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Via email: rhooker1@ymail.com
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Board of Directors
Association of Angel Fire Property Owners, Inc.
c/o Rick Hooker and Linda Wier
P.O. Box 21
Angel Fire, NM 87710

Re: Opinion Concerning Confidentiality of 95% Report

Dear Board Members:

I have been asked to provide an opinion concerning whether members have a right to access the “95% Report” which the Angel Fire Resort makes available to the AAFPO Board each year, with the proviso it be kept confidential by the Board. This year, for the first time, a Board member has refused to sign an agreement not to disclose the contents of this 95% Report, and members not on the Board have made requests for copies of the report.

Conclusion:

In my opinion AAFPO has no obligation to provide the information in this report to the members, and the Resort can refuse to disclose the 95% Report to a Board member who refuses to agree to keep it confidential.

Background:

AAFPO is a New Mexico non-profit corporation organized as a property owners association pursuant to the Amended Joint Plan of Reorganization (“Bankruptcy Plan”) confirmed in the Bankruptcy Case *In re Angel Fire Corporation*, Case No. 11-93-12176 RA, on May 31, 1995.

AAFPO is given responsibility under the Bankruptcy Plan to ensure the members’ use and rights of use of amenities are preserved, to serve in an advisory capacity on issues such as operating programs, annual budgets, and capital improvements performed by the Resort. In addition, AAFPO’s Board of Directors has limited and defined veto power of proposed budgets. The

AJP sets forth procedures, and authorizes the promulgation of rules and regulations, to govern the terms under which the property owners access and use the Amenities, the upper limits on annual assessments which can be collected by the Resort, the rules for increased annual assessments when the Resort has made capital improvements to existing Amenities, the limitations on the use by the Resort of the assessments collected, and the AAFPO Board's role in representing the property owners in all of the foregoing matters.

AAFPO is also a Homeowners Association under the New Mexico Homeowner Association Act. Under §47-16-5 of that Act, AAFPO must make its "financial and other records" available to members upon written request. "Financial and other records" is defined as:

- (1) the declaration of the association;
- (2) the name, address and telephone number of the association's designated agent;
- (3) the bylaws of the association;
- (4) the names and addresses of all association members;
- (5) minutes of all meetings of the association's lot owners and board for the previous five years, other than executive sessions, and records of all actions taken by a committee in place of the board or on behalf of the association for the previous five years;
- (6) the operating budget for the current fiscal year;
- (7) current assessments, including both regular and special assessments;
- (8) financial statements and accounts, including bank account statements, transaction registers, association-provided service or utility records and amounts held in reserve;
- (9) the most recent financial audit or review, if any;
- (10) all current contracts entered into by the association or the board on behalf of the association;
- (11) current insurance policies, including company names, policy limits, deductibles, additional named insureds and expiration dates for property, general liability and association director and officer professional liability, and fidelity policies; and
- (12) any electronic record of action taken by the board.

The New Mexico Public Records act, in NMSA 14-2-6 (G) defines "public records" as follows:

G. "public records" means all documents, papers, letters books, maps, tapes, photographs, recordings and other materials, regardless of physical form or

characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained.

The New Mexico Public Records act, in NMSA 14-2-6 (F) defines “public body” as follows:

F. “public body” means the executive, legislative, and judicial branches of state and local governments and all advisory boards, commissions, committees, agencies or entities created by the constitution or any branch of government that receives any public funding, including political subdivisions, special taxing districts and institutions of higher education.

The Resort’s Budget:

Paragraph 4.16 (f) of the AJP provides, in pertinent part:

The POA board will receive the annual amenities budget from the Purchaser prior to the Annual Assessment being spent showing the POA board how the Purchaser will break out the Annual Assessment proportionally by amenity and showing that sufficient funds remain on hand to fund the operation of each amenity.... The POA board will have veto power over the annual budget of any portion of the Annual Assessment contemplated by the Purchaser to be used for other than the amenities, prior to the sums being spent. ... The POA board will get to review and comment on the budget for the use of the Annual Assessment.

Pursuant to this paragraph, the Resort provides a proposed budget for the utilization of member assessments to AAFPO in the spring of each year. A copy of the budget for the upcoming fiscal year is attached. This budget is freely available to members upon request.

The 95% Report:

Each year the Resort provides an additional report pursuant to

Paragraph 4.16 (c) of the AJP provides, in pertinent part:

The required Annual Assessment shall be paid by the Property Owners to the Purchaser, its successors, assigns, or its agents. ***Each year, the Purchaser or its successors or assigns shall prepare an annual report of the Annual Assessment collected for the prior year showing how the Annual Assessment was spent.*** The Purchaser and its successors or assigns may only spend the Annual Assessment on the upkeep, maintenance, operation and improvement of the Amenities. The Purchaser shall be obligated to maintain the Amenities so long as it receives the Annual Assessment.

Each year of the operation of the Bankruptcy Plan, the Resort has provided a detailed financial report to the AAFPO Board which shows the total amount spent the previous year, broken

down by categories, and shows both the actual amount of the assessments allocated to each category, and the percentage contribution the assessments make to the expenditures in each category. As such it contains much proprietary information concerning the Resorts breakdown of its profits, percentages of re-investments of profits, and other information widespread distribution of which would put the Resort to competitive disadvantage.

For the 24 years since adoption of the Bankruptcy Plan, AAFPO has agreed to keep this “95% Report” confidential. In my opinion, the Resort is entitled to demand the report be released only to Board members who sign a confidentiality report, and AAFPO is not obligated to provide it upon request to members.

This is because the report is not an AAFPO record and is not included in the definition of “financial and other records” in the HAA.

As AAFPO is not a “public body,” it has no obligations under the New Mexico Public Records Act.

Very truly yours,

/s/

Carol A. Neelley

Enclosures