests amongst the Owners. Every Owner wants access to the Disputed Roads, and access to the Disputed Roads benefits the Owners. All of the Owners are also aware of this lawsuit, and a majority approve of it.

b. <u>Any final determination will not be inequitable.</u>

Any final determination will not be inequitable to the 141 Owners. The relief requested by Plaintiffs neither impairs nor impedes the 141 Owners from protecting their interests. Every Owner wants access to the Disputed Roads; a few just want to obtain access differently. The Association is attempting to obtain access here. A finding that the Owners have access will increase the Owner's property values, and increase convenience. To make an informed decision, the Court does not need

the 141 Owners making similar arguments. It is unnecessary, burdensome, and repetitive. If an Owner wants to argue against access, then they can intervene.

The Association is also representing the interests of a majority of the 141 Owners. A majority of the Owners want the Association to litigate on their behalf. The Court should not issue an Order that is against their wishes. The Association did not pursue this litigation haphazardly. Prior to initiating litigation, it held meetings, asked for guidance from the Owners, and ensured proper financing. The Association also attempted to settle this dispute outside of Court. The membership voted to initiate a lawsuit if attempts at mediation with the Dunwodys failed. This resolution passed with approximately 96% approval. A majority of the Owners also continue to support the Association, and have funded this litigation via assessments and private donations. This year a vast majority of the Owners approved a special assessment to prosecute this litigation.

c. There is no danger of inconsistent decisions, multiple lawsuits, and the Court's decision will be final.

This case does not lead to the risk of inconsistent decisions, multiple lawsuits, and the Court's decision will be final. The Association can adequately represent the 141 Owners, and all present and future Owners will be bound by this Court's decision. No party can later argue otherwise, and present and future Owners will be barred from litigating these same issues.

d. *Fairway* does not require joinder of the 141 Owners.

The Colorado Court of Appeals recently discussed "indispensable parties" in *Clubhouse at Fairway Pines, LLC v. Fairway Pines Estates*, 214 P.3d 451 (Colo. App. 2008). *Fairway* dealt with a dispute over the meaning of club in the restrictive covenants. *Id.* at 453. The covenants required that all Owners pay dues for the "club." *Id.* The privately owned clubhouse, which was adjacent to the subdivision ("Clubhouse"), brought an action against the homeowner association for failing to collect club dues. No homeowners were joined in the lawsuit. The trial court ruled for the

Clubhouse. *Id.* On appeal, the association argued that the Clubhouse failed to join each home owner as an indispensable party. The Clubhouse argued that the Court did not have to join each homeowner, and that CCIOA gave the homeowner association authority to defend their interests in the lawsuit. The Appellate Court reversed, finding that the homeowners were indispensable because of their conflicting interests unique to that case. *Id.* at 457. The case was granted certiorari, but was settled before the Colorado Supreme Court rendered a decision.

This case is distinguishable to *Fairway*, and the *Fairway* case does not mandate that the 141 Owners be joined. Foremost, this case does not involve the interpretation of covenants. It involves access to subdivision roads. Second, the interests involved in *Fairway* had a direct financial impact on each individual Owner (e.g. the collection of unpaid dues). Here, any financial impact on the Owners is tenuous. Third, *Fairway* involved an action brought against the homeowner association by an outsider, without the approval and support of the homeowner association. This case was brought by the Association after meetings, discussion, attempts at out of court settlement, and majority Owner approval. Fourth, in *Fairway* the issues were not common to every homeowner. Presumably, some homeowners wanted to pay dues to use the clubhouse. Others did not. Here, the issues are common to every Owner; every Owner wants access to the Disputed Roads. A small minority want to pay the Dunwodys for access, and a very small minority may not desire to frequently use the Disputed Roads. That said, if the Court holds the Association has standing, neither of these small groups will be prejudiced. There would be no point to CCIOA if Court's required this sort of absolute unanimity amongst the Owners.

3. *It is unduly burdensome to require that the Association join all 141 Owners as parties.*

Requiring that the Association join the 141 Owners is unduly burdensome and there are no countervailing benefits. The Association chose to bring this action on behalf of all Owners for sake

of convenience, efficiency, and cost effectiveness. There are 146 different property owners in the Elk Falls Subdivision. Four property owners are named Plaintiffs. One property owner is a Plaintiff in Intervention. This means that if the Court grants Defendants' Verified Motion and Supplemental Motion, the Court forces the Association to join 141 Owners. This is unduly burdensome. The only concerns raised by a few of the 141 Owners is over payment for the litigation. The Association does not know of any Owner that does not want access to the Disputed Roads, and access to the Disputed Roads is also in the Owner's best interests. A majority of the Owners support this litigation. In short, there is no benefit to joining the 141 Owners. The Association can adequately litigate this case on their behalf, Colorado law gives them that right, and the 141 Owners can intervene if they so choose.

4. ***The other arguments by Defendants are without merit.***

a. C.R.C.P. 19(a) does not mandate joinder of the 141 Owners because they are not indispensable parties. Only indispensable parties must be brought into an action. Because the 141 Owners are not indispensable parties, C.R.C.P. 19(c) does not require that Plaintiffs plead the names of any persons who are not joined and the reasons why they are not joined. That said, the reason the 141 Owners are not joined is because Colorado law gives the Association the authority to litigate on their behalf, the Association can do so effectively, and joining the 141 Owners is unduly burdensome, inefficient, and costly.

b. Defendants argue that *Potts v. Gordon*; *Woodco v. Lindahl*; *Dunne v. Shenandoah Homeowners Association, Inc;* and *Davis v. Maddox*, mandate that the Court join the 141 Owners. But, these cases stand for the proposition that the Court does not have to join the 141 Owners. In each of these cases, the Court only required or denied joinder after a determination of indispensability. The 141 Owners are not indispensable parties. See: *Woodco*

and *Davis supra*; *Potts*, 34 Colo. App. 128, 525 P.2d 500 (Colo. App. 1974) (the issue of joining indispensable parties can be made during trial); *Dunne*, 12 P.3d 340, 344 (Colo. App. 2000) (injury to the absent party is the most important factor in determining indispensability, and that other factors include: the danger of inconsistent decisions, avoidance of multiplicity of suits, and the reluctance of a court to render a decision which will not finally settle the controversy before it).

c. This case is also distinguishable from *Dunne* because this case does not involve the interpretation of covenants, C.R.S. § 38-33.3-302(1)(d) gives the Association standing, and *Dunne* involved an action brought against a homeowner association by an outsider, while this case was brought by the Association only after majority Owner approval. The issues are also common to every Owner here, and the Court does not need 141 Owners making similar arguments to make an informed final ruling.

d. C.R.C.P. 105. C.R.C.P. 57(j), and C.R.S. § 13-51-115 do not require that the Court join the 141 Owners. Joinder is only required if the 141 Owners are indispensable.

e. The recently filed affidavit of the Shapiros and the Disclaimers of the 8 property owners are irrelevant to this Motion except to show that 8 of the 146 Owners do not actively support this litigation, do not want to be involved in this litigation, or were intimidated by the Dunwodys to sign the Disclaimer. We do not know their reasons. The Disclaimers have no legal effect because they are not signed by named parties.

Conclusion

Indeed, the Court should deny Defendants' Verified Motion and Supplemental Motion because: (1) under CCIOA, the Association can adequately represent the interests of all Owners,

(2) the 141 Owners are not indispensable parties, and (3) it is unduly burdensome to require that the Association join the 141 Owners.

WHEREFORE, Plaintiffs respectfully request that the Court deny Defendants' Verified Motion and Supplemental Motion.

Dated: September 24, 2010.

Respectfully submitted,

MONTGOMERY LITTLE & SORAN, P.C.

By *s/ Nathan G. Osborn*
Frederick B. Skillern, #7983
Nathan G. Osborn, #38951

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2010, a true and correct copy of the foregoing was duly served to the following via LexisNexis:

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s/Sandra G. Reinke

In accordance with C.R.C.P. 121 § 1-26(9) a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the court upon request.